

Review

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Illegal Detectorism and Archaeological Heritage: Criminal and Administrative Punitive Systems in Spain

DOI 10.1515/opar-2016-0030

Received February 29, 2016; accepted December 28, 2016

Abstract: This paper details the punitive responses that Spain's legal system has established for attacks on archaeological goods through the use of metal detectors. These responses to illegal acts are not the same across the board; sometimes they stem from the criminal justice system (in the most serious cases) and sometimes from the Public Authorities. Below, I have analysed these responses and their scope in an aim to provide a broad view of the different instruments related to the fight against archaeological looting.

Keywords: Archaeological heritage, metal detectors, looting, cultural goods, illegal activity, Historical Heritage, punitive power, contentious-administrative proceedings, criminal proceedings.

1 Approach

As with other fields, there is significant intervention in the area of Cultural Heritage today (Alegre, 1994; Alonso, 1992; Barrero, 1990; Cortés, García & Guisasola, 2005 and Querol, 2010). As a result of the play between the jurisdictions of the State and the Autonomous Communities, there are eighteen laws regulating the legal system protecting historical material in Spain. There are also many provisions related to other areas (town and land planning, administrative organisation, Natural Heritage) that have a significant impact on this material. Nevertheless, the abundance of regulations has not resulted in a corresponding reduction in the abuse of historic objects: cases of destruction continue to appear in the media and the courts are handing out an increasing number of sentences in relation to the damage of cultural objects. Therefore, with a focus on archaeological remains, this paper aims to present the legal tools available in Spain to react to activities that are damaging to archaeological goods. The idea is to present a comprehensive view of the instruments established in our legal system and with which we can combat illegal acts related to Archaeological Heritage.

Spain is a country with advanced and progressive historical heritage legislation, both at the conceptual and the operational level. This legislation seeks the conservation of objects that are to be enjoyed by the citizenry at large, imposing obligations on owners or holders and enabling public intervention in their defense.

Regarding metal detecting, its incidence in Spain has been studied, among others, by (Alay, 2016; Morales Bravo de Laguna, 2015 and Rodríguez Temiño, 2012). From a legal perspective, laws are a necessary

Article note: This article is a part of Topical Issue on Aspects of Non-professional Metal Detecting in Europe.

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but not a sufficient condition to prevent this kind of illicit behaviour. Public enforcement must be set in action so that the legal provisions can be exercised in practice to curb the illegal metal detecting. In practice, only a very small fraction of the attacks against archaeological sites are punished: sometimes due to lack of information, other times due to the impossibility of prosecuting all infractions or lack of means to process all infractions... The reasons can be varied and all may be valid, but they show an inescapable truth: only a fraction of infringements are sanctioned, the rest go unpunished. There is thus a risk that those sanctions actually imposed are seen as arbitrary, and the system itself as a Russian roulette. The simplest way to try to avoid this is to act through the inspection services of the different Autonomous Administrations.

The preservation of archaeological sites and objects is a complex task for several reasons¹. Here I look at three which will help readers better understand the limitations:

1. There is Archaeological Heritage to be found all over Spain (it can be urban or rural, visible or invisible, it is found under the sea and on land, as part of large monuments or in the form of a few scarce remains, and so on). This lack of homogeneity makes establishing effective legal measures to suit all circumstances very difficult.
2. There is no single *modus operandi* for the acts that damage archaeological remains. Therefore, the response to the actions of a metal detectorist cannot be the same as the response to those of a property developer. Their intentions and ways of looting give us very different profiles.
3. The design of the legal system related to Archaeological Heritage is not particularly good. Both the Public Authorities and the Courts of Justice have punitive powers, meaning a single act can be either an administrative offence or a crime. In addition, each Autonomous Community has created its own legal subsystems.

In this article I present a systematised description of the options provided by our legal system for responding to any acts that endanger the integrity of archaeological goods through the use of metal detectors, thereby threatening to prevent them from complying with their purpose that justifies their legal system: increasing our knowledge of our past.

2 The Responses of Punitive Administrative and Criminal Law to Attacks on Archaeological Heritage²

Attacks on archaeological goods are punished in Spain by both the Public Authorities (executive power) and the Courts (judicial power). This duality also exists in other areas, with the criminal field being reserved for responses to the most serious acts, which can even carry a prison sentence, and administrative action for minor offences³. Any reference to the Courts of Justice should be understood as referring to criminal proceedings, those which resolve matters relating to crimes. However, it is possible for offences related to damage to archaeological goods by the use of metal detectors also to reach the Courts, in a second instance, if the accused does not agree with the penalty imposed by the Public Authorities and appeals to the court of contentious administrative proceedings, which handles disagreements involving administrative bodies.

In Spain, the current Constitution of 1978 grants full punitive powers not only to the Criminal Courts, but also to Public Authorities (which cannot impose custodial sentences but can impose fines and interdictions). Since the Constitutional Court Sentence 77/1983, of the 3rd October, there have been three arguments used to justify this:

1. It is advisable not to overload the Justice System with minor offences. However, the contentious-administrative jurisdiction which sees many of these cases is seriously clogged a fact that serves as a counter-argument, given the pointlessness of merely substituting one congested system for another.

¹ On authorizations to intervene on the Archaeological Heritage see Barcelona (2002).

² On the limits on Criminal Law and Punitive Administrative Law see Rando (2010).

³ On the fight against the plundering of the archaeological heritage see Barraca (2008), Rodríguez Temiño (2000) and Roma (2002).

2. There is a need for a more efficient use of the law enforcement system in relation to this type of offence.
3. The advantage of a swifter response of the authorities in imposing the penalty related to the offence.

Therefore, granting the Authorities the power to impose penalties is not only admissible, but also necessary. It would not be acceptable to request constitutionally that these Authorities represent general interests without affording them the basic instruments to do so, including the power to impose penalties.

Regarding the powers of the Public Authorities, the jurisdiction for penalty regulations related to Cultural Heritage is shared between the State and the Autonomous Communities, with one state law and seventeen separate Autonomous Community laws. These laws are all on the same subject – historical material (albeit in different geographical areas) – but are the result of the work of different and concurrent jurisdictions. This means that, having substantive jurisdiction on this issue, both the State and the Autonomous Communities have adopted penalty-related provisions that are applicable to the geographical area they are responsible for, in line with the doctrine established by Spain's Constitutional Court.

Regardless of the possible need to assess the effect of the distribution of jurisdiction between the State and the Autonomous Communities, the fact of the matter is that the current situation became consolidated after the Constitutional Court Sentences 17/1991, of the 31st January and 122/2014, of the 17th July. Therefore, it can be said that the administrative penalty system for Archaeological Heritage is contained in seventeen different laws, which apply to the different geographical areas corresponding to the Autonomous Communities, and that these have been approved by virtue of the exclusive jurisdictions that have been established for Historical Heritage. Having jurisdiction over the substantive issue, they also have jurisdiction for the imposition of penalties linked to it and have acted accordingly. In addition, there is a state law, Law 16/1985, of the 25th June, on Spanish Historical Heritage, which is applied in very specific cases.

However, when attacks on archaeological goods are criminal in nature (Penal Code), it is the Criminal Courts that enter into play. The legal consequences of different crimes related to archaeological goods (such as theft, looting, misappropriation, fraud, damage) can be more serious (although not always) than offences punished under administrative law, as only the most serious cases of damage correspond to the Penal Code.

3 The Administrative Penalty Route⁴

Damage to archaeological goods can be prosecuted through either administrative or criminal channels, generally depending on the seriousness of the offence. In this section I review some issues related to the imposition of penalties by administrative Law, while the analysis of criminal Law is made in the following section.

In Spain there are three different levels of regulation that apply to attacks against archaeological goods, and which are punished through the administrative route:

1. Provisions of a general nature that apply to any type of administrative offence and which principally correspond to articles 127 to 138 of Law 30/1992, of the 26th November, of the Legal System of Government Bodies and the Common Administrative Procedure, and Royal Decree 1398/1993, of the 4th August, which approves the Regulations of the procedure for exercising the power to impose penalties. These regulations are for application by Central Government, the Autonomous Communities and also local governments. The only Autonomous Community that has approved a law for these purposes in its territory is the Basque Country: Law 2/1998, of the 20th February, on the power of the Government of the Autonomous Community of the Basque Country to impose penalties. However, there are also Autonomous Communities that have established regulations regarding penalty procedures, such as Madrid, Aragon, the Balearic Islands and Extremadura, among others.
2. Laws regarding Historical and Cultural Heritage that regulate the system for goods of a certain value, including archaeological goods. They contain provisions related to different types of goods, for which

⁴ To the administrative penalty route see Gómez & Sanz (2013), Instituto Andaluz del Patrimonio Histórico (2012), Lozano (2010), Nieto (2012) and Rebollo, Izquierdo, Alarcón & Bueno (2009).

the level of administrative intervention can vary. Therefore, in the chapters dedicated to the penalty system, there are long lists of offences that sometimes affect one specific type of historical good and sometimes all of them. Equally, some offences entail the violation of mandates that refer to goods included in the categories of maximum protection, whilst others consist of a failure to observe duties related to historical goods as a whole.

3. Regulations which, without referring specifically to Historical Heritage, can affect archaeological goods because they regulate aspects related to them, and also because they include a penalty system for non-compliance with substantive regulation: regulations on environmental impact, town planning, the public nature of goods, etc.

As regards the power to impose penalties, the seventeen Autonomous Communities have clearly established which bodies are responsible. The power has not only been attributed to regional government bodies, but also to island councils, as is the case of the Canary Islands and the Balearic Islands. We can, therefore, clearly see the tendency to grant this power to those Authorities that have a closer relationship with the protection of historical goods, and it is clear that the power to impose penalties is a corollary of the management jurisdiction. Some Autonomous Communities, having regulatory jurisdiction in the matter, have passed the power to impose penalties to other regional courts rather than retain it themselves.

The penalty-related administrative law applicable to archaeological goods is based on known pillars, the non-compliance with which incurs a penalty through the administrative system:

1. The requirement to notify the authorities of any chance findings of archaeological elements.
2. The obligation to obtain authorisation to perform any intervention related to archaeological goods, and other archaeological activities. The need to obtain authorisation for the use of metal detectors should also be considered here.
3. The protection of integrity when undertaking town planning and other building work (the requirement to authorise work on sites where archaeological remains have been found).
4. The duty to ensure conservation.

The unauthorised search for archaeological remains is an offence that has had huge quantitative repercussions on the deterioration of Archaeological Heritage in recent years. Moreover, it is not unusual to find detectorists on archaeological sites with the clear intention of appropriating archaeological goods. Although it may come as a surprise, not least because we have recently celebrated thirty years of the Law on Spanish Historical Heritage, and Archaeology was long since classified a Science, awareness of the need to preserve Archaeological Heritage is progressing very slowly, unlike the case of other historical goods. One possible reason for this difference is that goods belonging to 'visible' Historical Heritage are more readily appreciated.

Archaeological Heritage is largely still viewed disdainfully or mythically, both of which are equally incorrect, not only from a legal standpoint, but also from an archaeological one. However, in principle this should be kept out of legal considerations, as both the lack of appreciation and distorted views are circumstances that are going to have a decisive impact on the implementation of an efficient enforcement policy. Lists of offences and the ability to impose astronomical penalties are of little use without making society aware of them and without knowing what mechanisms cause this type of offence in order to be able to act on their origins.

In Spain there are many criminological studies on archaeological plundering and the use of metal detecting devices; see, for instance (Alay, 2016) and (Morales Bravo de Laguna, 2015). Also of great interest are the statistics of the Public Prosecutor's Office and the police.⁵

The use of metal detectors is very damaging to Archaeological Heritage. Not only do they cause the disappearance of thousands of archaeological objects, but they also lead to the destruction of the

⁵ See <http://portal.proteccion.org/wp-content/uploads/2014/03/Grupo-de-Patrimonio-Hist%C3%B3rico-de-la-Guardia-Civil-UCO.pdf>; https://www.fiscal.es/fiscal/PA_WebApp_SGNTJ_NFIS/descarga/Memoria%202015%20Fiscal%C3%ADa%20de%20Medio%20Ambiente.pdf?idFile=0a07ddd4-c77a-472e-9f38-a003b571ca5e

archaeological contexts they were found in and, as a result, the valuable information that would otherwise have increased our knowledge of the past. In Spain, the regulations regarding the use of metal detectors in relation to archaeological goods are not the same across the country, although laws requiring authorisation by the authorities do predominate. In general, there are three different regulatory models:

1. In the first, the use of metal detectors is subject to authorisation and, therefore, their use without a permit is considered an offence. This is the case of the regulatory laws for historical goods in Andalusia, Aragon, Asturias, the Balearic Islands, Cantabria, Castilla-La Mancha, Extremadura, Galicia, La Rioja, Madrid and Navarre. In this way, as well as excavations, prospections and other illegal archaeological interventions being offences, the unauthorised use of these devices is also considered an offence. The regulations drawn up by the legislators in the autonomous communities are not uniform across the board, meaning there are several different formulas for classification.
2. In the second, the use of metal detectors is considered an aggravating circumstance, which means their use is taken into account to increase the amount of the fine. This is the case in Castile and Leon, Catalonia and Valencia. Seen in this way, there is no single offence related to the use of metal detectors, rather their use, when committing the offence of excavation, prospection or any other illegal archaeological intervention, increases liability and also any penalty imposed.
3. Lastly, it is important to highlight the existence of four laws in the Canary Islands, Murcia, the Basque Country and Central Government, which do not refer to these devices and where they are not dealt with separately. This does not mean that their use cannot be taken into account in penalty proceedings, for example by considering other circumstances such as intentionality: a person walking in the countryside, finding a fragment of a ceramic pot and starting to dig in the ground using a stick, is not the same as a person using a metal detector. The first case is the result of happenstance and would not lead to further reproach than the committing of the offence. In the second case, however, the action is planned and a method has been established to carry it out. The intentionality is, therefore, different in both cases.

As regards unauthorised searches for archaeological remains with metal detectors, in many cases the deliberation has been whether or not it is necessary for the illegal conduct to have been carried out in an officially protected archaeological area. A significant part of the pleas made in penalty proceedings refer to this point, and it would not be amiss if the next reforms to the regulations included the indifference as to whether the area was listed or not. For the offence, it is irrelevant whether the Area of Archaeological Interest was signposted or not, or whether ruins or remains that indicated an archaeological site existed or not, or whether it had been listed officially as an Area of Archaeological Interest or not. The absence of a formal declaration of an area as being of Cultural Interest does not prevent it from being subject to protection.

Another of the issues discussed in relation to such an offence is whether it is committed, regardless of whether archaeological remains are found or not. The finding of archaeological goods is a result that depends on luck and elements such as the preparation of the detectorist; are not an elements to be considered, given that the punishable act is performing the activity itself, regardless of whether archaeological objects are found or not. The penalty corresponds to the risk, the risk of seriously damaging our archaeological legacy.

Below is an analysis of the effects of these offences in relation to Archaeological Heritage. There are three types of consequences, which constitute the response that the legal system has established for the violation of the regulations classified as offences: penalties, returning the altered site to its original condition, and compensation for any damages caused. In administrative practice, the only consequence with legal force is the penalty. On the one hand, returning the site to its original condition plays a very limited role in Archaeological Heritage, as once the contexts and archaeological goods have been destroyed, it is, in fact, impossible to reconstruct in most cases. On the other, as the damage is taken into account when determining the amount of the fine, compensation for damages has not been required by the authorities in this specific sector.

The laws on Cultural Heritage include long lists of offences. These offences have been classified as minor, grievous or very grievous, based on several factors, and legislators have established fines that

correspond to each group of offences. In addition to the seizure of goods, which is defined as an additional penalty, some Autonomous Communities have established penalties other than fines (such as banning of professionals from working in the field of Cultural Heritage for a certain period of time). However, fines are undoubtedly the most common administrative penalty applied in this field. Perhaps it would be appropriate for some alternative positive responses to be developed, other than just fines, especially in cases of minor offences, including the proviso of not committing a second offence, the existence of vincible mistake of law, and the particular consideration of the circumstances of the offender.

Administrative penalties are nothing more than the punitive legal consequence that the legal system attributes to an offence and which is imposed after the proceedings. The aim of these penalties should be preventive, if we truly believe that prevention is the goal of administrative law, and it is important to differentiate between the penalties themselves and what we hope we will achieve with them. In the field of criminal law, while they are a punishment, prison sentences are aimed at re-education and social reinsertion (article 25.2 of the Constitution). Administrative penalties also represent a punishment, a suppression, an unfavourable consequence for the person who has violated the law. In short, and as mentioned above, their legal nature is punitive. However, the purpose of the fines in a specific legal system can be different. In Spain it would be plausible to defend their preventive purpose.

As regards the fines established for offences against Archaeological Heritage, these are not specified individually for each of the offences, but in brackets that can either be limited by minimum and maximum amounts, or solely by a maximum amount. The fine that corresponds to each specific offence depends on whether a financial value can be placed on the damage. In such cases, the fine is calculated based on this damage. The specific fine is not known by the individual, but they are aware that a financial penalty may be imposed which will depend on the damage caused, other relevant circumstances, and the weighting corresponding to the principle of proportionality.

Legislators have established provisions for cases where a value cannot be give for the damages, and the lists of penalties, according to the brackets related to the seriousness of the offence, cover cases where the value cannot be expressed in monetary terms. The special nature of archaeological goods, where their significance depends not on the materials they are made from, but from the scientific knowledge they provide our professionals, is probably the most problematic feature in this sense.

4 The Criminal Justice System and Archaeological Heritage⁶

Having presented the administrative system for responding to attacks on archaeological goods, this section details the wheels of the criminal justice system that can be set in motion if the damage to the archaeological elements is serious enough to be classified as a crime.

Organic Law 12/1995, of the 12th December, on the Suppression of Contraband, regulates this specific illegal activity in article 2.2.a) defining it as the export or issue of 'goods that comprise Spanish Historical Heritage without the authorisation of the respective authorities when required, or when said authorisation has been obtained through an application using false information or documents ...', whenever the value exceeds 50,000 euros. Under this amount, it is considered that the illegal activity is an administrative offence.

Spain's Penal Code of 1995 also has a singular way of classifying crimes that represent an attack on Historical Heritage in general and, therefore, against Archaeological Heritage. Here, the fact the crime is committed against archaeological goods can lead to the severity of the sentence being increased: such is the case of crimes of theft, robbery, fraud and misappropriation. In addition, the Penal Code has included in its articles Title 16, Chapter 2, entitled 'on crimes against Historical Heritage', which, in this case, has no financial bias. The legal asset protected in relation to all the crimes listed in Chapter 2 of Title 16 of the Penal Code, articles 321 to 324 and 338 to 340, is Cultural Heritage as a whole. The criminal acts classified in the Penal Code are as follows:

⁶ See Renart (2002) and (Yáñez, 2016).

1. The demolition or serious alteration of buildings that have a special protection status due to their historical, artistic, cultural or monumental interest. This is not a specific crime against archaeological goods, but it can affect them in that it refers to property structures and they are protected.

As regards this crime, it is a reaction to attacks on buildings with special protection status. There is no good explanation as to why buildings have been included in 321, but not other types of property, such as archaeological sites, or other types of archaeological remains considered immovable property, or historical gardens.

The consequences that the Penal Code establishes for these offences are prison sentences of six months to three years, a fine of twelve to twenty-four months and, in all cases, a ban from the professional activity or job for between one and five years.

2. Misconduct in service of officials and civil servants. The Penal Code of 1995 regulates the specific misconduct of officials and civil servants who participate in the demolition or alteration of protected buildings. This is the first time in Spain that the Penal Code has included this crime within its framework of attacks on Historical Heritage, and it was very necessary given the major effects such cases have had on archaeological goods.

As with any crime of misconduct in public office, misconduct in relation to historical goods is malicious or negligent conduct, as expressed in article 322 of the Penal Code, while being aware of the injustice. The individual that can commit the crime in this case is an official or civil servant, in accordance with the provisions of article 24 of the aforementioned Penal Code.

The legal consequences of the crime of specific misconduct in public service are the ban from public office or the civil service for a period of between seven and ten years, and prison for six months to two years or a fine corresponding to between twelve and twenty-four months.

3. Damage to goods of historical, artistic, scientific or cultural value, or to monuments or archaeological sites, both on land and underwater, as well as acts of looting in either of these places. This refers to an intentional crime, a 'result' crime, which typically consists of damage to, or the destruction of, a historical good that cannot be subsumed under article 321 of the Penal Code (demolishing or seriously altering buildings with special protection status). After the reform introduced by Organic Law 1/2015, of the 30th March, modifying Organic Law 10/1995, of the 23rd November, of the Penal Code, crimes or offences are no longer treated differently in criminal courts if the amount of the damages exceeds 400 euros, given that article 625, which referred to absence of damage, was abrogated by Organic Law 1/2015. As this article refers to goods of historical, artistic and cultural value, as well as monuments, with no mention of the need for special protection, the goods will not need to be listed by the authorities or officially protected in order for the crime to be considered to have been committed.

As regards the legal consequences of the crime of damages to cultural institutions and historical goods, the sentence established is of six months to three years of prison or a fine corresponding to between twelve and twenty-four months.

4. Damages caused through gross negligence.

The Penal Code establishes provisions for crime of damages to cultural institutions and goods through gross negligence in article 324, which repeats almost word for word the contents of article 323, in the version prior to Organic Law 1/2015. This regulation is a response to the relevance that has been given to the protection of historical goods, given that article 12 of the Penal Code decrees that 'reckless acts or negligence shall only be punished when specifically decreed by law'.

To conclude this review of the response of criminal law to this type of damage, it is important to make one last point in relation to the need to mark boundaries correctly, building bridges, crimes against Historical Heritage, crimes related to land and town planning, and crimes against natural resources and the environment. The undeniable relationship between these fields of activity has led to their regulation under a single Title and means they share certain common provisions. For this reason they need to be considered separately for technical and legal purposes, but comprehensively in relation to the similarities between these protected goods.

5 Final Statement

Having completed this overall view of the regulation of illegal activities against Archaeological Heritage and especially the use of metal detectors, below is a final statement regarding some problematic aspects that our daily struggle against archaeological looting has taught us. The aim of this statement is to raise awareness about two matters that currently need analysis and consideration.

Firstly, most reports of attacks on archaeological goods come from the security forces and, to a much lesser extent, from professionals and inspection services (Cobrerros, 2000). Rarely do criminal processes or penalty proceedings begin with a citizen reporting a crime. Nevertheless, it is not possible for the authorities to cover all acts of looting, fundamentally because Archaeological Heritage is found all over the country, including on the seabed. For this reason, it would be a positive move to involve citizens, either individually or through non-profit-making organisations, and encourage them to notify the Authorities of anything that could constitute illegal activity, so that they can respond and prevent the attacks broadening in scope. However, it should also be said that, no matter how much we want to involve citizens, it is the mandatory duty of the Government, as the custodian of these goods and having jurisdiction over Cultural Heritage, to ensure their preservation. Ideally, therefore, we would have people and organisations available to further expand the action of the authorities; an action that would ensure the legacy of our past was not lost.

Secondly, it would be advisable to perform an in-depth case-law analysis to evaluate the Court requirements for evidence to prove that items have come from a specific archaeological site or area. We need to ask ourselves whether these requirements are not excessive, considering that, as of Law 16/1985 entering into force, all archaeological items which have come from an archaeological site belong to the public domain and are not subject to private legal traffic. The illegality, therefore, lies in the illegal possession of the objects, while the exact place where they were obtained is less relevant.

Acknowledgements— This paper forms part of the 2013 R&D and Innovation Project of the State Programme for Research, Development and Innovation Aimed at the Challenges of Society, entitled: ‘Foundations for creating an effective legal response to archaeological looting’ (DER2013-48826-R).

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