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LEGAL ASPECTS OF THE UNDERWATER CULTURAL HERITAGE IN SPAIN. CURRENT STATE LEGISLATION

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ABSTRACT

The Underwater Cultural Heritageis a kind of heritage that is little studied and, for that reason, protection to Underwater Cultural Heritageis yet one of the greatest novelties of the present times. There was no standard to regulate it at the international level by 2001. In turn, at a domestic level, the legislation of the Spanish State fails to have a law to protect it in a specific way, except for Law 16/1985 dated June 25 and issuedby the Spanish Historic Heritage - LPHE, which includes it within the archeological heritage. The present legal paper addresses the legislation in force in the Spanish State on Underwater Cultural Heritage, with special attention given to Law 16/1985 dated June 25 of the Spanish Historic Heritage.

Key words: Underwater Cultural Heritage; Administrative Law; public domain assets.

1 LAW 16/1985 DATED JUNE 25 OF THE SPANISH HISTORIC HERITAGE

The first law to be mentioned when that issue is addressed is Law 16/1985 dated June 25issued by the Spanish Historic Heritage, LPHE. It comes up as a solution for the legislative chaos that took place by then on the matter. No doubt, the previous existing legislation was very broad and confusing. Unfortunately, the Underwater Cultural Heritage or even similar subjects failed to be explicitly regulated by earlier standards, except for Decree 2055/1969 dated September 25, whichrules the practice of underwater activities and that we are bringing up later on.

By the time the 1985 law was approved, theArtistic and Historic Heritagewas roughly regulated by a Law issued on May 13, 1933 on the defense, conservation and accretion of the NationalArtistic and Historic Heritage. It represented "the real unit code for the assets in the Artistic and Historic Heritage"[1].

That law was approved by the government of the II Spanish Republic and it was in force for over half a century, together with the Regulation for the application of the National Artistic Treasure's Law approved by the Decree issued on April 16, 1936 (expressly derogated by Decree 111/1986). They were supported by the 1931 Constitution. It is important to say thatit is the first time that a Spanish *Magna Carta* refers to the protection of the Historic Heritage, more specifically in Chapter II, which is entitled "Family, Economy and Culture".

Article 45 of the 1931 Constitutionwould point out the following: "The country's artistic and historical wealth, whoever the owner may be, consists in the Nation's cultural treasure and it is under the safeguard of the State, which can forbid that it is exported or sold and determine the legal expropriations that may be considered relevant for its defense. The State shall register its artistic and historical wealth, insure its careful custody and attend for its perfect conservation. The State is also going to protect places that outstand due to their natural beauty or renowned artistic or historical value".

The writing of this article sets the bases for the protection of the Spanish Artistic and Historic Heritage and later legislation on the subject. The archeological heritageis included as one of the existing heritages and the underwater heritage is part of it.

1 ALEGRE ÁVILA, J.M.: *Evolución y régimen jurídico del patrimonio histórico*, tomo I, Ministry of Culture, Madrid, 1994, p. 131.

Nevertheless, it is worth saying that the1933 law was not the only one to regulate the Artistic and Historic Heritageand that there were other standards in force such as the Royal Cell dated June 6, 1803;the Bill datedApril 28, 1837; the Royal Order dated June 13, 1844; the Public Instruction Law dated September 9, 1857 known as the "Moyano Law";and also the Decree dated December 16, 1873. On the 20th century, we counted on the 1911 Drilling Law and its regulation dated 1912; the March 4, 1915 Law regarding national architectural-artistic monuments;the Royal Decree-Law dated August 9, 1926, which creates the National Artistic and Archeological Treasure[2], among others.

As ÁLVAREZ ÁLVAREZ, who had the opportunity to take part in the creation of the 1985 LPHE, pointed out, that high amount of laws would result in "a lot of trouble defining the derogated principles once the system followed by almost all those standards is to not derogate previous provisions or to say they are in force, considering derogated the provisions contrary to the above mentioned, or to say that all the previous standards are indiscriminately in force [...] If all that is true for this subject and in less than sixty years there were more than one annual provision, it is easy to understand how difficult it is to change that legislation, which had the additional drawback of raising very little jurisprudence"[3].

It is therefore no surprise that, once and for all, a new legislative text should be configured that would address all the subjects and deprive all the previous standards of effect. On that purpose, at the request of the Ministry of Culture, a new legal text started to be sketched.

That was not a comfortable situation. In fact, GARCÍA DE ENTERRÍA pointed out at a conference in Madrid in 1983 that a new Artistic Heritage Law posed "big issues".

For the Administrative Law professor, the first problem to be accounted for was "the one related to the extension and the concept of artistic, cultural and historical heritage [...] The Spanish Constitution uses the wordshistorical, cultural and artistic heritage in its article 46. The term "cultural" is new for us. What is there to be understood in terms of cultural heritage?"[4].

2 Its article 1 defines the assets to be covered by its protection: "the set of moving assets and real estate worth to be conserved for the Nation on artistic and cultural purposes is recognized as a national artistic treasure".

3 J. L. ÁLVAREZ ÁLVAREZ, *Sociedad, Estado y Patrimonio Cultural*, Espasa Calpe, Madrid, 1992, p.251.

4 E. GARCIA DE ENTERRÍA, "Consideraciones sobre una nueva legislación del patrimonio artístico, histórico y cultural", *Revista Española de Administración*, nº. 39, 1983. p. 581.

On that purpose, he pointed out that "the concept of cultural assets is exactly one of the concepts on which the Italian Law has lately centered the problem concerning the regime of legal protection, especially as of the conclusions of the [...] 1966 Franceschini Commission that [...] defines cultural assets in a quite descriptive way, with not much of a technicism: ‹‹All the assets that incorporate a reference to the history of the civilization belong to the nation››"[5].

No room for doubt, assets that have an archeological interest would be included, among others, as one of those assetswithin which underwater heritage would fit perfectly. Professor GARCÍA DE ENTERRÍA signals that this is the moment when "the legal-technical construction of the cultural asset concept also starts"[6].

The secondproblem was the territorial distribution of the power. In the present, we are certainly able to notice that what professor GARCÍA DE ENTERRÍA had forecasted as a problem, ended up by being one. It is enough to assess the jurisprudence of the Spanish Constitutional Court on the competences between the State and the Autonomous Communities at a legislative level.

The third handicap "concerned the need to arrange the dispersion of different policies in that field in one unit" [...] "The protection policy was, until the almost undeveloped insinuation in the 1933 Law, a policy for the punctual protection of individual buildings and monuments"[7].

Once the issue of a new legislation on historic, artistic and cultural heritage proposed by GARCÍA DE ENTERRÍA was assessed, we are going to analyze the situation before the approval of the LPHE.

After several papers that targeted the new regulation of theArtistic and Historic Heritage, ÁLVAREZ ÁLVAREZ indicates that "the several preliminary drafts culminated in a new draft law that was presented by the UCD's government and that was published on the Deputy Congress Bulletin on September 14, 1981, but, due to the political circumstances in 1982, it was not even discussed in the Parliament"[8].

Despite the previous legislative failure, the new PSOE government

5 E. GARCIA DE ENTERRÍA, "Consideraciones sobre una nueva legislación del patrimonio artístico, histórico y cultural", cit., p. 582.

6 E. GARCIA DE ENTERRÍA, "Consideraciones sobre una nueva legislación del patrimonio artístico, histórico y cultural", cit., p. 582.

7 [113] E. GARCIA DE ENTERRÍA, "Consideraciones sobre una nueva legislación del patrimonio artístico, histórico y cultural", cit., p. 588.

8 J. L. ÁLVAREZ ÁLVAREZ, *Sociedad, Estado y Patrimonio Cultural*, Espasa Calpe, Madrid, 1992, p.252.

led by Felipe González submitted a draft law that was published in the Official Bulletin of the Congress on April 3, 1984. That project was strongly criticized by the opposition and an amendment to the totality was even submitted by the Popular Coalition Parliamentary Group as well as several other amendments to many articles[9]. After some months of hard work, the current law was approved to comply with the constitutional mandate of article 46 of our current Constitution.

As it is noticeable in the Preamble, "the need was felt, first of all, due to the normative dispersion that, along the half century elapsed since the venerable Law came into force, produced in our legal order a multitude of formulas by means of which they intended to face concrete situations that were not foreseen or that were lacking at that time. (...) Finally, the legal review is imposed by a new distribution of competences among the State and the Autonomous Communities that, in what regards such assets, emanate from the Constitution and the Statutes of Autonomy. Consequently, that Law is dictated due to standards in paragraphs 1 and 2 of article 149 of our Constitution, which assume both a mandate and a competence title for the legislator and the state Administration"[10].

The objects of the law are multiple. As article 1 sets forth, "protection, accretion and transmission to future generations of the Spanish Historic Heritage are the objects of this Law".

As ÁLVAREZ ÁLVAREZ points out, "that paragraph is the confirmation by the law of the ideas in article 46 of the Constitution. It talks about guaranteeing conservation and promoting enrichment. Conservation requires and encompasses protection and transmission because it conserves itself by defending and protecting that heritage. That function complements itself and it is updated through transmission to new generations, setting forth the continuity tie, which is one of the characteristics of the PH, and with the awareness and access of the present generations in such a way that enjoyment does not affect transmission.

Protection to conservation is necessary for accretion or enrichment and for transmission and access. It seems logical to us that

9 J. L. ÁLVAREZ ÁLVAREZ, *Sociedad, Estado y Patrimonio Cultural*, Espasa Calpe, Madrid, 1992, p.253.

10 That Law consecrates a new definition for Historic Heritage and clearly enlarges its extension.The moving assets and the real estate, the Archeological and the Ethnographic Heritage, the state Museums, Archives and Libraries, as well as the Documentary and Bibliographic Heritage are encompassed by it. It tries, in short, to insure protection and foster the material culture due to the action of men in a broad sense and understands it as a set of assets that have to be valued with no limitations resulting from property, use, antiquity or economic value".

the main purpose or object of that legislation has to be conservation and protection. That is the reason why they refer first of all to both the Constitution and the law[11].

Because there is no specific standard to rule the protection of the Underwater Cultural Heritageas well as its legal regime, we are limited to the provisions of that law once it regulates the aspects of the archeological heritage, among others.

The LPHE developed the constitutional mandate for the protection of ourhistoric and cultural heritage. Although paragraph 2 of article 1 fails to expressly mention the underwater cultural heritage, it refers to the archeological heritage. It highlights that "the real estate and the moving objects of artistic, historic, paleontological, archeological, ethnographic, scientific or technical interest are part of the Spanish Historic Heritage".

The following reference that affects us is the content of article 15, paragraph 5, when it declares that the Archeological Zone is "the place or natural place where there are moving assets or real estate that can be studied by means of an archeological methodology, have they been extracted or not and that are located on the surface, in the underground or in Spanish territorial waters". That principle, in the words of RUIZ MANTECA, "opens the possibility for certain zones or areas located on the bed of the territorial sea, in which submerged objects or rests integrating the Underwater Cultural Heritage are found, to be declared underwater Archeological Zones having a real estate nature and also being seen as Underwater Cultural Heritage integrating the Spanish Historic Heritage"[12].

The exclusive mention to the territorial sea is not a fortunate one because, as this author points out, it is inconsistent that "the archeological objects located in the territorial sea and on the continental platform are seen as assets integrating the Spanish Historic Heritage, pursuant to article 40.1, while the area located in that marine space is not seen as an Archeological Zone when it is known that several of those assets are spread or disseminated in it"[13].

In what regards the content, article 40.1 of the LPHE states that "the moving assets and the real estate of historic nature that can be studied

11 *Estudios sobre el Patrimonio Histórico Español*, cit., p. 71.

12 RUIZ MANTECA, R.: *El régimen jurídico del patrimonio cultural subacuático. Aspectos de derecho interno y de derecho internacional, público y privado,* Ministry of Defensa, 2012, p. 584.

13 *El régimen jurídico del patrimonio cultural subacuático. Aspectos de derecho interno y de derecho internacional, público y privado,* cit., p. 584.

by means of an archeological methodology, have they been extracted or not and that are located on the surface or in the underground, in the territorial sea or the Continental Platform are part of the Spanish Historic Heritage". For such, all the terrestrial as well as the underground archeological moving assets or real estate are part of the Spanish Historic Heritage, whenever they have a historical character.

Article 44 of the LPHE accounts for the legal nature of those assets by declaring them public domain assets: "all the objects and material rests that have the values that pertain to the Spanish Historic Heritageand that are discovered as a result of excavations, earth removals, constructions of any kind or casually are public domain assets". There is a public ownership that encompasses, as BARCELONA LLOP points out, "the inalienability, imprescriptibility andnon-arrestabilityof the assets that compose it, as well as attributing to the Administration that owns them the group of rules that the legal order arbitrates to its defense"[14],an opinion also shared by PRIETO DE PEDRO[15], which have the Administration protect those assets by keeping them away from the legal traffic.

Nothing is said in that article about assets found underwater. Nevertheless, there is a law in Spain dated 1962, Law 60/1962 issued on December 24, on maritime help, rescues, towing, findings and extractions regime, that we are going to address later on when we approach a specific paragraph that regulates maritime findings and extractions, even if there is no express reference to the underwater context.

The LPHE also develops the competences of the State related to the article we addressed previously, 149.1.28ª CE.

It is interesting to see that the LPHE declares the archeological heritage as public domain, but says nothing about its ownership, differently from article 132.2 of the CE, which expressly mentions the public domain.

To conclude that paragraph and regarding the case that concerns us, that issue entails some complication since the Autonomous Communities in their Autonomy Statutes declare the autonomous ownership of such asset and that makes it difficult to know that the Administration has a

14 J. BARCELONA LLOP, "El dominio público arqueológico", en *Revista de administración pública* nº. 151, 2000, p. 139.

15 J. PRIETO DE PEDRO, "Concepto y otros aspectos del patrimonio cultural en la Constitución", *Estudios sobre la Constitución Española. Homenaje al Profesor Eduardo García de Enterría*, tomo II, Civitas, Madrid, 1991, pp. 1551 y ss.

competence over the archeological heritage. AZNAR GÓMEZ defends that the solution lies on "granting them the generic competences over the cultural heritageand reserve to the central Administration certain subsidiary and residual competences. In particular, the possibility of authorizing prospecting and drilling in the Spanish territorial sea would correspond to the bodies belonging to each Autonomous Community in the particular context of its coastline [...] Anyway, we understand it is necessary to revisit the principle of cooperation and collaboration among Administrations deriving from the principle of institutional loyalty referred to in the Law of the Legal Regime of the Public Administrations and the Common Administrative Procedure"[16].

In case of conflict, AZNAR GÓMEZ still points out, "due to the non-economic exclusivity in exercising those competences (at least the ones regarding the Contiguous Zone, the Exclusive Economic Zone and the Continental Platform), one must turn to the provisions in article 149, paragraphs 1.28ª and 3 of the Constitution"[17].

2 THE UNDERWATER CULTURAL HERITAGE AS A SPECIAL REGIME WITHIN THE SPANISH HISTORIC HERITAGE

As well exposed above, we must refer to the existing legal order so that, even indirectly, the Underwater Cultural Heritageis not left unprotected.

That kind of heritage is submitted to a special regime, as it is the ethnographic, the documental and the bibliographic heritage. The legislator included some concrete provisions for each one of them. In the case addressed herein, the legislator dedicated articles 40 to 45 to the archeological heritage.

In the first paragraph of article 40, the concept of archeological heritage is set forth. In it, the legislator establishes that "the moving assets or the real estate that has historic characteristics and that may be studied by means of an archeological methodology, may they have been extracted or not, whether they are located on the surface or the underground, in the territorial sea or the Continental Platform" are considered archeological heritage. When including both moving assets and real estate, the legislator

16 AZNAR GÓMEZ, M.J.: *La protección Internacional del Patrimonio Cultural Subacuático con especial referencia al caso de España*, Tirant lo Blanch, Valencia, 2004, p. 412 - 414.

17 *La protección Internacional del Patrimonio Cultural Subacuático con especial referencia al caso de España*, cit., p.414.

refers to any kind of asset in the Spanish territory, for example, wreck sunk in the ocean.

This article is structured in three parts. The moving assets or the real estate that has historic characteristics and that may be studied by means of an archeological methodology, may they have been extracted or not, whether they are located on the surface or the underground, in the territorial sea or the Continental Platform, integrate the archeological heritage.

We endorse ÁLVAREZ ÁLVAREZ's words when he says that it is logical that, when the legislator refers to the word "extracted", he/she is thinking about "the underground and the most typical activity of archeology, which is to light or to bring to light what is hidden"[18].

The legislator mentions the underground, the territorial sea and the Continental Platform. The position we defend is that the heritage that may be found in water areas other from the territorial sea or the Continental Platform, such as rivers, lakes, lagoons, inner waters, etc. is also considered Underwater Cultural Heritage. As the article reads, it seems that only moving assets or real estate located in territorial sea or the Continental Platform are seen as archeological heritage.

From our standpoint, one of the deficiencies of article 40 LPHE is that it fails to encompass a time criterion, while the Convention on the Protection of the Underwater Cultural Heritagedated 2001 sets it at 100 years, as we have already mentioned.

Article 41 defines what the Law understands from excavation, prospection and casual findings[19]and the subsequent articles set forth the conditions and requirements they have to follow. There are Autonomous Communities, Catalunha for example, that already include in their legal order standards that regulate excavations and prospections[20], among which is Decree 155/1981 dated February 27 and issued by the Regional Government of Catalunha, which approves the regulation of archeological

18 *Estudios sobre el Patrimonio Histórico Español*, Civitas, Madrid, 1989, p. 736.

19 "**1.** For the purposes of this Law, removals on the surface, underground or underwater environments that are made in order to discover and investigate all kinds of historical or paleontological remains are archeological prospections, as well as related geological components.
2. The superficial or underwater explorations, with no soil removal, aimed at the study, investigation or examination of data on any of the elements referred to in the previous paragraph are archeological surveys.
3. Casual findings are discoveries of objects and material rests that, having the values that are proper to the Spanish Historical Heritage, have been produced by chance or as a consequence of any other type of soil removals, demolitions or works of any kind".

20 C. BARRERO RODRÍGUEZ, *La ordenación jurídica del patrimonio histórico,*Civitas, Madrid, 1990, cit., p.650.

excavations in the Community.

First of all, "every archeological excavation or prospection shall be authorized by the relevant Administration" (article 42). Secondly, such authorization "forces the beneficiaries to deliver the objects obtained duly identified, listed and accompanied of a Record to the Museum or Center that the corresponding Administration may define and within the timeframe established considering the proximity to the location of the finding and the circumstances that allow for its best cultural and scientific function as well as its due conservation". Finally and as expected, "the archeological excavations or prospections carried out outside the corresponding authorization, or the ones that are carried out without complying with the terms under which they have been authorized, as well as earth removal, dismantling or any other works carried out later at the location where archeological objects are casually found and that has not been immediately communicated to the relevant Administration" are illegal according to the provisions of the LPHE and people in charge are going to be punished according to that same law.

Another relevant note that the LPHE includes into article 43 is that, before the assumption of existing archeological, paleontological deposits or rests or geological components related to them, the relevant Administration has the power to order the execution of archeological excavations or prospections in any public or private plot of land within the Spanish territory. In what relates to that last case and in order to define the corresponding compensations, the provisions in the expropriation legislation shall be considered.

The law recognized as public domain assets all objects and material rests that own the values that pertain to the Spanish Historic Heritageand that are discovered as a consequence of excavations, earth removals or works of any kind or casually. Nevertheless, it sets a condition to the person who finds them, who shall communicate findings to the relevant Administration within a 30-day timeframe, except in case of a casual finding, in which case the communication shall be immediate. In both events, casual or non-casual finding, the LPHE states that "in no event shall provisions in article 351 of the Civil Code be applied to those objects"[21],that is, they are never considered the finder's property. That

21 "Thetreasure belongs to the owner of the land where it was found. Nevertheless, when the discovery happened in the property of others, or in State property, and by chance, half will apply to the finder. If the findings are interesting for the Sciences or the Arts, the state may purchase them for a fair price, which will be distributed according to what has beendeclared".

paragraph has to be understood in conjunction with the third paragraph of the same article. Still not applying article 351 of the Civil Code, LPHE foresees an "award" to both the finder and the owner of the place where the object is found. Based on paragraph three of article 44, "the finder and the owner of the place where the object was found have the right to a cash award corresponding to half of the legal evaluation attributed to it and distributed in equal parts between them. If there are two or more finders or owners, an equal proportion is maintained".

That same article of the Law, paragraph two, still states "once the finding is communicated, and by the time the objects are delivered to the relevant Administration, the rules corresponding to the finder are the ones that apply to the legal deposit, except for what is delivered to a public Museum".

As BARCELONA LLOP highlights, "the LPHE creates the archeological public domain. Despite the fact that there were assets of public domain, patrimonial or private property having archeological value before the law, as of the creation of it, all assets of that kind that are found and that are subject to studies by means of an archeological methodology are of public domain"[22].

The law is not looking for flexibility and, in case of non-compliance with the provisions both in paragraph 1 and 2 of the above mentioned law, it establishes that "the finder and, if that may be the case, the owner are deprived of the right to the award and the objects are immediately available to the relevant Administration, without prejudice to the applicable responsibilities and the corresponding penalties".

The LPHE concludes with article 45 by stating that "the archeological objects purchased by Public Entities for any reason whatsoever shall be deposited in Museums or Centers that the purchasing Administration may define considering the circumstances referred to in article 42, paragraph 2 of this Law", a principle that has already been analyzed.

22 J. BARCELONA LLOP, "Patrimonio cultural submarino: dominio público, titularidad y competencias de las comunidades autónomas", *Revista Vasca de Administración Pública*, nº. 99-100, 2014, p. 497.

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