

THE COMMON HERITAGE OF ALL MANKIND:
A STUDY OF
CULTURAL POLICY AND LEGISLATION PERTINENT TO CULTURAL OBJECTS
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ABSTRACT

THE COMMON HERITAGE OF ALL MANKIND:

A STUDY OF

CULTURAL POLICY AND LEGISLATION PERTINENT TO CULTURAL OBJECTS

Sonja Tanner-Kaplash

Government policy is subject to many influences, which may range from a philosophical position arising from changes in the value systems of a given society, to logistic considerations, such as available methods of implementation and the prevailing economic structure.

The value system known as "the common heritage of all mankind" - the long-term global stewardship of natural and man-made resources - is explored in this thesis in the context of cultural policies, specifically those concerning cultural objects. Heritage, linked to the concept of inheritance as a legally protected future interest, is traced in its historical migration from the private sphere to the development of national public assets to an international awareness of global stewardship.

Implementing legislation is a salient indicator of cultural policy; the cyclical relationship in which legal precepts internalized by a society from earlier laws become integral to the cycle of policy formulation and application is illustrated, featuring legislation from several States.

While the thesis is cast within a particular philosophical framework, practical economic realities are among the most important logistic considerations for government policy development. Illicit activities have been recognized as a major threat to cultural objects in the modern world, in addition, these objects are frequently "luxury goods" for which historically, regulation and taxation have been the rule rather than the exception; the thesis argues for a practical, domestic and economic approach to the problem of protection. This implies control of cultural objects in some form, including the documentation of significant pieces. The thesis conclusions propose that both the responsibilities and associated costs could be defrayed and shared by governments and the private sector by means of a licensing program.

CHAPTER ONE - INTRODUCTION

I Preamble and Perceived Problem Area

Culture is recognized both as an instrument of policy and as something socially desirable which it is the business of the State to promote.¹

The impetus for this study arises from the worldwide interest and debate surrounding the topic of cultural policy, particularly with regard to the cultural heritage in a general sense, and more specifically, to the treatment of cultural objects.² This concern is intrinsically linked to a network of other issues, which stem from an increased awareness of global ecological relationships, and the conservation and protection of resources,³ both natural and man-made. While 1970 might be identified as a landmark year in this regard, a great deal of preparatory work had been done in the previous two decades.⁴

¹T. S. Eliot, Notes Towards the Definition of Culture, (London: Faber & Faber, 1948) 83.

²"Cultural object" has been used consistently to avoid connotations associated with the more commonly used "cultural property". See Chapter Two, Methodology, for further discussion.

³For example, Donella H. Meadows et al. The Limits to Growth: A Report for the Club of Rome's Project on the Predicament of Mankind, (New York: New American Library, 1972).

⁴Largely through the efforts of the United Nations and the United Nations Educational, Scientific and Cultural Organization (UNESCO), which began with the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954. However, in 1970 the first in a series of UNESCO sponsored Conferences on Cultural Policy took place, as well as the Convention on the Means of Prohibiting

(Footnote Continued)

A heightened awareness of these ideas filtered down from the rarified atmosphere of international meetings and conferences to a more popular, operational level. This eventually contributed to a broader definition of the concept of culture, enlarging the traditional interpretation based on the aesthetics of the "fine arts" to include current anthropological theories which emphasize the total environment of man.⁵

Associated with this expanded view of culture, and thereby cultural policy, were new notions about nationalism, national identity and cultural rights,⁶ developmental policy,⁷ foreign aid,⁸ and most particularly for the

(Footnote Continued)

and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, (see Chapter Four, The Modern Era for references and discussion).

⁵ See Cultures 8:3 (1982), (the entire issue is devoted to "An Introduction to Cultural Policies"), for a discussion of the position taken by UNESCO regarding a contemporary interpretation of culture, including a rejection of the concepts of "Euro-centrism" and Europe as a traditional "exporter" of culture; i.e. Henri Janne, "Cultural Pluralism in Contemporary Society" 1-7 and Birgitta Leander, "Information and Counter Information" 7-10.

⁶ UNESCO Cultural Rights as Human Rights: Studies and Documents on Cultural Policy, (Doc.SHC.68/XIX.3/A) (Paris: UNESCO, 1970)19.

⁷ Mohammed Bedjaoui, Towards a New International Economic Order, (Paris: UNESCO, 1979)68. "Under-development is not just a natural state which precedes development and its attendant well being... it is not even the retardation, delay or absence of development, but rather an entirely different phenomenon . . . under-development is more properly a function associated with the actual blockage of development or growth as defined and understood in industrialized western terms."

(Footnote Continued)

purpose of this study, a new value system of global stewardship, identified as "the common heritage of all mankind".⁹ This philosophy, which eventually developed into a movement, concerned itself with the "protection" of the cultural heritage from injury, danger or loss.

Since time immemorial, warfare has been the major threat to cultural objects¹⁰ and today, this includes nuclear contamination as well as the conventional risks.¹¹ Natural disasters and gradual deterioration are lesser factors, usually beyond human control, but in the absence of warfare, illicit activities are the most serious threat today.¹²

Ultimately, effective protection from such illicit activities requires control, which is impossible without defining, identifying, locating and recording the objects to be protected. Therefore, inherent in the new world view

⁸ Anthony Sampson, The Money Lenders - Bankers in a Dangerous World, (London: Hodder & Stoughton, 1981) 97-100.

⁹ Sharon A. Williams, The International and National Protection of Movable Cultural Property, (Dobbs Ferry: Oceana Publications Inc., 2nd.ed.1978) develops the concept of the common heritage of all mankind in relation to cultural objects.

¹⁰ Williams ibid. 5, and A. Noblecourt, Protection of Cultural Property in the Event of Armed Conflict, (Paris: UNESCO, 1958).

¹¹ Charles H. Alexandrowicz, Lawmaking Functions of the U.N. Specialized Agencies, (Sydney: Angus Robertson, 1973) 128.

¹² See Chapter Four, on "monetization".

about the common heritage of all mankind, are ideas about accountability, at an international and national level, notably that of public institutions specializing in the exhibiting arts.¹³

The interest in cultural policy specific to objects has been demonstrated by activities at many levels. Foremost, perhaps, has been the role taken by international governmental and non-governmental organizations,¹⁴ which have: publicized issues and encouraged discussion and the exchange of ideas,¹⁵ offered formal and informal structures and mechanisms for negotiation and provided fora for the accession and ratification of international Conventions by individual States. In addition, these organizations have

¹³ Palmer B. Wald, "In the Public Interest," Museum News, 52:5(June 1974)30-32, one of the earliest articles on museum accountability, written by the then Assistant Attorney General for New York State.

¹⁴ Primarily the UN through UNESCO, the Council of Europe, and non-governmental organizations such as: the International Council of Museums (ICOM); Interpol; the International Foundation for Art Research, which publishes a bulletin Stolen Art Alert; the Commonwealth Arts Organization and its publication Link; international legal organizations such as: the Law and International Art Trade Association, the Institute of International Business Law and Practice etc.

¹⁵ Beginning in 1970, UNESCO sponsored a series of Intergovernmental Conferences on Cultural Policy, each preceded by meetings attended by specialists from related fields to prepare working papers. The series began with a consideration of organizational and administrative topics followed by sessions dedicated to specific regional groupings for Europe, Asia, Africa, Latin America, the Arab States and culminated with a World Conference on Cultural Policies in 1982. (See UNESCO Bibliography for complete references.)

sponsored extensive publications on all aspects of the protection of the cultural heritage.¹⁶

Since 1970, almost all States, regardless of economic or political orientation¹⁷ have participated in the development of national cultural policies. Many have ratified or acceded to the international Conventions specific to cultural objects and have passed domestic legislation to implement the obligations undertaken. Occasionally, opposition to these developments has only served to emphasize the intensity of the debate. Finally, there is the contribution made by individuals through local, national or transnational organizations, particularly those disciplines associated with the exhibiting arts, as well as certain allied fields, such as the legal profession.¹⁸

¹⁶ Note the large volume of publications since 1970 listed in the Bibliography, as well as series such as UNESCO Museums and Monuments Series, beginning 1953, which continued after 1977 as Technical Handbooks on the Protection of the Cultural Heritage, and included topics such as museum security, fine arts insurance coverage, conservation, computerized documentation, emergency planning and so on.

¹⁷ Felipe Herrera, "Thoughts on the Economics and Financing of Culture" in International Seminar on the Financing of Culture Report, (Madrid: 22-24 March, 1982) Annex 21:11-13.

¹⁸ The activities of ICOM, (already noted) are supported by many national and regional associations of museum and/or gallery staff; discipline specific organizations include archaeologists, ethnologists, art historians, natural scientists etc., among others, the International Bar Association has a Cultural Property Division, and the American Law Institute and American Bar Association have sponsored numerous seminars and conferences on art law.

Perhaps the most visible and public indication of concern specifically relating to cultural objects are the many international (and domestic¹⁹) repatriation requests, that have been made - and granted - since 1970.²⁰ Clearly this activity is related not only to concerns about conservation and protection, but as noted earlier, to the issue of national identity, and ultimately, to that of national sovereignty.

II Policy Specific to Cultural Objects

There are certain values which are more pronounced in cultural objects than in other cultural expressions, for example, those connected with the performing arts. These values, (discussed below as "reality, evidence,

¹⁹ Primarily in North America, Australia and New Zealand, where substantial indigenous populations have made claims for cultural objects held by national or private bodies. For example, the application for an interim injunction to terminate the exhibition of, and seek possession of, material loaned to the Glenbow Alberta Museum in Calgary for the exhibition "The Spirit Sings" by other Canadian museums, (made in the Court of Queen's Bench of Alberta by the Mohawk Bands of Kahnawake, Akwesasne and Kanesatake, January 14, 1988) citing that "the exhibition of False Face masks... is an unwarranted and unlawful intrusion of the sovereignty of the Mohawk Nation." (Affidavit, appended to the Statement of Claim, p4), also "Native groups want artifacts pulled from show", (Toronto) Globe and Mail, Jan.15/1988, page A4.

²⁰ A great deal has been written on the issue of restitution; see Sharon Williams, "Recent Developments in Restitution and Return of Cultural Property," International Journal of Museum Management and Curatorship, 3(1984), 117-129; since 1979 the UNESCO journal Museum has included a regular section on "Arrangements concluded or in progress for the return of objects . . .".

economic and symbolic" values), assist in the application of policy analysis which, under the best of circumstances, is an inexact and difficult process. As discussed in Chapter Two, the narrower field of cultural policy analysis suffers from a lack of reliable data amassed over time;²¹ even if this were not so, many aspects of cultural policy are inherently unsuited to the analytical procedures developed by the policy sciences, due to the presence of intangible qualities which cannot be readily measured.²² However, of all possible cultural policy topics, those relating to objects deal with real things that have physical characteristics, an economic value and a legal status - all concrete qualities which can be quantified, examined, recorded, compared and analysed. Therefore, policy relating to cultural objects has a better potential for analysis than other aspects of cultural policy.

A. Reality Value

In modern society, "most adventures are second hand,"²³

²¹ Michael Green and M. Wilding, Cultural Policy in Great Britain: Studies and Documents in Cultural Policy, (Paris: UNESCO, 1970)62. There are numerous and continuing references to this shortcoming: e.g. Final Report of the Meeting of Experts on Instruments of Analysis for Cultural Development, Kingston, Jamaica, October 1976, (UNESCO Doc. CC-78 AMERICULT/3 Annex II)5, and World Conference on Cultural Policies, Final Report, Mexico City: 26 July - 6 August 1982; (UNESCO Doc. CLT/MD/1)165 "Recommendation for further research, documentation and information . . ."

²² "Excellence" is the criterion that is most frequently cited as causing difficulty for Arts Councils and other bodies that adjudicate cultural activities or award funds to cultural organizations.

so the primacy of the "real" object is a recurrent theme, not only in museological literature and research;²⁴ but also in related fields such as ethnology, anthropology and archaeology.

Cultural objects have a real dimension in time and space, and this concrete, constant (albeit passive), quality distinguishes them from the intellectual property of the performing arts - dance, music and drama - which depend upon production and distribution techniques for their actual and often temporary existence.

Reality value also imposes certain restrictions, in that cultural objects may be damaged or destroyed by physical means - unlike the dance or the epic poem, which often survive as a performing or oral tradition. Concerns about the protection and surveillance of cultural objects led to the development of specialized social organizations and custodial facilities, such as: the tomb, the temple treasury and the library of antiquity, and more recently, the museum, the art gallery, the archives, and the historic

²³ John Henry Merryman and Albert E. Elsen, Law, Ethics and the Visual Arts: Cases and Materials, 2 vols. (New York: Matthew Bender, 1979)7:3, attributed to Philip N. Youtz, the late director of the Brooklyn Museum in New York.

²⁴ e.g. "The Object and the Museum" was the theme of the 1985 Annual Conference of the Canadian Museum Association in Toronto. See also a series of articles by Susan Pearce, "Thinking About Things: . . ." beginning with "Approaches to the Study of Artifacts," Museums Journal, 4(1985)198-201 and concluding with "Objects in Structures," 4(1986)178-181.

house.²⁵

Reality value also provides a quality of immediacy and presence, so that with - or without - the sanction of State policy, cultural objects are always the subject of some form of action and thereby "policy," either by omission or commission.²⁶

B. Evidence Value.

In addition to their mere presence or reality value, cultural objects are information carriers; this characteristic is common to other cultural expressions, but it is a particular attribute of material culture.

While an object may be altered in composition, use or construction, and may be subject to the interpretation of an art historian, material culture specialist or museum curator, it is not dependent upon the presence of a specific animateur - musician or actor - for its existence. While there is some controversy as to the importance that can rightfully be attached to the object as an historic document, the argument is one of degree rather than validity.²⁷ The increasing availability of computerized

²⁵ See Jacques Barzun, "Scholarship vs. Culture," Atlantic Monthly, Nov. 1984, 93-104, on the modern custodial facility.

²⁶ Cultural objects may be either preserved or abused by the same process of storage, in, for example, a burial site; they may be further preserved or abused by the discovery and excavation of that site, and so on.

²⁷ e.g. Thomas Schlereth, ed. Material Culture Studies
(Footnote Continued)

data in vast quantities²⁸ may depreciate the value of this aspect of cultural objects, yet clearly, particular objects will become ever more significant in the scientific sense of "type specimens".²⁹

Theories developed in many disciplines depend upon the evidence supplied by the existence or discovery of a specific object for verification. While the epic poem or traditional folk tale is considered supporting evidence, the physical presence of an artifact or specimen is accepted as conclusive and beyond argument.³⁰ Many disciplines use

(Footnote Continued)

in America, (Nashville: American Association for State & Local History, 1982). This anthology of American and Canadian writings has contributions that range from the position taken by William Hesselstine at the 1957 American Association for State and Local History Annual Meeting, in which he argued against the use of artifacts as historical sources to the diametrically opposed position taken by folklorist Henry Glassie, who argues that only objects can generate information about certain aspects of the past because most information about historical periods is unwritten, because even in literate societies, most individuals were illiterate and could not generate written information.

²⁸ Including the generation of images.

²⁹ Greg Baeker, "To Interpret or Not to Interpret. . ." Museum Quarterly, 14:1(1985)4-6.

³⁰ A classic example is the description of the helmet described in the epic poem 'Beowulf', later verified by excavations of a Viking burial at Sutton Hoo in the UK. For a more recent example, see Robert S. Woodbury, "The Legend of Eli Whitney and Interchangeable Parts," Technology and Culture, 1(1960)235-251 and Edwin A. Battison, "Eli Whitney and the Milling Machine," The Smithsonian Journal of History 2(1966)9-34 and "A New Look at the 'Whitney' Milling Machine", Technology and Culture 10(July 1969)355-370. These studies are an example of evidence drawn from objects and applied to historical problems, based on research done on the Smithsonian Institution's collection of Whitney muskets.

cultural objects for empirical testing purposes and in this respect, the museum collection has assisted the anthropologist, the ethnologist or the archaeologist to test a theory against a corpus of documented objects. In fact, in the early days, this process allowed certain fledgling disciplines to establish themselves as bona fide sciences.

C. Economic Value.

Environmental anthropology views material culture as an inherently economic response to the environment. The contemporary production of cultural objects is usually labour intensive; and for highly industrialized societies, this means they are inherently expensive, and in the terminology of cost analysis, "susceptible to market failure".³¹ Nevertheless, the impact of cultural objects upon the wider economy is substantially different from that of the performing arts, which may remain unproduced or unperformed, and can only claim an economic existence for relatively short and sporadic periods of time.³²

While there is always a tendency to upgrade the past

³¹ D. Cwi, "Merit Good or Market Failure: Justifying and Analyzing Public Support for the Arts" In Public Policy and the Arts, edited by K.V. Mulcahy & C.R. Swain, (Boulder, Colo.: Westview Press, 1982)59-81. In comparison to other sectors of the economy, production costs for cultural products other than those featured by the cultural industries, are proportionately higher.

³² The performing arts do generate royalties (for written material) and performance license fees; however, these are dependent upon actual production of the work, in printed form or staged event.

environment into an art form, it is frequently the most ceremonial objects associated with elite groups, rather than everyday utensils, that survive, and in the best condition. This factor engenders a disproportionate view of their importance, rarity and economic value.³³ How often, for example, are private or public collections referred to as "treasures"?³⁴

Many types of cultural objects qualify as true scarce resources,³⁵ and as such, are subject to all the pressures associated with that designation. However, all cultural objects are subject to economic forces in transactions such as: purchases, sales, appraisals, taxation, insurance, storage, transportation, copyright and so on. An infrastructure of specialized dealers, auction houses, appraisers, fine arts insurers, lawyers, and even moving companies, has come into being to meet this demand.

In addition, the well documented and rising incidence of illicit transactions supports its own underworld network

³³ Humphry Wakefield, "Secrets of Great Furniture Revealed in the Analysis of a Chair: How to Know the Value of Everything", Connoisseur, 213:862(Dec. 1983)112-117.

³⁴ Ian Finlay, Priceless Heritage, (London: Faber & Faber, 1977)29. See also, Kenneth Hudson, Museums for the '80's -A Summary of World Trends, (New York: Holmes & Meier Publications, 1977)32-3 deplors the use of the word "treasures".

³⁵ Where the demand exceeds the available supply and some obstacle to the production of unlimited quantities also exists. Scarcity is to be sought after rather than mere fewness.

of smugglers, jobbers, fences and forgers.³⁶ In fact, the past two decades have seen an increasing monetization of cultural objects, and the rise of unprecedented speculation and investment strategies involving cultural objects.³⁷ For these reasons, cultural objects generally attract the attention of government at a very early stage, due to the perceived need to regulate or control the economic transactions associated with them.

D. Symbolic Value

Most cultural expressions, including objects, contain a split-level construction of direct, primary or literal meaning and a secondary level of indirect, figurative or symbolic meaning. Recent research suggests that the meanings bestowed on cultural objects considered as "art" have little or nothing to do with the physical or intrinsic qualities of the object, but are derived almost exclusively from the social and symbolic context of the object.³⁸

The role of symbols - from mere grammalogues to

³⁶ Bonnie Burnham, Art Theft, Its Scope, Its Impact and Its Control. (New York: Institute for Art Research Inc., 1978) and "The Black Market in Art," Artnews, (Jan. 1976)80, and M.C.Joshi and K.S.Ramachadran, "The Problems of Imitations of Antiquities," Museums and Museology: New Horizons - Essays in Honour of Dr. Grace Morley. (Delhi: Agram Kala Prakashan, 1980)293-298.

³⁷ See Chapter Four on the monetization of cultural objects.

³⁸ Mihaly Csikzentmihalyi and Eugene Rochberg-Halton, The Meaning of Things: Symbols in the Development of the Self, (Cambridge; Harvard University Press, 1981)178.

cultural objects, has increased in importance as Western society moves from a primarily extractive economy to an information-based economy. In 1954, Lasswell commented upon the tremendously increased opportunity for men to live by "manipulating symbols"³⁹ - today the opportunity is even greater.

The performing arts often offer an intense expression of symbolic values, perhaps arranged as cluster of abstract concepts, particular to a given society, in a sequence or storyline. But the passive, concrete and constant presence - in short the reality value - of cultural objects, provides a more consistent focal point for important group values than those transient forms of cultural expression which exist only temporarily while being performed, viewed or heard. Cultural objects are used as symbols in social strategies of all kinds, and tend to be specific to a narrow range or to a single symbolic value.⁴⁰ For example, the European crown is an item of decorative headgear which also symbolizes the concept of sovereignty, but other objects are used by the same community to convey concepts of fertility, wealth or death.⁴¹

³⁹ Harold Lasswell, Politics: Who Gets What, When and How. (New York, Meridian Books, 1968)16.

⁴⁰ Ian Hodder, Symbols in Action: Ethno-Archaeological Studies of Material Culture, (Cambridge: Cambridge University Press, 1982)210.

⁴¹ Walter Ullmann, Law and Politics in the Middle Ages,
(Footnote Continued)

Ownership, possession and control of the appropriate object confers an aura of legitimacy, so that without the appropriate objects, certain social or ceremonial events or transactions lose credibility; imagine the coronation without a crown or the wedding without a ring. This is often the paramount reason for repatriation requests for cultural objects made by various States or indigenous peoples.

III Research Questions

Although policy relating to cultural objects usually represents only a small component of the total cultural policy for any given State, it is a particularly significant aspect, for the reasons identified in the previous sections on "reality, evidence, economic and symbolic" values.

This study seeks to identify, examine and compare how national cultural policies affect the treatment of cultural objects owned by public and private bodies. A major focus will be on illicit transactions - a serious problem today - and possible protective measures.

The purpose of the examination is: first, to indicate the range of cultural policy options and illustrate some of their historical origins. The second goal is to identify effective, ineffective and/or under-utilized examples, and finally, to explore alternatives to existing practices.

(Footnote Continued)

(Ithaca, Cornell University Press, 1975)207-8. "Symbols used at particular important public functions, i.e. the anointing and crowning of a king, are chosen in such a way that they could not convey any other meaning than the one intended."

This topic is particularly suited to the field of Museum Studies because museums, as defined by the International Council of Museums,⁴² have a special responsibility for cultural objects which, as museum collections, are the fundamental reason for their organizational existence. In company with archives, art galleries and libraries, museums are major repositories for cultural objects of all kinds; as such, they are an ideal vantage point from which to observe and document relevant aspects of national cultural policy.

VI ORGANIZATION OF THE STUDY

As indicated in Chapter One, this study is cast within a particular philosophical framework - that is, the concept of global stewardship or, as it has become known, the common heritage of all mankind. Nevertheless, the underlying, practical structure of economic reality must be taken into consideration. The manner in which these divergent factors can be reconciled is the major methodological issue.

Chapter Two considers some problems inherent in the methodology of policy analysis, and reviews major post World War II influences upon cultural policy in a general sense, and then upon cultural object specific policies.

⁴² ICOM Statutes, (Adopted by 11th General Assembly, Copenhagen, 1974 with amendments made in 1983 and 1986). Article 3: "A museum is a non-profitmaking, permanent institution in the service of society and of its development, and open to the public, which acquires, conserves, researches, communicates and exhibits, for the purposes of study, education and enjoyment, material evidence of man and his environment."

The terms "culture" and "policy" are discussed and defined (for the purpose of this study), as well as the means used by governments to make explicit and to implement cultural policies. This provides the rationale for the selection of a specific indicator of cultural policy - that is, domestic legislation, some of which in modern times, may implement relevant international Conventions.

The reasons for featuring certain States in preference to others is explained, and the Chapter concludes with a brief discussion of the sources and literature, and an evaluation of their value and reliability.

Chapter Three - Cultural Objects in Historical Perspective - provides some background and context for the study; two major themes are explored throughout three historical periods. The first examines the philosophical precursors of the concept of the common heritage of all mankind. This includes early roots in group and individual inheritances, the development of a national heritage of public assets and the beginnings of concepts about international global stewardship. The second theme deals with the legislation of each historical era, (specific to cultural objects) and illustrates the origins of certain significant legal premises that have survived.

Chapter Four - The Modern Era - portrays the current situation and covers the institutionalization and politicization of cultural objects. In this Chapter, some new, economic aspects are introduced, notably the

monetization of cultural objects, and the criminalization of offences connected with them. The international Conventions are reviewed, and well as the role of international organizations.

Chapter Five - Towards a Solution - begins with a consideration of the basis of obligation in legal systems and introduces accountability as a modern contender for this role. The increasing importance of economic considerations in cultural transactions of all types is illustrated, and the disadvantages of the present legalistic control mechanisms, which reflect the cultural policy options, (specific to cultural objects) presently in use. The Chapter focuses upon economic benefits and/or sanctions found within the legislative framework, including "the benefits of tax benefits."

Chapter Six provides a response to the research questions; it reconsiders some under-utilized cultural policy options and using an economic approach, develops an alternative policy option.

CHAPTER TWO - METHODOLOGY

I. Policy Analysis - A Brief Overview

Any consideration of state policy inevitably raises certain fundamental questions about goals. . . . What means are used to make policy explicit and acceptable to the public, and how are resources allocated?¹

The discipline of political science was known in antiquity,² but its modern analytical aspect was first explored by Harold Lasswell in 1951.³ Since World War II, several factors have contributed to greatly increased State⁴ involvement in fields previously considered beyond the public domain.⁵ As government apparatus became more extensive and complex, there arose an unprecedented

¹ M.V.Desai, Communication Policies in India, (Paris: UNESCO, 1977)1.

² Aristotle defined political science in the Politica as a practical (rather than theoretical) art; "it is not the purpose of political science to know what virtue is, but rather how to make men good." Richard Mckeon, Introduction to Aristotle, (New York: Random House, 1947)548.

³ Harold D. Lasswell, "The Policy Orientation" in The Policy Sciences: Recent Developments in Scope and Method, edited by D. Lerner and H.D.Lasswell, (Stanford: Stanford University Press, 1951)3-15.

⁴ State is used throughout this document in the national sense, and does not refer to local, regional, provincial or state governments.

⁵ Frequently, technological advances created areas that had not existed earlier, or were of insufficient dimension to be of concern to the State.

awareness of the need for planning and a more rigorous approach to policy formulation. In turn, this encouraged the development and application of the policy sciences to provide technical advice to government and private sector policy makers.⁶

Recently, the discipline has acknowledged some of the fundamental points made by Lasswell, particularly its interdisciplinary relationship with the social and natural sciences, and its future orientation.⁷ Lasswell characterized policy as a theory of choice, involving a selection of values - not merely the projection of existing directions, but the deliberate acceleration of some trends in preference to others.⁸ In short, the means by which new value systems are identified and introduced into the policy formulation process.⁹

⁶The policy sciences were first applied to problem solving and intelligence needs in military and defense sectors in the USA and UK in the 1950's.

⁷Harold Lasswell, "The Emerging Conception of the Policy Sciences," Policy Sciences 1(1970)3.

⁸S. K. Arora, "A Reconnaissance of the Policy Sciences" in Policy Making in Government, ed. by K.D. Madan et.al., (New Delhi: Ministry of Information and Broadcasting, 1982)21, 42.

⁹Arie Halachmi, "Policy Analysis" in Madan, op.cit. 48, "the means by which to maintain some control of the course of events . . . to minimize losses and maximize benefits.

Clearly, policy formulation does not occur in a vacuum - but is strongly influenced by its historical, political and socio-economic contexts - all of which are deemed "cultural" qualities in the current literature on international development.¹⁰

In the third quarter of the twentieth century, a relatively new value system,¹¹ concerned with the highly inequitable distribution of, and skewed access to, the gross global product,¹² has become more sharply focused and articulated at many levels. Known as the common heritage of all mankind, it is gradually being integrated into many disciplines, including the policy sciences.

Although the intent of this study is to focus on the outcomes of certain cultural policies relating to cultural objects, this brief background to the discipline is intended to demonstrate that it is not possible, or expedient, to ignore the contextual dynamics which shape the policy making process.

¹⁰ Felipe Herrera "Cultural Policies in Latin America and the Caribbean," in Cultural Development: Some Regional Experiences, (Paris: UNESCO, 1981)81.

¹¹ With historical precursors, which are explored in Chapter Three.

¹² Richard A. Falk, A Study of Future Worlds - Preferred Worlds of the 1990's, (New York: New York Free Press, 1975)17.

II Definitions

Up to this point, the term cultural policy has been defined minimally. Both component words are value-laden concepts which are used in a flexible way in both the academic and popular milieux. Before proceeding further, it will be useful to discuss them more fully, keeping in mind that although definitions are expected to exhibit some degree of stability, language itself is constantly changing to incorporate new facts, perceptions and experiences.¹³ Not unreasonably, definitions expand or contract to accommodate these new values.

A. Culture and Cultural

Culture is one of the most complicated words in the English language;¹⁴ and no agreement has been reached as to an acceptable definition among the many academic disciplines that use it.¹⁵ In popular parlance, the word describes many diverse activities connected with the production, preservation, distribution, or administration of artistic (and often scientific) endeavours of both a contemporary and heritage nature.

¹³ Robert McCrum, William Cram and Robert MacNeil, The Story of English, (London: Faber and Faber, 1986) describes the evolution of the language, and the incorporation of new words and meanings.

¹⁴ Raymond Williams, Keywords, (Croom Helm: Fontana, 1976) 76.

¹⁵ Cultural Policy: A Preliminary Study, (Paris: UNESCO, 1969) 8. "The participants to the round table meeting of experts on cultural policies decided unanimously against embarking on an attempt to define culture. . "

In a somewhat arbitrary fashion, the field is often divided into four components: the performing and exhibiting arts,¹⁶ the cultural industries and the arts services.¹⁷ These activities include both "high" or "establishment" culture as well as folk arts and popular culture; and to an increasing degree, the mass media, and recreational education. Architectural and town planning projects, tourism, government information or communications, and in some States, activities of a sporting, political or religious nature,¹⁸ also fall under the aegis of "culture".

Archaeologist Grahame Clarke defines culture as:

. . .no more than a traditional medium for harmonizing social needs and aspiration with the realities of the physical world - the soil and climate of the habitat and. . . all forms of life including man himself - that constitute the biome.¹⁹

¹⁶ The term "exhibiting arts" was coined to parallel the commonly accepted term "performing arts, although it focuses on the institutional aspect rather than the production phase. Brian Arnott and Sonja Tanner, "Hard Art/Soft Art" in Love and Money: The Politics of Culture, edited by David Helwig, (Ottawa: Oberon Press, 1980)110-127.

¹⁷ Cultural industries include publishing, recording, film making for video, television and movies, fashion design, crafts and so on. The common factor is their location in the profit-making sector rather than in the public (not-for-profit) sector. The arts services are the professional associations and organizations that service the cultural field itself, rather than the general public.

¹⁸ Akreba-Abaza, H. "Legislation Relating to the Protection of Cultural Property with Particular Reference to the Arab States," (M.A. Thesis, University of Leicester, 1981)19 dicusses the relationship of "church" (in the sense of a religious institution) and State, within the Islamic legislative framework.

¹⁹ Grahame Clarke, Archaeology and Society (London: Methuen, 1968)175. Author's emphasis.

As a starting point, this definition is useful because it recognizes the contextual quality of culture and portrays it as an organic, dynamic force; most particularly, it emphasizes the relationship between economics and culture which is so often overlooked.²⁰

Clarke's view of culture as a co-ordinating factor is especially useful at the local, regional (or even national) level; however, at the international level, culture has a divisive influence - it has been the very quality that sets peoples and nations apart and emphasizes their differences. In our shrinking world of McLuhan's global village, or Farmer's "spaceship earth,"²¹ can the philosophy of the common heritage of all mankind revitalize culture's "harmonizing" role on the larger scale?²²

B. Policy

As a concept, policy is used almost interchangeably

²⁰Paul Schafer, Aspects of Canadian Cultural Policy, Studies and Documents in Cultural Policy, (Paris: UNESCO, 197)94-5. "In the past, culture was viewed as an extension of a State economy and a consequence of economic growth, but since culture determines the values, aspirations and in many cases even the occupations of the inhabitants of a given State; in short, the shape and structure of society, perhaps there is an argument to be made for the reversal of positions, whereby the economy is viewed as an extension of national culture."

²¹Richard N. Farmer, Benevolent Agression - the Necessary Input of the Advanced Nations on Indigenous Peoples. (New York: David McKay Co. Inc., 1972)308.

²²"All cultures are part of the common heritage of all mankind." Final Report World Conference on Cultural Policies, op.cit. 41-2.

with strategy; both are accordion-like terms that have been stretched to accommodate a variety of nuances, but an important difference separates them.²³ Policy has etymological²⁴ and practical connections with government and statecraft. As a prudent and advantageous course of action, policy takes a long-range perspective in order to avoid short-sighted, "strategic" decisions based on expediency.

The classic, spare, definition of policy based upon the idea of intent - "a body of principles to guide action"²⁵ - appeared in one of the earliest publications on public policy, and identified four phases of policy formulation.²⁶ Clearly, even at this early stage, considerable weight was

²³G.A. Steiner & J.B. Miner, Management Policy and Strategy, (New York: MacMillan, 1977)²⁴.

²⁴Policy from the Greek politeia - citizenship; strategy, from the Greek strategia - generalship, the effort to avert a potential or actual threat by competitors. Shorter Oxford English Dictionary. In strategy, the time frame is short and there is often an element of winning at all costs and by any means. Since the policy - to win - has been determined in advance, strategy is a purely procedural undertaking.

²⁵Charles Rothwell in his Introduction to The Policy Sciences: Recent Developments in Scope and Method, ed. Lerner & Lasswell, op.cit.ix.

²⁶Identification of objectives: evaluation of situation to be met; selection of a course of action by weighing the consequences of the alternatives; determination of the optimum means. Later elaborated by Charles Hitch, "An Appreciation of Systems Analysis," in Systems Analysis, ed. Stanford L. Optner. (Harmondsworth: 1973)²⁰. Hitch's article was originally published in 1955.

assigned to the practical aspects - the ways and means of arriving at a policy decision.

Undoubtedly, the most significant influence upon the perception of cultural policy has been the international re-appraisal of general development policies for the Third World. Today, significantly broadened definitions of policy, such as:

converging collective actions which aim at achieving certain objectives while programming the use of certain resources²⁷

incorporate the essential element of resource allocation.

C. General Development Policies

In the immediate post World War II period, "development" was firmly equated with material improvement. The many newly independent States looked to the major powers for transfers of capital²⁸ and technology to achieve both industrialization and modernization.²⁹

Priority areas were those which yielded direct returns, while the infrastructures for education, health, social welfare or cultural services and facilities were delayed or overlooked.³⁰ Almost two decades passed before a new

²⁷ Claude Fabrizo, "Cultural Policies in Europe" in Cultural Development op.cit.383.

²⁸ Foreign aid was unknown to pre WWII governments or bankers and was generally considered the purview of missionary societies. Sampson op.cit.100.

²⁹ Farmer, op.cit.313. "The relatively simple-minded concept of increased per capita Gross National Product became a surrogate for the complexity of modernization. . ."

³⁰ In the meantime, the developed States were already moving towards the post industrialized era of information
(Footnote Continued)

school of economists acknowledged that developmental models based on foreign aid had created increased, (rather than diminished) dependence, and had also neglected to provide any choice of value systems for the society that was being "developed". They called for a reconsideration of the non-economic factors, including the cultural dimension.³¹

International organizations provided a forum and rallying point for these new States, and gradually a programme for self development, was formulated.³² As an alternative to imported capital, technology, as well as their inherent value systems, the notion of creating knowledge from within arose. This came to be known as endogenous development.³³

At a round table meeting of experts sponsored by UNESCO, it was suggested that:

(Footnote Continued)

technology, so the aspirations of the Third World for industrialization were already obsolete.

³¹ Gunnar Myrdal, Asian Drama: An Inquiry into the Poverty of Nations, 3 vols. (New York: Pantheon, 1968) 1150, 1541, discusses education in the context of "population quality".

³² One aspect manifested itself in the collective bargaining technique employed by the "Group of 77" within UNESCO and the UN generally. See Chapter Four, The Modern Era.

³³ P.H.C. de Lauwe et.al., "The Sharing of Knowledge and Innovative Cultures" in Domination or Sharing? Endogenous Development and the Transfer of Knowledge, (Paris: UNESCO, 1981) 264.

the development of economic independence is a long and arduous process... and the only way ... to bridge the gulf is to find certain viable short cuts.³⁴

Developing States appraised their existing stock of assets, in an attempt to identify suitable agents of change. This included natural and human resources, and led to a reconsideration of government policies on the protection of natural resources and the environment, as well as the preservation (or revival) of the cultural heritage of indigenous populations - in short, the formulation of cultural policies. Predictably, cultural objects - as tangible evidence of both the natural and man-made heritage, received greatly increased attention, as did their traditional repositories - museums.³⁵

By 1968, the key components of the new developmental policy were formulated - with culture as "a complementary and interdependent aspect".³⁶ Two years later, at the first

³⁴Cultural Rights as Human Rights: Studies and Documents on Cultural Policies, (Paris: UNESCO, 1970)19. This meeting of experts invited by the Director General of UNESCO, took place July 8-13, 1968 and was part of the programme for the study of cultural policies, adopted at the Fifteenth Session of the General Conference of UNESCO, 1968. The quotation is by Romesh Thapar of India. Author's emphasis.

³⁵One of the "short-cuts" devised by developing States was the encouragement of science museums. See Final Report of the Workshop on the Establishment of Science Museums in Asian Countries, (Bangalore: Sponsored by UNESCO and ICOM Asia, February 1980)68 and S. K. Bagchi, "Science Museums and Social Relevance - An Indian Experiment," Museum 150 (1986)106-7.

³⁶At the Fifteenth Session of the General Conference of
(Footnote Continued)

Intergovernmental Conference on Cultural Policies in Venice, the notion of cultural development as "part and parcel of total development" was explicitly formulated,³⁷ and within the decade, cultural policy was portrayed as the "central, driving force" of developmental policy.³⁸

D. Cultural Policy - Domestic Approaches

A genuine absence of cultural policy is extremely rare in most States today, and a "policy of non-policy" may represent only an unstated position³⁹ rather than

(Footnote Continued)

UNESCO, 1968, cited in Domination or Sharing op.cit.14
 "This development must seek to be. . . integrated, i.e. not confined to economic growth alone, since economics, culture, education, science, technology and communications are separate but complementary and interdependent aspects of true development; global, assuming a world wide character which links the progress of the less well endowed groups with that of the most prosperous; equitable, for there can be no development if growth accentuates inequalities between nations and between population groups within nations; and endogenous, which implies that different societies must retain their individual character, drawing their strength from their own innate modes of thought and action and adopting goals in keeping with these values, with perceived needs and with the resources at their disposal."

³⁷ Fabrizio, "Cultural Policies in Europe" in Cultural Development op.cit.374. "as a way of extending and correcting a conception of development too exclusively economic."

³⁸ "Problems and Prospects" (Doc.CC-78AMERICACULT/3) Working Document prepared for the Intergovernmental Conference on Cultural Policies in Latin America and the Caribbean, (Bogota: 10-20 January 1978)32.

³⁹ J. Mark Davidson Schuster, Supporting the Arts: An International Comparative Study - Canada, Federal Republic of Germany, France, Italy, Great Britain, Netherlands, Sweden, United States. (Cambridge: Massachusetts Institute of Technology: 1985)5 notes "most States have not articulated a clear statement as to what falls under their

(Footnote Continued)

a true lack of policy; even this may be a deliberate and conscious policy choice.⁴⁰ Nevertheless, culture is one of the last areas of public policy to receive attention; as recently as the mid 70's it was still being suggested that "the very concept of cultural policy is a relatively new one."⁴¹

Historical perspective shows this to be a simplistic approach, for cultural policy has long existed in practice if not as an official statement. Since ancient times, the State (as kingdom, republic, dictatorship etc.) has frequently assumed the role of patron, custodian, dealer, educator, scientist, surveyor and recorder, but until very recently, cultural policy was usually fragmented, disjointed and poorly - if at all - articulated. All too frequently, it was occasioned by a specific event, such as a celebration or an emergency such as war, or even a windfall bequest.⁴²

(Footnote Continued)

concept of arts and culture . . . the United States, while providing support to areas within the broader concept of culture, has no nationally articulated cultural policy."

⁴⁰ Schafer, op.cit. 94.

⁴¹ Address by Dr. Rene Matheu, then Director General of UNESCO, Final Report Intergovernmental Conference on Cultural Policies in Asia, Yogyakarta, 10-19 December, 1973. (Doc. SHC/ASIACULT/1)9. Three years later, Kalevi Kivisto, then Finnish Minister of Education, in "Defining the Objectives of Cultural Development" a paper given at the Meeting of Experts on the Methodology Applicable to the Definition of the Objectives of Cultural Development, Hanasari, March 1976, could still describe the planning of cultural activities as "a relatively new phenomenon."

⁴² Typical examples are the U.S. Federal Works Program of the 1930's, which provided a livelihood for artists during

(Footnote Continued)

Such cultural policies were piecemeal, short-term measures, often as not, related to political expediencies. Several factors have been responsible for this state of affairs.

Culture has been viewed as relatively non-essential in the overall plans of governments.⁴³ In an unfavourable economic climate, cultural activities have been subject to diminished State (and private) support. As an internal matter, potential errors of judgement posed less risk than decisions concerning defence, foreign trade, or monetary policy. Predictably, culture is usually one of the less powerful and prestigious portfolios, and as a relative newcomer to the political arena, it rarely enjoys the stable ministerial setting of long established public

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the Great Depression; the development of the Arts Council of Great Britain as part of the World War II "Home Effort"; the Canadian Centennial Commission of 1967 which initiated the building of many cultural facilities. In 1954 the Canada Council and in 1974, the Ontario Heritage Foundation were both founded with funds from bequests. Schuster, op.cit.²¹ on the Canada Council endowment of Cdn.\$M50.

⁴³ "Cultural needs may not, at first glance, appear as evident and pressing as some others, such as health, education or welfare." Final Report of the Inter-governmental Conference on Institutional, Administrative and Financial Aspects of Cultural Policy, Venice, 24 August - 2 September, 1970. (UNESCO Doc. SCH/MD/13). As recently as 1982, the Eighth Report from the Education, Science & Arts Committee, Session 1981-2. Public and Private Funding of the Arts, Vol.I. (London: HMSO, 1982)xxii, (Q's 1521-2) noted in testimony given by Peter Brinson, Director of the Calouste Gulbenkian Foundation."the arts are an extra . . . at most of our schools... they were something that happened on wet days... I am afraid we carry these attitudes with us".

responsibilities.⁴⁴ Historically, culture has been associated with education,⁴⁵ and further fragmentation of cultural policy may occur in States where this is a local or regional responsibility.⁴⁶ Today culture is often linked to some of the newer public concerns, such as: tourism, information and communications, or citizenship.

Formerly, the culture of foreign countries was viewed as colonial exotica or trivialized as inconsequential; today cultural activities often serve as a goodwill precursor to trade (or other) negotiations with foreign States, and therefore, culture has assumed importance to ministries of external relations.

E. Cultural Policy - International Considerations

In response to changing attitudes towards general development policy, a revised view of cultural policy began to evolve, and in 1967, UNESCO initiated a programme for the study of cultural policy, and initially defined it as:

⁴⁴ e.g. One aspect of cultural policy concerns museums; in a ten year period, this responsibility in the province of Ontario, Canada, moved from a provincial Ministry of Education, to a Ministry of Colleges and Universities, to a Ministry of Culture and Recreation, which was renamed Ministry of Citizenship and Culture and as recently as 1987, became a Ministry of Culture and Communication.

⁴⁵ "Problems and Prospects" (Panama: February 1976)33. UNESCO Doc.CC-78 AMERICACULT/3. This working document prepared for the Intergovernmental Conference on Cultural Policies in Latin America and the Caribbean 1978, Bogota, recommended the establishment of "cultural ministries leaving overburdened education ministries free."

⁴⁶ In Canada and the U.S., education is a provincial or state jurisdiction, and the distinction between education and culture is not clearly articulated.

a body of operational principles, administrative and budgetary practices and procedures which provide a basis for cultural action by the State.⁴⁷

This definition emphasized the role of the State and went beyond a theoretical statement of intent to include the essential aspect of resource allocation for implementation.⁴⁸ The responsibility of the State had been long anticipated,⁴⁹ and was firmly reinforced at the first Intergovernmental Conference on Institutional, Administrative and Financial Aspects of Cultural Policy in 1970.⁵⁰ Although more recent definitions of cultural policy have emerged from international meetings,⁵¹ there has been no significant development from the 1967 position.

47 Cultural Policy op.cit. Preface, no page.

48 This principle is widely accepted, see ICOM News, 35:4(1982)1

49 e.g. R. Carless and P. Brewster, Patronage and the Arts, (London: Bow Group, 1959)139 "the burden of support must fall increasingly on the State . . . there is need for more money in total and better organization in distributing it. . . the State must be prepared to facilitate long-term planning."

50 Further defined at the Intergovernmental Conference, Venice, 1970. op.cit. "It is . . . necessary that governments and other public authorities accept a clear responsibility for culture and formulate long term policies."

51 Final Report World Conference on Cultural Policies, op.cit. 9,22, the manner in which the creative elan . . . of society is recognized and encouraged through the sum total of practical measures, organizational approaches and economic and social development."

III Methodology

A. Literature

The literature used for this study reflects the multidisciplinary nature of the topic⁵² ; an attempt has been made to review contemporary and historical theories or approaches. Contributions have been drawn from disciplines as varied as the policy sciences, economics, history, anthropology, sociology, philosophy, international development, domestic and international law, as well as those fields traditionally associated with cultural studies, such as museum studies and heritage or arts administration.

Considerable emphasis has been placed on current materials, not only scholarly works and periodical literature, government publications and those of international organizations, but also popular magazine or newspaper articles which report topical information before it materializes^{as} academic publications.⁵³ In addition, unpublished or draft manuscripts, such as reports, minutes, working papers from domestic or international meetings and

⁵² UNESCO, Main Trends of Research: Part One, Social Sciences, (Paris: 1970) 589-96 on problem focused research that requires an inter or multi disciplinary approach.

⁵³ Peter Cannon-Brooks, "Museological Information Requirements in the 1990's," International Journal of Museum Management and Curatorship 7(1988)115-6 "A vast range of important material is published only in newspapers and news magazines, not in technical journals, in colour supplements and other give-away magazines."

conferences provide a similar, but more formal background to current issues.

Much of the extant literature that touches upon cultural policy is concerned with the idea of "advocacy", which has both a remedial and reactive quality, rather than the perspective of long-range policy formulation. There is a significant body of writing on legislation affecting cultural objects; not surprisingly, it is generally by lawyers specializing in art law, and while it forms an invaluable foundation, to date there have been no overarching studies by museum specialists focusing on the development of cultural object specific legislation in tandem with the process of cultural policy formulation.⁵⁴

Among the historical material, are several influential 19th century legal texts, notably Sir Henry Sumner Maine's Ancient Law.⁵⁵ Maine drew upon the emerging disciplines of the social sciences, and his own experiences with the judicial system of British India; his approach to the history of legal institutions dealing with property and the

⁵⁴ There is a great deal of material on specific issues, such as restitution claims or import/export regulations, beginning with an early article by Norman Pegden, "A Comparison of National Laws Protecting Cultural Property," *Museum* 26(1974)53-60.

⁵⁵ Henry Sumner Maine, Ancient Law, Its Connection with the Early History of Society and Its Relation to Modern Ideas, (London: John Murray, 1861). See Chapter Three, *Ancient World*, at note 9.

contemporary practices of non-European societies was entirely novel for his era. While publications of this type are considered a trifle dated today, (replaced by more sociologically "correct" and less biased views) their significance lies not in the degree of accuracy, but in the influence such books exerted over a long period.

Maine's text, for example, was used extensively until the late 1930's in the English speaking world; it exercised tremendous influence upon generations of lawyers - from whose ranks in most States are drawn the leading career civil servants, politicians, and influential citizens of their day - in short, the very individuals who create public policy of all kinds.

Literature surveys by the academic are like the selection of the long, warp loom threads made by weavers - a search for the themes, motifs, or ideas that will last the length of the fabric. These are the philosophical or practical approaches of wide applicability and continuity that are identified by the sub-headings used in Chapters Three and Four.

B Cultural Policy Indicators

In that "the measurer affects the measurements",⁵⁶ the choice of data always requires caution, especially in the public service sector, where decisions rely more heavily on

⁵⁶ Leslie Patten, "Romanticism in the Hallowed Halls", CMA Gazette 13:3/4(1980)26-31.

judgemental and non-quantifiable factors than in the private sector. Reliable data on cultural activities is "hard to come by, hard to compare and hard to rely on".⁵⁷ This fact, in addition to the ~~the~~ basic difficulty in quantifying certain variables, can skew findings to a significant degree. Therefore, the need for a reliable, comparable and relevant indicator of cultural policy, easily found in a representative cluster of States, which is least likely to be manipulated in an arbitrary fashion.

1. Featured States

Five States - Canada, India, Mexico, the United Kingdom and the United States of America - have been featured in this study. They have some common characteristics, but more importantly, they contain great diversity and the full spectrum of circumstances in which cultural policy is formulated.

There are four States with significantly different colonial histories or routes to independence, and one ex-colonial power. Geographically, there is representation in Europe, Asia and North America; and while four States are large land mass countries, the fifth is one of the world's smallest. As to demographics, the group contains some of the most densely and most sparsely populated areas. In economic terms, variables such as income per capita, literacy rate and number of museums per State all indicate considerable variety; in addition, both totally "planned" economies as

⁵⁷Green and Wilding, op.cit.62.

well as liberal economies are represented.⁵⁸

In addition to the requirement for diversity, (which could have been satisfied by many combinations), it is also important to provide for consistency in certain features. Therefore, each selected State has comparable governmental structures, that is, a relatively stable, democratic multi-party system, with regular elections and sufficient government machinery to provide policy development.⁵⁹ In addition, at least 35 years independence from any colonial or foreign administration, to ensure that a domestic government has had an opportunity to develop and implement cultural policies, since this area is often secondary to economic and social welfare policies. Finally, each State has demonstrated activity in the development of cultural policies, particularly since 1970, and has readily available information on cultural policies and activities. This is evident when there is a reasonably consistent history of an uncensored press, sufficient publications at the popular, technical, academic and government level, and some contributions to international publications.

Quite deliberately, no totalitarian regimes have been

⁵⁸ In the modern world, totally liberal "free trade" is virtually impossible due to established trading bloc practices and more formal organizations, such as the European Economic Community. India is an example of a "planned economy" where a central government exercises considerable control by means of five year plans.

⁵⁹ For the purposes of analysis, this is far preferable to an unstable situation, where government policy may change very rapidly.

included, since the criteria enumerated above eliminates them. Also conspicuous by their absence are the many new African states, which have had a great impact upon the major international organizations, and have demonstrated considerable activity, particularly in relating cultural policy to general development policy. These States are excluded by several criteria, notably government instability and insufficient volume or quality of publications.

2. Legislation

The connection between cultural policy, cultural objects and the law has been made by Prott and O'Keefe:

"the impact of certain contemporary ... factors on cultural objects... demand the working out of agreed policies ... through the legislative process".⁶⁰

All government policy, including cultural policy, requires specific implementing strategies by government; in democratic States under stable circumstances, the process of policy development (or modification) occurs in a reasonably predictable sequence.⁶¹ Initially, there is usually a demonstrated level of concern⁶², followed by the formulation

⁶⁰ Lyndel V. Prott and Patrick O'Keefe, Law and the Cultural Heritage, Vol. I. Discovery and Excavation, (Abingdon, Professional Books Ltd., 1984)14.

⁶¹ There are many models, but the sequence of events parallel the steps identified here. For example, Lucien Pye, "Transitional Asia and the Dynamics of Nation Building" in World Pressures on American Foreign Policy, (Englewood Cliffs, N.J.: Prentice Hall Inc., 1964)154-172 suggests a five step process which may occurs as a "series of crises."

⁶² Described in relation to cultural objects in detail in Chapter One: essentially, consciousness raising activities that involve individual citizens, professional or special

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and articulation of a specific position by authorities, often in conjunction with public hearings, consultations with experts or investigative inquiries. Finally, the announcement and implementation of these positions takes place. This may take the form of progressively persuasive measures such as: publicity campaigns, public education projects or government funding programs. Ultimately, however, the State must publicize its intent and must provide the necessary resources to implement any required activities. These two objectives are invariably met by the enactment or amendment of legislation, and the enforcement of sanctions or regulations associated with it.⁶³

Sharon Williams has proposed that because the position of art as being of importance to the cultural life and heritage of all States has placed great importance on the preservation of such articles, that conventional property concepts necessarily do not apply to cultural objects in the modern context.⁶⁴ Since the contemporary legal systems of the five States featured in this study are derived from both the Roman civil law tradition and British common law,⁶⁵

(Footnote Continued)

interest groups, political groups and international non-governmental and governmental organizations.

⁶³ John E. Kersell and Marshall Conley, Comparative Political Problems: Britain/United States/Canada, (Scarborough: Prentice Hall Inc. 1968) 79.

⁶⁴ Williams, op.cit. 52. For example, by restricting the rights of an owner to do what s(he) pleases with property.

⁶⁵ Either directly or indirectly as a result of colonization. John Henry Merryman, The Civil Law Tradition - An Introduction to the Legal Systems of Western Europe and Latin America. (Stanford: Stanford University Press, 1969).

some historical legal approaches to conventional property concepts will be examined, to gain an understanding of the source of contemporary attitudes and legal precepts.

The law has been pr^otrayed as "a branch of social engineering,"⁶⁶ and earlier writers had anticipated how new value systems, such as the common heritage of all mankind, might be accommodated:

the law cannot and does not refuse to solve a problem because it is new and unprovided for; it meets such situations by resorting to a principle, outside formulated law. . . "⁶⁷

Some of these principles, such as "natural" law, "equity" and the "basis of obligation" and are treated in Chapter Three in relation to property and cultural objects during specific historical periods.

As described in the following section, the relationship between national cultural policies and the law is cyclical.⁶⁸ Legal precepts, internalized by a society from earlier, (often much ealier) legislation, are integral to the cycle of policy formulation and application. While the process may be set in motion by a wide variety of

⁶⁶ Rosalyn Higgins, The Development of International Law Through the Political Organs of the United Nations, (London: Oxford University Press, 1963)9-10, in the sense that the law is primarily concerned with order and not, as is common believed, justice.

⁶⁷ J.L.Brierly, The Law of Nations - An Introduction to the International Law of Peace, (Oxford: Oxford University Press, 1963, first ed.1928)23 "natural law, therefore, or a like principle under some other name, is an essential underlying principle . . ."

⁶⁸ Maine, op.cit.257 "There are always certain ideas, existing antecedently on which the sense of convenience works, and of which it can do no more than form some new combination."

factors, (such as the "level of concern" noted earlier), the end product - legislation - is largely regulated by existing legal principles which, for example, provide definitions, regulate transfers of ownership, create custodial organizations, set out associated rights and penalties, thereby affecting the next generation of legislation.⁶⁸

C. Models and Conceptual Frameworks

Among the techniques for policy analysis drawn from other fields (notably economics), is the notion of model building. In many commonly used mathematical or computer-simulated models, variables are converted to weighted numerical terms, and structured into a linear, "input - output" system, often provided with a feedback loop to provide some measure of evaluation and adjustment.⁶⁹ Substantive policy analysis, for example, frequently employs cost-benefit analysis, (or a simplified version, cost effectiveness), to determine how losses might be minimized and benefits maximized for a given option.

Such techniques are most useful when the values of variables can be readily calculated; some concern has

⁶⁸Prott and O'Keefe, op.cit.vi, in their analysis of (primarily) contemporary legislation, note: "it is somewhat curious that for the most part, national legislation has been drafted without any account being taken of comparable legislation elsewhere in the world . . . it is a veritable jungle for any student of comparative international law." The longer, historical view of property law and cultural policy, taken in this paper, leads to a different emphasis.

⁶⁹Such models have been considered somewhat judgemental, in that their very construction carries connotations of "progress", of moving "forward" through several stages to a more or most desirable position.

been voiced⁷⁰ that quantitative research methods fail to provide an adequate understanding of complex, contextual realities in the social sciences.⁷¹ Quantitative modelling techniques are of particularly questionable use in cultural policy analysis, where quantification may be difficult or even misleading. A methodology that is widely used in this field is the verbal model; one variation, the scenario, is often used to forecast the most probable future outcome, but may be employed effectively for historical or current contextual analysis.⁷²

Even without a quantitative focus, a conceptual model is still a useful framework within which to approach, organize and analyse a problem. A variation of the standard "input-output" model initially developed for government systems analysis,⁷³ (and further refined by other researchers⁷⁴) recognizes that policy formulation is

⁷⁰ Budd L. Hall, "Creating Knowledge - Breaking the Monopoly," in Domination or Sharing? (Paris: UNESCO, 1982)65 outlines the major weaknesses of such techniques.

⁷¹ For example, a "cut off horizon" is used to reduce the diversity of the external environment and create a more manageable parameter, so that certain areas may be reduced or eliminated, thereby emphasizing others - perhaps to an unreasonable degree. Yehezkel Dror, Public Policy Making Re-examined, (San Francisco: Chandler, 1968)38-9.

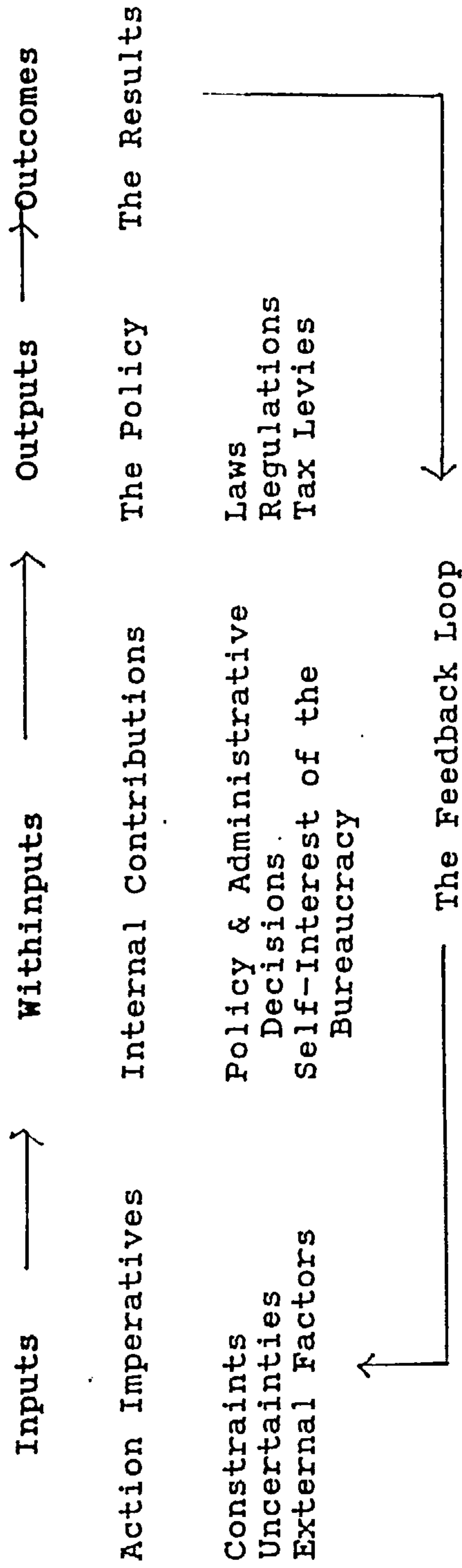
⁷² Arora op.cit. in Madan 17-46.

⁷³ Daniel Katz and Robert L. Kahn, The Social Psychology of Organizations, (New York: Wiley, 1966)14-29.

⁷⁴ Such as Malcolm Taylor, Health Insurance and Canadian Public Policy, (Montreal: McGill-Queens University Press, 1978)xv.

FIGURE I

The adaptation of a conventional "input
-output" model for policy analysis.



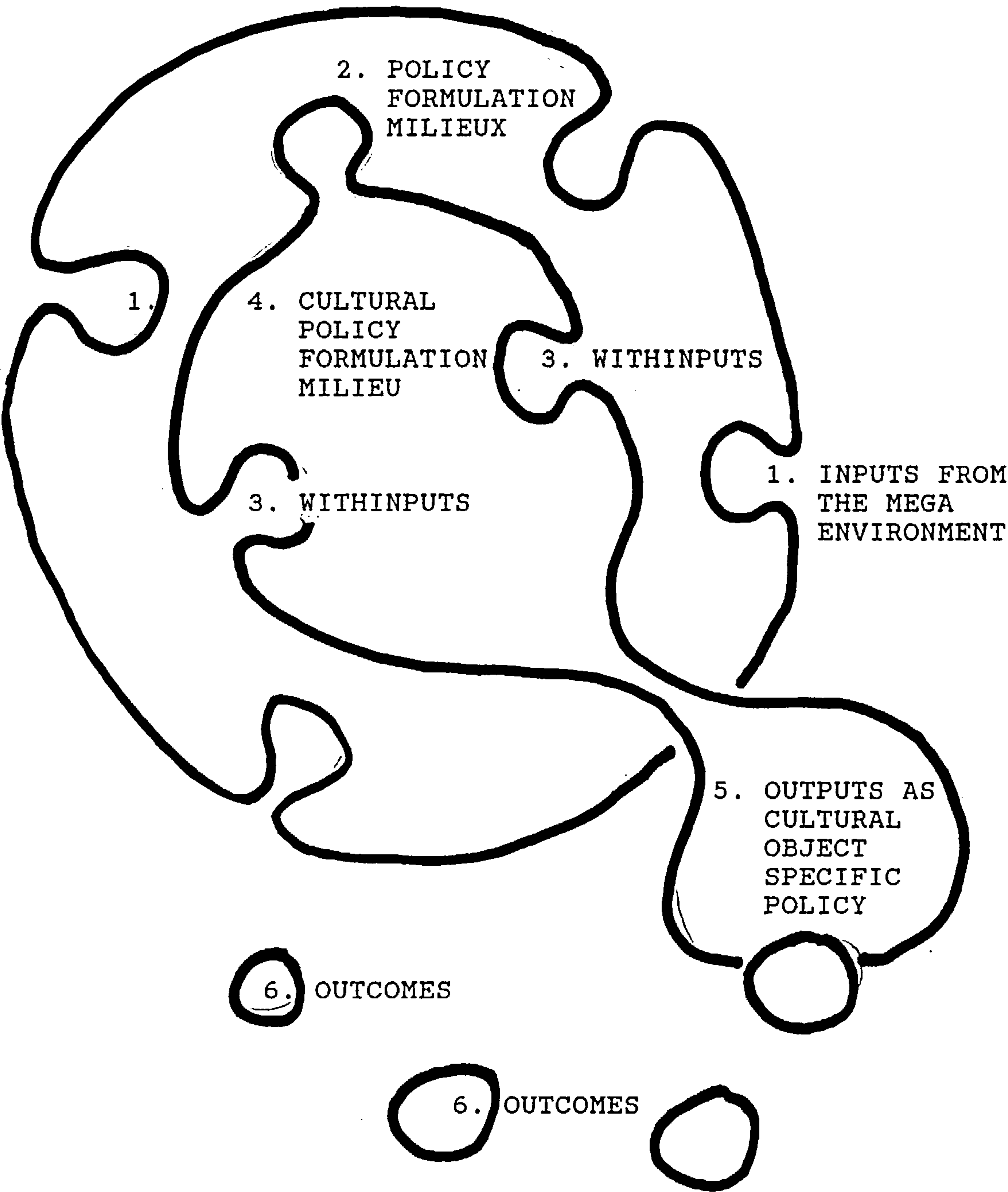
Malcolm Taylor, Health Insurance and Canadian Public Policy,
Montreal: McGill-Queens University Press, 1978.

constantly adjusting and finetuning itself in response to pressures received from the "outside" environment, as well as from an "inside" environment. As illustrated in Fig.I, the Taylor model diagrams the presence of "withinputs" to account for such influences such as "the self interests of the bureaucracy."

Using these ideas as a starting point, the model illustrated in Fig. II features a more organic approach. It illustrates the infiltration of the outside, "mega" environment (labelled #1) into the inner core, the policy formulation milieu. The mega environment includes the major geographic, historical and socio-economic factors, (climate, demography, occurrence of natural resources and so on), as well as chance situations such as natural disasters, world economic downturns, and even new value systems, like the common heritage of all mankind. These factors enter the general political milieu of State policy formulation (labelled #2) as first level "inputs", to be filtered and focussed in an interactive manner, which parallels the real life situation rather more closely than the linear process characteristic of many models. In this context, national political and legal systems, (with their specific philosophical foundations), create a further, secondary level of "withinputs" (labelled #3) to the central area of cultural policy formulation, (labelled #4). Previous (or historic) legislation is the withinput of particular interest in this study.

FIGURE II

Conceptual Framework for the Formulation
of Cultural Policy



"Outputs" from the central hatchery are cultural policies specific to cultural objects, (labelled #5) which intrude as specific "outcomes" (labelled #6). These are activities such as government sponsored publicity campaigns, public education projects, funding programmes specific to the protection, preservation or maintenance of cultural objects, and most particularly, legislation of both a direct and indirect nature. In turn, these outcomes contribute to both the inside and the outside environment and are filtered back into the system.

CHAPTER THREE - CULTURAL OBJECTS IN HISTORICAL PERSPECTIVE

I INTRODUCTION

Cultural policy contains many ingredients; those selected for closer scrutiny in this study are primarily legislative and judicial activities - past, present, unsuccessfully attempted, repealed, ignored or enforced - which relate to cultural objects in the broader context of movable property.

For each of the historical periods covered in this Chapter, two major themes are examined as they applied to movable property and particularly, to cultural objects. First, the legal philosophy of the era and second, the legislation to which it contributed. Which section should precede is a moot point, since inevitably, the relationship is cyclical; but for consistency, philosophy is dealt with first.

Throughout the discussion, certain key concepts will appear in different guises in different eras. For example, there is a considerable body of historical legal philosophy which argues for an "ethical" component to the law, variously known as natural law, justice or right,¹ which transcends positive law,² in some legal systems by a

¹For further discussion, see Leo Strauss, Natural Right and History, (Chicago: University of Chicago Press, 1953).

²More correctly, "posited" law; see Walter Ullmann, Law and Politics in the Middle Ages, (Ithaca: Cornell University Press, 1975)62 cites S. Kuttner, "Sur les

mechanism known as equity. Since the mid 20th century, this ideal has been applied to natural and man-made resources which are limited or endangered in some manner, including cultural objects. The concept of the common heritage of all mankind is a recent metamorphosis of this ideal, and is gradually being incorporated into legislation at many levels, from local municipal by-laws to international Conventions.

Heritage, derived from inheritance - the intergenerational transfer of wealth,³ is a concept that has been indissolubly linked to property since ancient times. In their study of Law and the Cultural Heritage, Lyndel Prott and Patrick O'Keefe acknowledge the connection between these two ideas:

. . .the development of the concept of heritage is having some important effects on the concept of "property" in many legal systems.⁴

In the sense of a legally protected future interest,

(Footnote Continued)

origines du terme droit positif" Revue historique de droit français et étranger, 15(1936)728. The term "positive law", (the opposite of customary or natural law), arises from the Roman principle, lex posita, the law laid down, given or set in place, which should be translated correctly as "posited" law. However, since the 12th century, a translation error has survived to give modern law the term "positive" instead.

³ Inheritance - from Middle English and Old French "eritage", the portion reserved or allotted; 1556, first used in England to mean the fact of inheriting, hereditary succession. Shorter Oxford English Dictionary.

⁴ Prott and O'Keefe, Law and the Cultural Heritage op.cit.189.

inheritance functions in ~~the~~ both the private and public spheres; this Chapter traces its development from a family and community context into the national and international milieux, to illustrate the formal recognition of cultural objects both as public assets and as international heritage.

Property law constitutes a significant element in even the most ancient legal codes; while it originated from a necessity to regulate land and other immovable property,⁵ applications specific to movable objects are frequently found. Yet:

. . . fundamental concepts are often the more difficult to define because of their ubiquitous employment . . . "Property" is just such a concept, standing upon the frontiers of linguistics, law and logic without deriving final shape from any of them. Since no legal transaction or dealing could take place without it . . . it seems strange that it is so little understood. Many legal systems, which of necessity employ the concept at every turn, contrive to dispense with a definition altogether - Roman law and English law have persistently avoided the necessity.⁶

⁵ L.B. Curzon, Law of Trusts, (Bungay, Chaucer Press, 1974)4, "In non-industrial societies, land is not only wealth itself, but a source of most other wealth; its ownership confers economic and social powers, and ultimately, political power."

⁶ J.D.M. Derrett, "An Indian Contribution to the Study of Property," in Essays in Classical and Modern Hindu Law, 4 Vols. (Leiden: E.J. Brill, 1976)II:333.

II THE ANCIENT WORLD

A. Philosophical Background

The concept of the common heritage of all mankind as applied to cultural objects first appears in legislation in the mid 20th century,⁷ although it was articulated in other forms rather earlier. For convenience, the idea of a global inheritance shared by all peoples will be examined in its component parts, as the common (in the sense of shared), heritage (in the sense of future interests), of all mankind (in an universal and egalitarian sense).

1. Common - as Shared

The common ownership of the same thing at the same time in the same manner by a number of persons was typical of ancient communities,⁸ which generally functioned as an extended, corporate family,⁹ related by kinship either real

⁷ John Henry Merryman, "Thinking about the Elgin Marbles" Michigan Law Review, Vol.83:8 (1985)1916.

⁸ Aristotle (384/3-322 BC) referring to a period earlier than his own, speculated on the common or shared use of property. Politics, Book II:Chap.8, in McKeon, op.cit.243.

⁹ The British jurist and legal historian, Sir Henry Sumner Maine (1822-1888), pioneered the study of comparative law, and anthropological jurisprudence; his extremely influential Ancient Law, op.cit. was first published in 1861. "In ancient societies, men are regarded and treated not as individuals, but always as members of a particular group. Everybody is first a citizen, and then, as a citizen he is a member of his order. . . Next he is a member of a gens, house or clan; and lastly he is a member of a family. This last was the narrowest and most personal relationship in which he stood - nor, paradoxical as it may seem, was he ever regarded as himself, a distinct individual". Maine, op.cit.204-5.

or assumed.¹⁰ Today, the operative unit is the individual and the community is merely a resident population.

Urbanization contributed to the demise of such co-proprietorships, and while mature Roman law¹¹ continued to recognize the survival of several types of group ownership,¹² it also firmly established the individual owner in law.¹³ By the beginning of the feudal period in Europe, the undivided patrimony of the group had fragmented into the endlessly divisible interests of individual owners.

However, after Constantine recognized the early Church as a legal, corporate body,¹⁴ monasticism revived and Christianized the old idea by means of a new corporate "family" - a brotherhood united not by blood, but by belief.¹⁵ While individual adherents eschewed all

¹⁰ Adoption was a contrivance to continue the family where there was no appropriate succession of kindred.

¹¹ Generally accepted as the Corpus Juris Civilis of Justinian, published A.D. 529-534.

¹² Notably res communes, limited to specific natural resources: the air, running water, the sea and the seashore. See J.A.C. Thomas, The Institutes of Justinian: Text, Translation and Commentary, (Amsterdam: North Holland Publishing Co., 1975) 65-7.

¹³ The Corpus identified res patrimonio nostro and allowed a proprietor to override the claims of his kindred in blood by means of a will.

¹⁴ The Edict of Constantine AD 311 elevated the Church from its former "underground" existence to bring it under the jurisdiction of Roman public law, of which the Emperor was the undisputed source.

¹⁵ Roland Bainton, The Horizon History of Christianity, (New York: Avon, 1964) 95. Monasticism was a reaction to the
(Footnote Continued)

possessions, their religious communities, richly endowed by wealthy and powerful patrons or converts, provided convenient repositories for collections of cultural objects of all kinds.¹⁶

2. Heritage as Future Interests

Central to the concept of the common heritage of all mankind is the practice of inheritance, which in ancient times meant the automatic entitlement of an heir to a future interest in the undivided patrimony of the group.

(i) Inheritance

To ensure its civil and legal continuity, the Roman family identified the heir - haeres - with their deceased common ancestor - succession was essentially the assumption of an office,¹⁷ for the management of family properties, and the ownership of them was almost incidental:

at the death of an owner ... lands and goods ... devolved ... according to the rules of descent and succession, unaffected by any act or desire on his part.¹⁸

(Footnote Continued)

inevitable secularization of Christianity after it became a state religion under Theodosius I, who made Christianity the only official religion of the Empire.

¹⁶The Ostragothic King Theoderic (d.526) founded a monastery and church at Ravenna, which he both endowed and presented with his own library. Bainton, Horizon History op.cit.129

¹⁷Patria potestas, the governance of the household and the performance of the sacra - the rites by which the family celebrated and commemorated its descent from a common ancestor.

¹⁸James Andrew Strahan, A General View of the Law of
(Footnote Continued)

Ultimately, the office of haeres became that of a mere executor.¹⁹ It was the later practice of testamentary disposition that most clearly demonstrated the replacement of the corporate family by the individual owner.²⁰

The will was a purely Roman innovation totally unknown to the early law of Greece, India, Egypt, Babylon or Israel.²¹ Early Roman law had permitted only a childless citizen to name a successor;²² by facilitating inheritance by other than an agnatic heir-at-law, mature Roman law indicated increasing deviance from the traditional forms. Undoubtedly, the strong support of the early Church, which benefitted from assets acquired in this manner, was an

(Footnote Continued)

Property, (London: Stevens & Sons, 1905)262. Emphasis is author's.

¹⁹ Charles P. Sherman, Roman Law in the Modern World, 2 vols. (New York: Baker Voorhuis & Co, 1917, 2nd.ed. 1937)2:242. The Roman horror of intestacy arose because "unemancipated" heirs inherited automatically, even without a will, while any "emancipated" heirs (i.e. those who were no longer under the direct control of the head of the household) had to be specifically designated in order to benefit from a will.

²⁰ Joseph Harding Underwood, The Distribution of Ownership, (New York: Columbia Press, 1907)35 describes the will as "the very essence of private ownership."

²¹ I.S.Pawate, Res Nullius: An Essay on Property, (Hubli, India: 1938)51, ancient Hindu law, for example, forbade the alienation of immovable property by an individual, because even his unborn sons had a right in it.

²² Alan Watson, Rome of the XII Tables, (New Jersey, Princeton University Press, 1975)158. The Decimviral Tables (451 BC) followed the example of the the Greek lawgiver, Solon, who also forbade the disherison of legitimate heirs.

important reason for its popularity.²³

The rights of the individual were largely formalized by Justinian; the Corpus specified the format of wills, and required the formal acceptance of an inheritance by the designated heir,²⁴ thereby removing the last shred of automatic future interest.

(ii) Public Assets

How was the ancient idea of an automatic future interest carried into the public sphere? Educational collections were known in antiquity,²⁵ but the institutionalization of sacred objects was more common; it

²³Ronald Chester, Inheritance, Wealth and Society, (Bloomington: Indiana University Press, 1982)11 and Bainton, op.cit.95,104. Under Theodosius I, heretics lost the right to inherit property, which was forfeit to the Church. In addition, Church dogma predicted a danger to the soul of the intestate who died without having assigned a fitting portion of his estate to pious uses.

²⁴Thomas, op.cit.136-9, Just.Inst.II:xix:5 "On the Categories of Heirs" and Sherman, op.cit.2:238/9. Originally it was impossible for a descendant in the power of the decedent at the time of his death to decline an inheritance (Gaius 2:19:2); this right was later granted by the Praetor's Edict and under Justinian, the inheritance did not vest until the act of acceptance, aditio hereditatis (Digest 50:17 & 77).

²⁵Geoffrey Lewis, "Collections, Collectors and Museums: A Brief World Summary" in Manual of Curatorship: A Guide to Museum Practice, ed.John M.A. Thompson, (London: Butterworths, 1984)7-8 cites Sir Leonard Woolley and P.R. Mallown, Ur of the Chaldees, (London: Herbert Press, 1962)17. Excavations at Ur by Woolley between 1922-34 revealed an apparent schoolroom and display area for objects which predated the contemporary context by several hundred years, and may have been associated with a primitive type of museum "label".

was recognized in law,²⁶ and provides a better indicator of the use of cultural objects as public assets.

Collections of religious cultural objects were among the first to be assembled in a formalized facility for a specific purpose, and thereby accessible to an increased number of individuals, although not necessarily to the "public" as understood today.²⁷ The Greek thesauri - temple treasury - is well documented by epigraphical studies, by modern archaeological excavations, and by current museological literature;²⁸ however, the use of such sanctuaries as public assets is less well explored.²⁹ An example was the huge chryselephantine cult statue of Athena Parthenos,³⁰ commissioned as part of an enormous public

²⁶ Sherman op.cit. 2:139, and Francis de Zulueta, The Institutes of Gaius, (Oxford: Clarendon Press, 1946), the Institutes of Gaius (110-180 A.D.) are later than the Twelve Tables, and identify two categories of things subject to divine law, res sacrae which belong to the gods and res religiosae which are under the protection of the gods. (Gaius 2:2-12).

²⁷ Williams, Keywords op.cit. 76.

²⁸ Germain Bazin, The Museum Age, (Brussels: Desoer, 1967) 14. Neils von Holst, Creators, Collectors and Connoisseurs: The Anatomy of Artistic Taste from Antiquity to the Present Day, (London: Thames & Hudson, 1967) 24.

²⁹ Most of the literature documents the existence of early collections to illustrate the history of the museum. See J. Lynne Teather "Museology and its Traditions: The British Experience 1845 - 1945" (Ph.D. Dissertation, University of Leicester, 1983) 62, does note "silver and gold in the form of bullion as objects ready for community need," but the context is not clear.

³⁰ The statue, about 40' high, was constructed from gold
(Footnote Continued)

works programme to transform the Acropolis from a fortress to a civic monument - the entire cost of which was met from public funds.³¹ The gold sheathing of the statue, estimated to have weighed approximately one ton³² was:

so wrought and cast³³. . . that it might be removed and weighed.

Today, only Roman miniature copies and coined likenesses remain, for the statue was literally liquidated in antiquity to finance military campaigns.³⁴

This was not an unusual fate for objects made of precious metals, but more often, such cult statues were considered so representative of a site that they became official trophies of military victories. The prosecution of Gaius Verres by Cicero in 70 BC illustrates both this practice and the developing role of sacred objects as public

(Footnote Continued)

and ivory plates (used for flesh-coloured areas), on a wooden base. It stood in the cella of the Doric temple dedicated to the goddess, surrounded by a shallow pool to provide humidity. It was designed by Pheidias, (500-430 B.C.), the leading sculptor of the day, and dedicated in 438 BC.

³¹ Rhys Carpenter, The Architects of the Parthenon, (Harmondsworth: Penguin, 1970)112. The Acropolis was a symbol of the ascending power of Athens as the leader of the Delian League; funds became available after the treasury of the League was moved from Delos to Athens in 454 BC.

³² Neda Leipen, Athena Parthenos: A Reconstruction, (Toronto: Royal Ontario Museum, 1971)45.

³³ Plutarch, "Life of Pericles" in the Parallel Lives, circa AD 46, cited in Carpenter, op.cit.140-2.

³⁴ Gisela M.A.Richter, Greek Art, (London: Phaidon, 1959)119.

assets.

During his appointment as pro-Praetor - chief magistrate - in Sicily, Verres appropriated all manner of property for his own use; his most notorious acquisition was a large brass statue of the goddess Diana which had adorned the public forum at Segesta:

not only invested with the most sacred character, but also wrought with the most exquisite skill and beauty.³⁵

The statue, previously sacked from that very Sicilian city by the Carthaginians, had been returned by General Publius Scipio Africanus, after the Third Punic War, as a gift from the Roman people to the Sicilians and to commemorate his victory. In his summation, Cicero characterized Verres' crime as heinous and inhumane, involving extortion, embezzlement, sacrilege,³⁶ treason and impiety. The prosecution, launched to investigate the extortions, came to focus on the improper confiscation of a religious object from a public place; Cicero's frequent allusions to the statue as "an ornament to the city" and the "rights of the citizens" clearly identify it as a public

³⁵ Marcus Tullius Cicero, "In Verrem - The Fourth Book of the Second Pleading in the Prosecution of Verres," in Select Orations of Cicero, C.D. Yonge, ed., (Philadelphia: David McKay Co., 1928) 163-237. "Verres so coveted the piece that he commanded the local magistrates to deliver it to him, and when they refused, he imposed additional taxes and levies upon the city. . ."

³⁶ Sacrilege included the theft or embezzlement of public or sacred property; later under Justinian, (Dig. 48:13:4 & 7) the punishment was forced labour in the mines, deportation or death. Sherman op.cit. 2:481.

asset,³⁷ for the principle of utilitas publicae had survived from Republican times.

3. All Mankind

In its modern usage, the common heritage of all mankind has an international and egalitarian flavour; while the ancient world was undeniably cosmopolitan, the prevalence of slavery certainly precludes the latter possibility. Nevertheless, a principle originated at this time, which has contributed enormously to ideas of egalitarianism.

Aristotle acknowledged that a law intended for universal application may not apply in all situations; and proposed that the intent of the lawgiver should cover unforeseen contingencies:

Then it is right, where the legislator fails us, and has erred by oversimplicity, to correct the omission and to say what (he) would have said had he been present.³⁸

The Greek epieikeia encouraged the formulation of new legislation, but the Roman aequitas modified the idea into a dualistic system, and augmented statute law by additional interpretations.³⁹ For example, the practice of

³⁷ Yonge, op.cit.199-201. Cicero's prosecution was so effective that Verres left Rome and was found guilty in his absence.

³⁸ Aristotle, Nicomachean Ethics, (Book V.Ch.9) in McKeon, op.cit.421.

³⁹ The Praetorian Edicts often required additional interpretations and a series of glosses - the Institutional Treatises - were developed by the leading jurisconsults and
(Footnote Continued)

bonorum possessio was introduced to alleviate hardship in inheritance cases where the claims of agnates,⁴⁰ especially adopted agnates, imposed material hardship on persons with a "natural right" to share in the property of the deceased.⁴¹

The principle of equity has been accepted in both common and civil law systems, because it provided for the development of new ideas and legal forms to suit the needs of the time, and more importantly, it recognized unfair practices and attempted to provide remedies.

B. Legislation

Property is not in having, but in being allowed to have.⁴²

A centralized authority and codified law were essential prerequisites for the development of the dualistic concept of property, which includes both the right of ownership as

(Footnote Continued)

recorded and circulated by their students, so in a sense, authority arose not at the bench, but at the bar; Maine op.cit.41,64/5 discusses the terms aequitas (equal or proportional distribution) and aequus (levelling).

⁴⁰ One descended, usually by male links, but possibly by male and female links, from the same male ancestor. Shorter Oxford English Dictionary.

⁴¹ The Praetor granted these individuals actual possession of the estate "against the will", (Gaius 2:125 & 3:32-38 identifies bonorum possessio contra tabulas) and those named in the will became heirs in name only. See K.K.Kagan, Three Great Systems of Jurisprudence, (London: Stevens & Sons, 1955)60; Sherman op.cit.2:243-4; de Zulueta, op.cit.101.

⁴² Underwood, op.cit.198, author's emphasis.

well as the thing over which such a right exists.⁴³ As a legally protected entitlement,⁴⁴ upheld by a principle more influential than the limited force of an individual, family or clan, rights allowed ownership by parties who otherwise might be unable to control or possess property in a physical manner - perhaps from a distance, or as a future interest.

1. Codification

While ancient eastern law codes,⁴⁵ are noted for their extensive treatment of property law, Roman law provided the foundation for European governmental and legal systems, in such areas as the "descending" theory of government⁴⁶ and

⁴³ Eventually, ownership was seen to consist exclusively of an enormous repertoire of complex rights instead of the property itself; a nineteenth century British jurist could state confidently, "that which a man owns is in all cases a right." Sir John Salmond, Jurisprudence, (London: Sweet & Maxwell, 9th ed.1937)339.

⁴⁴ "The issue of entitlement and the second-order decisions concerning the manner in which entitlements are protected are the first issues to be faced by any legal system." Guido Calabresi and A. Douglas Melamed, "Property Rules, Liability Rules and Inalienability - One View of the Cathedral" in Bruce A. Ackerman, Economic Foundations of Property Law, (Boston, Little Brown & Co., 1975)31.

⁴⁵ eg. The Indian Laws of Manu (variously dated 200 BC-AD 200), the Code of Hammurabi the Assyrian, (1724-1682 BC), the Greek Code of Dracon, (621 BC).

⁴⁶ The Roman jurist, Ulpian (AD 170-228) who provided approximately one third of the material used in the Digest of the Corpus commissioned by Justinian, offered a juristic explanation for the shift from relatively democratic Republican government, (the "ascending" theory) to Imperial rule (the "descending" theory based on the "will of the prince"). The Roman people had voluntarily transferred its power, the imperium, to the Emperor who, as the source of

(Footnote Continued)

as the source of modern international law.⁴⁷

The earliest Roman code of consequence, the Decimviral Tables,⁴⁸ confirmed the most fundamental property right - ownership by occupation or seizure, in short, by possession.⁴⁹ Later Roman law quickly distinguished between possession and legal ownership,⁵⁰ and sanctioned a mechanism to convert one status to the other. Usucapio allowed commodities possessed or occupied for a relatively short, uninterrupted period of time to become the legal property of the possessor;⁵¹ this principle was later applied with

(Footnote Continued)

all law, was outside and above it. See Tony Honore, Ulpian, (Oxford: Clarendon Press, 1982)239.

⁴⁷Brierly, op.cit.17.

⁴⁸The Twelve Tables (451 BC) arose as a codification of the early Praetor's Edicts, (decisions of magistrates delegated the legislative and judicial powers previously vested in the sovereign after the expulsion of the Tarquins). See Maine op.cit.41.

⁴⁹Possession from Latin potis sedere, "to be able to sit upon", Shorter Oxford English Dictionary. The concept consisted of two components, an intent to have and exclude others (animus possidendi), and the physical ability to control the property (corpus possessionis).

⁵⁰Jus in rem, the unification of property with its lawful owner, who has both possession and the right to the property, good against all others, and jus ad rem, the right to property, which can be held by a party without actual physical possession of it, (e.g.ownership and possession are divided in rented or loaned property).

⁵¹Usucaption from Latin usu capio, "to take by use", Maine op.cit.303 & 277, notes the required prescription of only one or two years found in Gaius 2:42,54,204.

various prescribed time periods.⁵²

Eventually, Roman law recognized five rights associated with ownership,⁵³ including the almost totally unencumbered use of property.⁵⁴ Dominium - ownership - was understood as a unitary, undivided and complete interest; later systems often began with the component parts, and "brought some or all of them together from time to time for special purposes."⁵⁵ The "Roman" origins of property rights were later incorrectly characterized by jurists as: "a bundle of powers, capable of being mentally contemplated apart from one another and separately enjoyed";⁵⁶ and modern property law textbooks perpetrate the allegory.⁵⁷

⁵²The principle was introduced as a Statute of Limitations by James I(1565-1625) to protect persons against claims made after evidence was lost, memories had faded or witnesses disappeared.

⁵³James A. Coriden, Thomas J. Green, Donald E. Heintschel, The Code of Canon Law - A Text and Commentary, (London: Geoffrey Chapman, 1985)862: utendi (to make use of); fruenti (to enjoy); abutendi (to manage, use up, consume); alienendi (to transfer); vindicandi (to reclaim or lay claim).

⁵⁴The owner enjoyed the absolute right to use and abuse lawfully held property - jus utendi et abutendi res sua, quatenus juris ratio patitur - e.g. slaves, within the limits set by law. The Lex Cornelia 81 BC decreed it murder for anyone but an owner to kill a slave, and it was not until Claudius that this became a crime for slave owners. Underwood op.cit.40.

⁵⁵F.H. Lawson, Introduction to the Law of Property, (Oxford, Oxford University Press, 1958)9.

⁵⁶Maine, op.cit.158.

⁵⁷Robert Broughton, Measures of Property Rights,
(Footnote Continued)

In ancient law, rights represented a relationship or an interest of a long-term and continuous nature; co-proprietorship by corporate family units was typical, and the deceased left vacant only his share of the whole. For this reason, ancient law codes were framed to deal with many small corporations, understood as perpetual entities, continuing beyond the lifespan of a particular member.⁵⁸ The emergence of the individual owner came about under mature Roman law, which ultimately viewed co-ownership as the exception and private property as the rule.⁵⁹

2. Early Definitions of Property

The etymology of "property"⁶⁰ reveals the link between ideas of property and the Greek concept of "natural" justice.⁶¹ In a treatise on ethics, which questioned the

(Footnote Continued)

(Pacific Grove, California: Boxwood Press, 1977)1 notes the difficulty encountered by students in understanding "that Blackacre is a bundle of rights, and not that piece of ground over there." ["Blackacre" - legal jargon for real property; origin unknown, but believed to arise from an allusion to the British jurist, Sir William Blackstone.]

⁵⁸ Lawson, op.cit. 9.

⁵⁹ The principle survives as: "no one can be kept in co-proprietorship against his will" (nemo in communione potest invitus detineri). Maine op.cit.283.

⁶⁰ Property from Latin proprius, related to: "proper, as one's own, naturally belonging;" Shorter Oxford English Dictionary.

⁶¹ Which also became known as natural "law" or "right". See Strauss, op.cit.93/4, where Aristotle is identified as a major source.

traditional authorities,⁶² Aristotle used "nature" as the rational, logical, model for justice; he distinguished between "natural" laws as universally recognized principles, and laws of convenience which reflect decisions made by a positive authority to facilitate relationships between people.⁶³ In this vein, he proposed a naturalistic definition of property - "that which ... seems to be given by nature herself to all."⁶⁴

Rome interpreted the Aristotelian theory with a different emphasis,⁶⁵ but its significance, in the context of the common heritage of all mankind, lies in two corollaries - the spirit of inquiry that questioned the basis of

⁶²Early jurisprudence often blended sacred and secular matters, the ruler and the law were associated with divine or supernatural origins, and legislative and judicial procedures were administered by a priestly elite privy to an often unwritten and customary practice. Strauss op.cit.85 "if man knows by divine revelation the right path, he does not need to seek it for himself."

⁶³"Natural justice, that which everywhere has the same force and does not exist by peoples thinking this or that, and conventional justice, that which is originally indifferent, but when it has been laid down, is not indifferent." Aristotle, Nicomachean Ethics, Chapter VII in McKeon, op.cit.413.

⁶⁴Aristotle, Politica, Book I Chap.8 in McKeon, op.cit.566; author's emphasis.

⁶⁵Roman law combined the theory of natural law with the already existing Roman tradition of ius gentium - the laws pertaining to all men and used for disputes with foreigners, who otherwise were without rights or duties under Roman law. H.F.Jolowicz, An Historical Introduction to the Study of Roman Law, (Cambridge: Cambridge University Press, 1954)100-106.

obligation for any legal system,⁶⁶ and in the perception of the ownership of property as a primordial and inalienable right.

The consensual transfer of property requires the assent of society at large, and early law codes recognized this fact. For example, the Decimviral Tables identified two major categories of property: res Mancipi,⁶⁷ which required a complicated, ritual transfer of ownership,⁶⁸ and res nec Mancipi, which was transferred by traditio - a simple formality based on physical delivery. The first category consisted of the familia - the estate or household;⁶⁹ this finite grouping was never expanded to

⁶⁶ See Brierly, op.cit. 49-52, for a discussion of the sources of the basis of obligation in modern international law.

⁶⁷ Mancipatio meant "seized by the hand," brought under the physical and later, the legal dominion; "mancipatio is the central institution of early Roman law", Alan Watson, Rome of the XII Tables, op.cit. 134. See also Sherman, op.cit. 2:139-147 for a listing of other subsidiary property definitions.

⁶⁸ The ceremony required the presence of a minimum of five witnesses of legal age, plus a scale holder; the transferee struck the scale with a bronze ingot to symbolize the price of the exchange, (since coinage was not introduced until 280 BC) Alan Watson, The Law of Property in the Later Roman Republic, (Oxford: Clarendon Press, 1968) 16/7.

⁶⁹ Including land, slaves, animals, agricultural implements, and household effects. These could be considered "essential" either in the sense of a bare livelihood (as used by Aristotle) or, as Pollock citing Muirhead has suggested (in Maine, op.cit. 328) the familia or household which determined a Roman citizen's political qualifications and thereby voting rights. See also de Zulueta, op.cit. 123.

include other classes of property, no matter how valuable or important.⁷⁰

As the tempo of society accelerated, the conveyance of property by means of intricate ceremonies became burdensome. However, a simplified procedure was not confirmed until the Corpus Juris Civilis of the Byzantine Emperor Justinian (AD 524-65). It is still considered the benchmark of mature Roman law⁷¹ and is notable for:

how very much is devoted to questions of private property, its safety, preservation and transmission".⁷²

One of the Novels⁷³ of this Code abolished the

⁷⁰ Strahan, op.cit.8, and Sherman, op.cit.2:147 cite Ulpian.

⁷¹ The Code attempted to reconcile the existing Graeco-Roman philosophical and legal tradition with Christianity, and reflected almost a thousand years of accumulated legal experience. See Thomas, The Institutes of Justinian, op.cit. The Corpus was proclaimed by an imperial decree, Tanta, in three sections between AD 529 and 534. First, a twelve volume Code, a codification of enactments from Hadrian (AD 117-138) to Justinian's own day, by which the Emperor intended to standardize legal procedures throughout the Empire; second, a Digest (or Pandects) of fifty volumes, which treats of general jurisprudential principles, the pronouncements of leading jurists of the 2nd and 3rd centuries A.D. plus a few from the Ciceronian period. Third, the four books of the Institutes, (more properly the Institutions) an introduction to the Digest and the Code itself, an official textbook for the law schools at Constantinople and Berytus, (modern Istanbul and Beirut). The Institutes had the force of law, as an expression of the Emperor's will. The publication of any further commentaries was prohibited, thereby reserving for the Emperor alone the function of law-making in any form. See Walter Ullmann, op.cit.53-79.

⁷² Percy Neville Ure, Justinian and his Age, (Harmondsworth: Penguin, 1951)144.

⁷³ The Novels, (novellae, novae leges) were 160 new laws
(Footnote Continued)

ancient distinction of mancipatio,⁷⁴ so that property of any type could be transferred by the simple formality previously reserved for res nec mancipi property.⁷⁵ Justinian's new definitions recognized property in a different way - based on the identity of the owner, rather than by a classification of the property itself:⁷⁶

res patrimonio nostro - property in private or individual ownership

res universitatis - property belonging to a group or corporation of individuals, the use of which is common to the members

res publicae - property of a public nature

res communis - property that is the common property of all men, and cannot be appropriated by any specific individual or group; specifically, the air, running water, seas and sea shores - since these things cannot be occupied by any person for any length of time

res nullius - property which does not have, or has never had, an owner, such as wild animals, lands newly discovered, and abandoned or deserted property including the property of an enemy - since at the outset of hostilities, directly the thing ceases to be in the power of the occupant, the property in it is lost, and it is exactly as if it had never been seized or occupied.⁷⁷

(Footnote Continued)

devised by Justinian and his advisors on matters which were inadequately treated in the Code.

⁷⁴"This centuries old division of things, which originated in ancient Roman law and persisted down into the early Empire, fell into disuse after the bestowal of Roman citizenship on all free inhabitants of the Empire by Caracalla in AD 212. It is not mentioned in the law of Justinian and has not descended into modern law." Sherman, op.cit.2:146.

⁷⁵Just.Inst.II:i:40 in Thomas op.cit.76.

⁷⁶Just.Inst.II:i:1-12 in Thomas op.cit. 65-7.

It is interesting to note that among the res nullius, (rather than the res communis), Justinian specifically included:

things sacred, religious or hallowed, since that which is subject to divine law is not the property of anyone.⁷⁸

This formulation, clearly based upon a long tradition of reverence for religious cult objects, recognized the tremendous influence of the early Christian Church, by providing legal protection for its assets. In this way, not all, but at least some, cultural objects were protected both from arbitrary seizure and reversion to private ownership.

⁷⁷ Originally, res nullius was the primary source from which usucaption could occur. See also Pawate, Res Nullius: An Essay on Property op.cit.3-16, who advances the argument that "in every transition of a thing from the ownership of one person to another, there must be some point of time at which the thing was the property of neither party, but a res nullius. A thing owned is in the power...of the person owning it, when the owner wants to transfer it, he frees, emancipates or liberates it from his power...and the thing reverts to its natural state and is capable of being seized by the intended transferee as his own. It could be seized by a third party, who could become the owner, but in practice this is impossible since the interval is generally so short".

⁷⁸ Just.Inst.II:i:2 in Thomas op.cit.65. The precedent was set by Gaius (AD 110-180) who had identified res sacrae as a specialized category of property. Watson, The Law of Property, op.cit.17.

III THE MIDDLE AGES

For further developments, attention shifts from Byzantium to the West, specifically to feudal¹ England. Although the medieval period concludes with the emergence of a true market society, governed by the mercantile law of Tudor times,² this Chapter will focus on the 13th century, as the most pertinent period for the development of concepts that affect cultural objects. Following the organization of the previous section, the theme of the common heritage of all mankind is considered in its three component parts.

A. Philosophical Background

While the Biblical revelation that the earth was "given to mankind in common"³ did little to advance the notion of the common heritage of all mankind in the medieval period, the significance of the Church in fostering shared values (and re-introducing inheritance) is considerable.

1. Common as Shared

Medieval Europe, fragmented in the secular political sphere,

¹Michael Curtis, The Great Political Theories, (New York: Avon, 1961)153 on feudalism. "The concept, it would seem, is a wholly modern one, neither the English word, nor its equivalent in any other language, was apparently invented before the 19th century.

²Robert L. Heilbroner, The Making of Economic Society, 5th ed. (New Jersey: Prentice Hall, 1975)44-71, Chapter III, "The Emergence of Market Society" defines a market society as one that is driven by market forces, rather than simply containing them.

³Psalms 115 v16, and Eccles.5 v9, "the profit of the earth is for all."

acknowledged the Church as its "organizing principle"⁴ in social, spiritual and cultural life; it was the matrix in which a common heritage could be nurtured. For Europeans were not Europeans, they were first and foremost Christians.

(i) The Matrix of Church and Christendom

Modern cultural policy is often identified with nationalism, (or even regionalism), but the most important statement of medieval cultural policy - the holy crusade - was absolutely international in scope. Western Christendom repeatedly found spiritual focus in commitment to religious causes; at times, these causes were inimical to both ecclesiastical and secular hierarchies; for example, the various egalitarian movements inspired by the ideal of Christian brotherhood.⁵

To further its influence, the Church used its administrative stability, enormous material resources⁶ and, (for the educated) a common international language.⁷ Literacy was rare, and

⁴Barbara Tuchman, A Distant Mirror; the Calamitous 14th Century, (New York: Alfred A. Knopf, 1978)3.

⁵The powerful Cluniac movement supported the liberation of monasticism from lay control. Marshall W. Baldwin, The Mediaeval Church, (Ithaca, N.Y.: Cornell University Press, 1953)36. The mystical mendicant sects, the Fraticelli or Spirituali, were acutely inconvenient and embarrassing for the Church, which sought an ever closer attachment to its lands, buildings and movable treasure; the Papacy reacted by declaring the sects heretical. Tuchman, op.cit.36.

⁶Leslie Lipson, The Great Issues of Politics. Englewood Cliffs: Prentice Hall Inc., 1970)178, "the Papacy was the greatest financial institution of the Middle Ages . . . an immense vested interest . . . implicated to the hilt in the economic fabric . . ."

⁷The Augustinians and other Christian missionaries
(Footnote Continued)

ecclesiastical patronage concentrated on more accessible cultural expressions, "for things are read, though letters be unknown".⁸ In this environment, music, drama, rhetoric, literature and particularly the plastic arts, flourished.

The role of the Church as builder and patron is well documented; as educator, it provided an academic curriculum and specialized training in technique, design and iconography for all types of artisans and was instrumental in the encouragement of new artistic styles as they arose.⁹ Christian teachings were reflected in a great outpouring of material culture - in architecture and every form of the decorative arts - replete with Biblical themes, religious symbolism, Church dogma, and political messages of ethnocentrism and superiority.¹⁰

(ii) The Corporate Image

The Roman concept of res universitatas, (which had formalized

(Footnote Continued)

contributed to the "Latinization" of Europe by introducing the Bible.

⁸Elizabeth Holt, ed., A Documentary History of Art, (Princeton: Princeton University Press, 1957)120-125, cites William Durandus (1220-1296), "Of Pictures, and Images and Curtains and the Ornamentation of Churches," 1286. Author's emphasis.

⁹By comparison, the role of the secular princes was slight, for the era of the great royal collections does not really begin until the 14th century.

¹⁰The claim of the Church to the primacy of the Pope was based on the doctrine of Apostolic Succession. The struggle for power had, as one of its causes, control over the nomination of bishops, and became known as the Investiture Contest. Brian Tierney, The Crisis of Church and State, (Englewood Cliffs: Prentice Hall Inc., 1964) on the Papal Bull Unam Sanctam 1299, issued by Boniface VIII. See also note 84.

joint or group ownership by incorporal means¹¹ found its equivalent in the medieval corporation,¹² a device used extensively by municipalities and trade associations.¹³ By the 13th century, the Church was the most successful corporate entity known to date,¹⁴ and functioned as a prototype state.¹⁵

Politically advanced, the Church practiced the canonical election of a chief executive officer, while the royal houses were still struggling to institute hereditary kingship. The Consiliar movement¹⁶ set the tone for representative government within and

¹¹ Both tangible and intangible property could be owned by unrelated individuals who did not possess it in a personal or physical manner.

¹² Underwood op.cit. 39. Roman law recognized the corporation, (corpus) as a legal entity, but came to distrust its political potential, and ultimately used it as a State instrument to provide public needs, such as water supply, amphitheatres, etc.

¹³ The monopoly trade practice enjoyed by medieval guilds incorporated by royal charter is an example of intangible property owned by a group; the same corporate body might also own real property - the guild house - and movable objects of a functional and ceremonial nature.

¹⁴ Membership was virtually compulsory. Tuchman op.cit. 32.

¹⁵ R. H. Tawney, Religion and the Rise of Capitalism, (New York: Harcourt Brace, 1926) 20. "The Papacy. . . itself the greatest landowner. . ." In addition to its massive land holdings, the Church developed extensive legislative, judicial and revenue collecting machinery, (with surplus assets directed into international banking), an extensive diplomatic service maintained through the legatine system, and upon occasion, it declared war and sustained a military presence. At the local level, in addition to its ceremonial functions, the Church provided extensive social services ranging from: educational systems, medical services and care for the aged, the traveller and the orphan, to dowries for poor girls.

¹⁶ Consiliarism developed from the scholarly exegesis of juristic sources to a more practical application of canon law; prominent canon and civil lawyers were asked to provide opinions

ultimately, in the secular world. The role of the medieval Church as a supra power can hardly be ignored, and after the monarchic theme, the corporational thesis was an essential organizational model for medieval society.

2. Heritage as Future Interests

With few exceptions, feudalism militated against the concept of private ownership,¹⁷ and after William of Normandy introduced a version of Carolingian feudalism¹⁸ to England in 1066, earlier Saxon customs of allodial ownership¹⁹ were suspended and his vassals could no longer bequeath or inherit most forms of property.

(Footnote Continued)

on legal issues raised in an international forum. Later these Councils considered questions of the governance of the Church itself. Consiliarism's basic philosophy was concilium repraesentamentem populi - what touches all must be approved by all - the formula attributed to Bartolus de Sassoferrato, (1314-1357). Ullmann op.cit.110 notes that although he was not the first to advance the Consiliar viewpoint, "he did it better than the others."

¹⁷ Local leaders were "seised" for a variety of feudal "incidents" in return for which they received temporary access to an economic and political base. Services rendered to an overlord varied from the provision of military assistance (knight-service), to relatively inconsequential obligations such as prayers.

¹⁸ Feudalism originated from the Roman emphyteusis practised at the barbarian borders of the Empire, along the Rhine and Danube, where veteran soldiers became frontier tenants of land owned by the State, secured not by rent, but by garrison duty as required. Later, this arrangement was transformed into the precursor of feudal knight-service. Maine op.cit.316-18; Pawate op.cit.152-4; Underwood, op.cit.43.

¹⁹ An estate held in absolute ownership without any acknowledgement to a superior.

Ownership of land (and the chattels²⁰ associated with it) could be neither absolute nor unitary, since:

the King is sovereign lord . . . of every parcell of land within the realme.²¹

This meant that the great fiefs changed hands frequently,²² and the efforts of both the Church and feudal nobility to weaken royal control, combined with the universal desire to preserve property in the family, contributed to the re-emergence of inheritance. In particular, the Church stood to gain from independence from feudal overlords and from bequests of lands and movable property.²³

²⁰ "Chattel" from Old English and French "cattel" - cattle, and thereby, associated with the land. Shorter Oxford English Dictionary.

²¹ Technically, the British Crown still has an interest in all real estate today, since property is held "at the pleasure of the Crown," Strahan, op.cit.19. The Second Statute of Westminster, Quia Emptores 1290, (primarily intended to discontinue subinfeudation and eliminate allegiance to an intermediate, local lord) reinforced the concept of dual ownership of property by both Crown and vassal. Broughton, op.cit.29.

²² A descending hierarchy of tenancies enabled a distant ruler to exercise authority at a regional level for law enforcement, taxation, judicial decisions, and to muster military resources while retaining the capacity to redistribute assets according to political need. Colin Ellis, History in Leicester, (Leicester Recreational and Cultural Services Dept. 1976)49-50, notes that from 1066 to 1289, The Earldom of Leicester, (later the Duchy of Lancaster) was granted to seven different noble vassals, only two of which, de Montfort and de Grantmesnil, held it for more than one generation.

²³ Justinian's designation of sacred and hallowed objects as res nullius left such property in a state of limbo - belonging to nobody, but incapable of acquisition by another party. The Church found this an unacceptable state of affairs, and struggled for control over the lands, revenues and cultural objects granted it.

(i) Inheritance and Wills by "Use"

In the 13th century, testamentary disposition began to encroach upon the prerogatives of the feudal overlord in a circuitous fashion, by means of wills by "use". Not until Tudor times was there was a clear right of testamentary disposition guaranteed by law,²⁴ and in the interim, primogeniture, ultimogeniture and gravelkind²⁵ were practiced informally and simultaneously in England.²⁶

The major device which allowed individuals to control future interests in property probably arose from a pre-Norman arrangement for usufruct.²⁷ Abbreviated notations of "aes"

²⁴ Statute of Wills 1541, (32.Hen.VIII,c.1).

²⁵ Ellis, opcit.44. In 1255, the burgesses of Leicester petitioned Earl Simon de Montfort for a change from ultimogeniture ("borough-english") to primogeniture, because inheritance by the youngest, weakest and most inexperienced sibling was judged not in the best interests of the community. George W.Keeton & L.A.Sheridan, The Law of Trusts, (London: Professional Books, Ltd., 10th ed.1974)214, note "gravelkind", practiced in Kent, and probably derived from Jutish settlers, which allowed all land to be divided equally between all male heirs.

²⁶ Always subject, of course, to payments made to feudal overlords for the 'privilege' of inheriting. Broughton, op.cit.28.

²⁷ The origin of the "use" is still a controversial topic of legal history; Oliver Wendell Holmes, "Early English Equity" in Select Essays in Anglo American Legal History (London: Wildy & Sons Ltd.,1968)V.2:705, describes the legal entity of the "truehard" of early Teutonic law, a type of primitive executor. Frederick Pollock & Frederick William Maitland, The History of English Law, (Cambridge: Cambridge University Press, 2nd. ed.1923) V.2:228, elaborate: "even before the Conquest, cases have been found of land being conveyed to one man to be held for a limited time and purpose, such as for the grantor's family while he went on Crusade."

against certain entries in the Domesday Book - ²⁸ eventually became known as the "use". This "parent of our modern trust"²⁹ allowed one party, (the feoffee to uses), to become the legal owner of property held solely for the benefit of another, (the cestuiqui use), without receiving any benefit from the transaction.

The earliest documented "use" in England, in 1225,³⁰ names the Conventual Franciscan Order,³¹ which was frequently the recipient of both inter vivos gifts and bequests. After legacies of land to the Church were forbidden³², the Franciscans arranged for assets to be transferred to the boroughs for their benefit.³³

²⁸ "Aes" or "ues," a Norman French short form for the Latin ad opus - for the benefit. William Allan Jowitt, The Dictionary of English Law, edited by John Burke, (London: Sweet and Maxwell, 2nd ed. 1959)1810.

²⁹ "and the greatest contribution to the substantive law." Holmes, op.cit. 706.

³⁰ Curzon, op.cit. 7.

³¹ The Order founded by St. Francis (1182-1226) predicated upon the rejection of property, eventually split into two factions: the Spirituals and the Conventuals. The latter abandoned their mendicant origins and established permanent monasteries.

³² De Viris Religiosis, the Statute of Mortmain 1279, (7 Edw.I s.2 c.3) was the first of several such Statutes, (in 1391, 15 Rich.II c.5 and in 1532, 23 Hen.VIII c.10). Since the Church could never be a minor, or marry or die without leaving an heir - all those "incidents" to which a feudal lord looked for profit, it was as if the property had been grasped by a "dead hand."

³³ Ellis, op.cit. 50 notes that the Franciscans first came to Leicester in 1225; this supports Curzon's finding regarding the first recorded "use". Cardinal Ugolino, the Order's patron and protector, had petitioned the Pope to allow the Order to acquire usufruct of property without breaking their vows. The Church, he

The advantage of the "use" was quickly realized by the lay population, since it made possible the avoidance of feudal incidents; more importantly, it provided a mechanism to re-introduce the old Roman concept of inheritance by will³⁴ into the feudal system and the common law courts.³⁵

(ii) Public Assets

The votive offerings made in the temple treasuries of pagan antiquity³⁶ were replaced by an acceptably Christian cult of relics.³⁷ Revered as efficacious in the process of intercession - relics were "the language of doing business with the

(Footnote Continued)

proposed, "should assume the burden of ownership (dominium) and let the brothers have the use (usus)". By 1279, a Papal Bull declared that a "use" was not a property per se, and was therefore an acceptable practice for religious Orders. Bainton op.cit. 203,210,218.

³⁴ Phillip Pettit, Equity and the Law of Trusts, (London: Butterworths, 1979)20.

³⁵ "Common" law - the law known in all regions of the country, and not specific to a particular manor or local feudal court; essentially customary in nature, and based upon judicial decisions supplemented by royal decrees on specific topics.

³⁶ Teather, op.cit. 62-73 reviews the importance of relics in the development of the museum; also, Marina Warner, Alone of All Her Sex - The Myth and Cult of the Virgin Mary, (London: Quartet, 1978)285-298, Chapter 19, "Icons and Relics".

³⁷ There was Biblical support for relics - the alleged physical remains of prominent Christian figures, (bones, nails, hair, even bottled tears, blood or milk) or objects and clothing closely associated with them. "And God wrought special miracles by the hands of Paul, from his body were brought unto the sick, handkerchiefs . . and the diseases departed out of them." Acts 19:12. The Council of Nicaea 325 A.D. had decreed that in order for a church to be consecrated, a relic must be placed beneath the altar. See James Bently, Restless Bones - The Story of Relics, (London: Constable & Co., 1985)222.

supernatural"³⁸ - such objects were often encased in reliquaries of precious metals and fine workmanship, embellished with gems.³⁹ The theraputic qualities⁴⁰ attributed to the relics at important shrines generated substantial revenue for the Church from pilgrims.⁴¹

Ecclesiastical treasuries also housed liturgical and decorative objects, as well as valuable secular items, donated to the Church as votive offerings or merely placed there for safekeeping.⁴² As in the past, the portable wealth of the Church was subject to appropriation by secular rulers in time of crisis,⁴³ a situation which diminished as the Church developed its

³⁸ Donald Horne, The Great Museum: The Re-presentation of History, (London: Pluto Press, 1984)13.

³⁹ The design of churches and crypts reflected the need for a repository for relics; entire churches were built for this purpose - the stained glass jewel of the Sainte Chapelle was begun in 1241 and dedicated in 1248 by (the later canonized) Louis IX of France when he purchased the Crown of Thorns.

⁴⁰ Geoffrey Lewis, "Collections. ." in Thompson, op.cit.9.

⁴¹ The four shrines to St. Thomas a' Becket at Canterbury necessitated, in 1174, just three years after Becket's death and one year after his canonization, a complete rebuilding of the cathedral. These shrines were the most profitable in Europe and generated fully a quarter of the total cathedral revenues. Bently, op.cit.98 & 151.

⁴² Perhaps a jewelled crown to adorn a statue, or an inlaid gaming board converted into a cover for a codex. Warner, op.cit.105.

⁴³ In 1294, Edward I ransacked the treasuries of abbeys and churches to finance an attack on Gascony.

surplus assets into an international banking system, and met these needs with repayable loans.⁴⁴

In terms of institutionalizing cultural objects, the Church was no mere repository; its role as patron, exhibitor, researcher, authenticator⁴⁵ - in short, its public, "curatorial" persona is often underrated. The church and cathedral were early public art galleries and museums; the public processions, mystery plays and pageants sponsored by the Church (and affiliated organizations) provided additional opportunities for the public display of important cultural objects.

(iii) Beginnings of the Public Trust

After feudalism replaced the classical conception of the state as a form of political organization, a sense of generalized civic responsibility - beyond that owed to an immediate vassal or overlord - was extremely limited.⁴⁶ Where it did exist in practical terms, it was largely fostered by the Church rather

⁴⁴Tuchman, op.cit. 26-8, on the development of Italian banking based on the capital of the Church; in 1327 at Avignon, there were 43 branches of Italian banking houses catering to the Papal Court.

⁴⁵When Henry III secured a portion of the Holy Blood, in 1245 it was "certified" by the Masters of the Templars and the Hospitallers, the patriarch of Jerusalem and a flock of lesser prelates" Margaret Wade Labarge, Simon De Montfort, (Toronto: Macmillan & Co, 1962)83.

⁴⁶Both ecclesiastical and lay writers conceptualized this quality in a romantic and chivalric guise, as the honourable obligation - noblesse oblige - to assist the weak and oppressed. Bainton op.cit.183-4 "Chivalry, which long outlasted the crusading movement . . . imposed on the armoured knight . . a code of honour - which the Church could sanction while seeking to enlist his arms for the succouring of the oppressed".

than by the secular rulers.⁴⁷ The modern idea of the public trust has roots in Roman law,⁴⁸ in 13th century "use" and in the ecclesiastical Consiliar movement.

The "use", which allowed the circumvention of certain rights of feudal overlords, was the foundation for the modern private trust,⁴⁹ and Consiliarism⁵⁰ contributed to the reduction of royal prerogatives, by firmly implanting in the secular world "one of the oldest restrictions placed on any ecclesiastical officer"⁵¹ -

⁴⁷ Broughton op.cit.19-20 on the activities of the Church to mitigate the effects of famine in the Middle Ages.

⁴⁸ Certain Roman legal concepts survived feudalism in a modified form, including res publica and utilitas publicae - public assets and the safeguarding of the public interest.

⁴⁹ Pettit, op.cit.18, commenting on the uniquely feudal origin of the trust, quotes Merryman, Civil Law op.cit.67 "there is no institution quite like the trust in the civil law systems based on Roman law." See also Kagen op.cit.27 on a Talmudic version of the trust.

⁵⁰ Usually associated with the 14th century, the basic philosophy of Consiliarism (see The Corporate Image), was actually expressed earlier by an English Franciscan, William of Ockham, (1290-1350) in "The Right to Chose Rulers," Dialogus (Part III:Tr.2:Book 3: Chap.6) in Curtis op.cit.185. Ockham proposed that ultimate authority resided in the corporate body of the Church and not in the person of the Pope. He extended this idea to the secular sphere, to recommend that rulers employ not only a consultative process, but also a delegation of power.

⁵¹ Ullmann, op.cit.182 and Coriden et.al.op.cit.879, (Canon 1291) on the prohibition against the alienation of the stable patrimony of the Church, and on the origin of the concept of inalienation to the Council of Nicaea, A.D.325. As of 1989, three cases are pending or awaiting appeal in which religious bodies are seeking the return of religious objects which had been improperly alienated, (Government of India, et al vs. Bumper Development Corporation of Alberta, 1988 heard in the UK; Autocephalous Greek Orthodox Church vs. Goldberg 1989, heard in the USA; National Museum of Civilization vs. L'Ange Gardien Parish Church 1989, heard in Canada).

the principle of inalienability.

Gradually, the powerful, ecclesiastics and lay vassals used the sophisticated juristic arguments of canonic and civil law scholars,⁵² to recast their feudal overlords as "patrons" or "advocates" of the Church.⁵³ England was never "properly" feudal in the Carolingian sense,⁵⁴ and before the middle of the 13th century, Bracton's comprehensive treatise of the common law,⁵⁵ not only rejected Justinian's concept of the law as the "will of the prince" and the feudal principle of "might makes right", but also proposed that the king's statutes were subject to, and could not contradict the common law.

Authoritative Roman legal allegories such as the tutela⁵⁶

⁵² Such as St. Gratian, a Camaldunensian monk working at Bologna, who organized the vast body of earlier canonical writings into a series of discussions on particular problems and developed a dialectical method to resolve canonical contradictions using the juristic equipment of Roman civil law. His methodology was eagerly accepted at Bologna, and his "Harmony of Discordant Canons" c.1140 (known as the Decretum), was one of the most successful texts ever written. Ullmann op.cit.165-6 and Tierney, op.cit.98.

⁵³ Ullmann op.cit.167.

⁵⁴ William I sought to establish his right to the Crown of England by legitimate succession (as well as by conquest), and undertook to uphold the "laws of the Confessor"; he accepted both the common law as it stood, and the idea that the law was not merely the will of the king, but should be based upon the consent of the people and settled precedent.

⁵⁵ Henry de Bratton (known as Bracton), a Devonshire judge who served in both the assize courts and the central court, (the King's Bench), wrote De Legibus et Consuetudinibus Anglica 1250-58. Labarge op.cit.167 & Broughton op.cit.7 and 22.

⁵⁶ The guardian or "curator" was appointed by the magistrate to administer the affairs and interests of minors or orphans. This public office had been first defined by Gaius, and was incorporated into Justinian's Institutes, (I:23-26).

were revived; the feudal sovereign became a tutor regni - a regal guardian, set by divine order to govern a kingdom by protecting its interests. By 1154, the principle of inalienability appeared in the Coronation Oath of Henry II:⁵⁷.

This function mitigated against any alienation by the ruler of the goods, estates or rights which were inherent parts of the kingdom or empire - in other words, which were public.⁵⁸

As the allegorical, royal guardian of the welfare of his subjects, the King was also characterized as parens patriae;⁵⁹ initially minors, orphans, incompetents or those otherwise incapacitated or unrepresented, were his special responsibility.⁶⁰ Royal inalienability, coupled with the custodial role of the monarch, was the public, generalized civic counterpart of the "use", which had developed to protect the interests of a specific beneficiary.⁶¹

⁵⁷ Gaines Post, "The Roman Law and the Inalienation Clause in the English Coronation Oath," Studies in Mediaeval Legal Thought, (Princeton: Princeton University Press, 1964)415-6 discusses the origin of the concept in the late 11th or early 12th century, in the oath of office taken by bishops, not to alienate the estates of their churches.

⁵⁸ Ullmann, op.cit. 58 & 201-8. Author's emphasis.

⁵⁹ "Father of the country," see Marie Malero A Legal Primer on Managing Museum Collections, (Washington, Smithsonian Institution Press, 1985)20 on the principle in recent U.S. cases.

⁶⁰ De Prerogativa Regis 1255, promulgated under Henry III (1216-72) made the Crown responsible for the management of the estates of idiots and lunatics, noted in Report of the Committee on Funds in Court, (London: H.M.S.O., July 1959)9.

⁶¹ The issue of inalienability is part of the international debate concerning cultural objects in return and restitution claims between States. Robert Browning, "The Case for the Return of the Parthenon Marbles", Museum 36(1984)38-41.

3. All Mankind

The concept of equity, which entered Mediaeval thought from both Greek⁶² and Roman⁶³ sources, is a basic building block in the development of egalitarian attitudes.

(i) Equity

With access to a wide range of ancient writings, Aquinas was familiar with the classical notion of the State⁶⁴, when he wrote:

human law is rightly changed insofar as such change is conducive to the common weal.⁶⁵

and later elaborated on this idea as it concerned property:

whether private property is the product of personal labour or the result of occupancy, it must be limited or conditioned by the needs of others.⁶⁶

In England, application of the principle of equity gave

⁶²When the Dominican William of Moerbeke (d1285) translated Aristotle's Politica, he was obliged to coin new Latin words for certain Greek concepts which had fallen into disuse, e.g. politeuesthai - acting as a citizen. Ullmann op.cit.295.

⁶³The early Praetor's Edicts (jus honorarii) were originally effective only for the year of the magistrate's office, and initially, were the informal part of Roman law. The early Twelve Tables arose in this manner, and Justinian formalized many Edicts that had occurred prior to his reign. This cycle of codification parallels the concept of equity that developed in England.

⁶⁴As a body of citizens capable of creating laws and governing themselves.

⁶⁵Thomas Aquinas, Summa Theologica, (Quest.97:Art.2) in Stanley Parry, Thomas Aquinas, Treatise on Law, (Chicago: Henry Regnery Co., 1964)109, "of change in laws". The Anglo Saxon "weal" used in the translation derives from the Teutonic "welon" and Old English "wela" - well being, prosperity, social good; the root of well, welfare and wealth. Shorter Oxford English Dictionary.

⁶⁶Thomas Aquinas, Summa Theologica, (Part II, Quest 32a) in Chester, op.cit.16 note 17.

rise in the late 13th century to a parallel, but complementary judicial system, intended to provide remedies in cases where the common law failed to give redress.⁶⁷ Litigants in property and inheritance disputes petitioned the King's Chancellor - an ecclesiastic until Tudor times - for justice.⁶⁸ Eventually, this process was formalized into the King's Court of Chancery, which evolved to protect the interests of beneficiaries of "uses" unable to secure an equitable settlement in the common law courts, and was instrumental both in re-introducing inheritance by will⁶⁹ and in developing the concept of the trust as a benefit held for another⁷⁰.

B. Legislation

Although Maine wrote of "the great interruption to juris-

⁶⁷ By this time, the common law courts formed a rigid system and could hardly adapt to changing needs. Broughton, op.cit. 23.

⁶⁸ At first, the Chancellor acted as a delegate of the King's Council and the King; ultimately the office assumed the characteristics of a court. The first recorded mention of Chancery occurs in 1340. Holdsworth, op.cit. History of Law. Vol 1:403. By 1450, most of the work of Chancery was concerned with "uses". It was not until 1474 that the Chancellor made a decree upon his own authority. Keeton and Sheridan, op.cit. 2, cites Margaret E. Avery, Law Quarterly Review 86(1970)84.

⁶⁹ Chancery worked "behind the scenes", so that if A's action against B in the common courts was viewed as inequitable in Chancery, a common injunction could be brought against A to prevent the continuance of the action in the common courts. Failure to comply with such an injunction constituted contempt of court, and was punishable by imprisonment.

⁷⁰ See Glanville Williams, Learning the Law, (London, Stevens & Sons, 10th ed.1978)22-26 for a discussion of equity and Curzon, op.cit. 1-12 on the development of trusts.

prudence created by feudalism",⁷¹ he was singularly incorrect on this point, for the law became the most crucial and vital element in the whole medieval social fabric. In consonance with the prevalent Christocentric world view, the law was seen as the "soul of the body public",⁷² and medieval legal thought was shaped by the necessity of dealing with three fundamentally different legal systems, operating simultaneously - the surviving Roman civil law, feudal law and ecclesiastical (or canon) law.

1. Codification - The Triad of Roman, Feudal and Canon Law

The barbarian tribes which invaded the Empire absorbed the surviving Roman laws and customs with ease; missionary activity further contributed to the Latinization of Europe by introducing the Bible and Patristic writings, replete with a fusion of Roman law and Christian doctrine.⁷³ With its universal and imperial themes and adherence to a "decending" theory of government, Roman law provided a model for both the Western Church and the Holy Roman Empire.

In contrast to the stability and juristic sophistication of Roman law, feudal law arose in response to the exigencies of establishing order following the Imperial collapse.⁷⁴ Based on a

⁷¹Maine, op.cit.14.

⁷²Ullmann, op.cit.28 traces the idea to Hellenistic sources.

⁷³Roman law was transmitted under cover of the Bible, and the Frankish Lex Riburara, circa A.D.741, declared ecclesia vivit iure Romano - "the Church lives by Roman law." Ullmann, op.cit.45, 54, 66-8.

⁷⁴Trade and communication over wide distances ceased, there was a regression to marginal agriculture and centralized Roman authority gave way to local self-government and military self-sufficiency.

system of temporary tenancies and implemented by a consensual social and economic contract⁷⁵ between lord and vassal, the outstanding characteristic of feudalism was:

a recognition of a double proprietorship, the superior ownership of the lord of the fief co-existing with the inferior proprietorship, or estate, of the tenant.⁷⁶

In the absence of commerce, usufruct of land and chattels was the only form of wealth; public office and the resultant revenues were viewed as functions of land tenure, inseparable from property rights.⁷⁷

Operating alongside, and frequently in tension with feudal law, was canon law. It was perceived as an evolving, "living" law,⁷⁸ and enjoyed wide jurisdiction, applying to all secular and regular ecclesiastics, and to the lay population in cases concerning oaths, usury and the sacraments. In England particularly, property cases, (other than those arising from feudal obligations,) became the concern of the ecclesiastical courts.⁷⁹

⁷⁵ An example of the application of the contractual aspect of feudalism arose with King John, who governed in so clumsy and ham-fisted a manner in the 13th century, that the baronage threatened to repudiate the diffidatio, their feudal obligation.

⁷⁶ Maine, op.cit.312.

⁷⁷ Tierney, op.cit.24. The feudal inability to view property and office as conceptually separate contributed, in large part, to the Investiture Contest - a struggle to return the control of episcopal appointments to the Church, see supra note 10.

⁷⁸ Compared to the static Roman law - virtually unchanged for centuries.

⁷⁹ Earlier, the canon courts had secured an exclusive jurisdiction over the testament of personality, (i.e. the
(Footnote Continued)

A renewed interest in the study of Roman jurisprudence occurred after the library of the cathedral school at Bologna acquired a copy of the only surviving manuscript of Justinian's Digest in the late 11th century.⁸⁰ The Bolognese civil law graduates⁸¹ were in great demand as Chancery personnel and public functionaries.⁸² Their migratory careers and proximity to power were significant factors in the dissemination and application of Roman legal principles. Both ecclesiastical and secular powers used these legal concepts to further their respective ambitions.⁸³

The most significant work of codification, Gratian's

(Footnote Continued)

inheritance of movables) and the "Ordinary" was named as a guardian or executor as necessary. Gareth Jones, History of Law of Charity, (Cambridge: Cambridge University Press, 1969) 4 note 6. It was logical that the responsibility for settling disputes based on the "use" as a form of inheritance device, should devolve upon an ecclesiastic, the King's Chancellor.

⁸⁰ The Bologna copy, (the Littera Bononiensis) of the original ms., (the Pisana), was again widely copied, often with errors and textual variations and disseminated throughout medieval university and monastic libraries. Ullmann, op.cit. 68.

⁸¹ As well as those of other law schools which quickly sprang up; in Spain alone, Valencia, Salamanca and Lerida were faithful copies of the Bolognese model.

⁸² Irnerius (probably the German Wernerius), one of the earliest noted scholars to lecture at Bologna, (the earliest evidence of his work is dated 1120), became a counsellor to Emperor Henry V. Baldwin, op.cit. 68.

⁸³ The Germanic King/Emperors cited Justinian's position on the Emperor's role as pontifex maximus, or chief priest; see Thomas, op.cit. 76. The Institutes begin with a section "On the Trinity, the Catholic Faith and the Prohibition of Public Discussion Concerning the Truth" and the 6th Novella identified the Emperor as the "fount of both public and sacral law". The Papal Bull, Unam Sanctam 1299 issued by Boniface VIII denied the direct and divine institution of kingship, and proclaimed: "it is necessary to salvation that every human creature be subject to the Roman pontiff."

Decretum, (c.1140)⁸⁴ reflected this motif of jurisdictional conflict. It proposed a new relationship between the Church and the lay lords,⁸⁵ who were characterized as patrons or advocates (advocatus) of the of the Church, and not its overlords.

In civil law, the study of Roman law also stimulated codification; the Libri Feudorum, compiled in the mid 12th century, reflected prevailing feudal practices.⁸⁶ But far from strengthening feudalism, Roman law, which had favoured private and unitary ownership of property, provided the sophisticated juristic rationale required to undermine the feudal system of dual ownership and re-establish the allodial principle.

2. Definitions of Property

The importance of ancient inquiries into the basis of obligation for the legal system of the day, and in particular, the Aristotelian concept of natural law has been noted earlier. With the rediscovery of the major Greek writers through Arabic translations, medieval thinkers began to assimilate these ideas into their Christian worldview.

(i) Natural Law and Natural Right

Reflecting the Greek commitment to human reason, Aristotle had considered natural law as an element of political right, in

⁸⁴Tierney, op.cit.98, which was rapidly accepted as a "definitive statement of existing ecclesiastical law."

⁸⁵Gratian argued that clearly the res ecclesiae and abbatiae were annexed to a spiritual thing - the Church - and therefore, were subject the jurisdiction of canon law, and not the temporal lords.

⁸⁶By the Milanese Obertus de Orto, c.1150.

the sense of "public spirited."⁸⁷ Thomas Aquinas, for whom the ultimate source of law was supernatural, remodelled⁸⁸ the Aristotelian theory of civic duty into one of universal obligation to a Christian divinity.⁸⁹ Since this obligation applied to both ruler and subject, Aquinas' views contributed to the gradual undermining of royal prerogatives, and prepared the way for ideas about public rights as an element of a social contract.

(ii) Nationalization

In early times, property had been defined according to the manner in which it was alienated; Justinian redefined it according to its present ownership. Feudalism introduced another set of conventions, based upon the concept of the ruler as joint owner of all land, as well as a great deal of movable property. This principle survived medieval times, and is an important precursor to the modern theory of nationalization - i.e. the right of a

⁸⁷ Strauss, op.cit.168. Aristotle viewed the state as "natural" (Politics, Bk.I:Chapter II) "for what each thing is when fully developed we call 'its nature' . . ."

⁸⁸ Aquinas reviewed Greek, Hebrew, Islamic, and early Christian philosophy to arrive at his conclusions and proposed a model in which four types of law, (human, positive law; natural law; eternal law; divine law) form a continuum, progressively specified and advancing from imperfect to perfect. Summa Theologica (Q96:Art 4) in Parry, op.cit.105.

⁸⁹ Parry, op.cit.42-48 (Q 93: Art.3-4). In rejecting the Roman belief in the divine qualities of earthly political rulers, Aquinas came to speculate on the basis of obligation incumbent upon all Christians, noble and common. This obligation, he concluded, must be latent in the "nature of things". It was painfully apparent in the disease and famine stricken Middle Ages that man had little control over the "nature of things" and therefore a divine source must determine both this and the basis of obligation.

ruler (later the State) to retain, acquire or appropriate certain commodities including, of course, cultural objects.

(a) Heirlooms

Feudal grants of land included certain chattels associated with the property, known as heirlooms.⁹⁰ Originally, this class of property comprised tools, utensils, and agricultural apparatus; eventually it included household furnishings such as furniture, plate, tapestries and manuscripts - in short cultural objects of all types.

Ownership in chattels other than heirlooms was absolutely reserved to the individual, and had been legally protected in England by Magna Carta 1215, which set out certain rights to be enjoyed by freemen, without any specific concession from the king, including "life, property and freedom."⁹¹ However, there is little evidence that extensive personal ownership of significant objects was common, even among the nobility in the 13th century,⁹² for it was not before the embourgeoisement of the 14th century

⁹⁰ "Heirloom" - a chattel that under will, settlement or custom follows the devolution of real estate. Shorter Oxford English Dictionary.

⁹¹ Lawson, op.cit. 18 cites Magna Carta, (Article 39), author's emphasis.

⁹² "Cups of . . . silver ornamented with jewels were one of the visible signs of wealth . . . but even a wealthy household would have only a few of these precious objects." Labarge, op.cit. 93, 88, 101 cites the earliest record of household expenses in England, those of the Countess of Leicester, from February to August 1265; the majority of expenses were for basic consumables, (food, wine, beer, candles, cloth etc.), and very few purchases of other goods took place. In this six month period, parchments for a breviary and a cloak clasp and girdle, both intended as gifts, were the only purchases of this type.

that "luxury" goods became available in any quantity. In the meantime, most movables were heirlooms that devolved with the land.

(b) Treasure Trove

Before the Conquest, English common law had specifically recognized the right of the King to appropriate objects made of precious metals such as gold and silver, (coin as well as decorative objects), found hidden in the earth by any of his subjects.⁹³ This right to treasure trove can be traced to Teutonic and Scandinavian origins, and the operative element was the fact that the treasure was only temporarily hidden - theoretically awaiting retrieval. Valuables might be hidden not only to avoid looting by invaders and marauding barons, but also to avoid the payment of taxes and other feudal incidents; therefore, the emphasis upon the King's right to assume ownership of such property. The juristic rationale combines Roman and feudal principles: Roman private property law gave the landowner rights over everything above and beneath the surface,⁹⁴ and the principle of treasure trove is comprehensible in a feudal context where all the land of the realm was owned jointly by the Crown. The concept was upheld⁹⁵ as recently as 1981 in Britain, by Lord

⁹³ Prott & O'Keefe, op.cit. 311.

⁹⁴ Prott & O'Keefe, op.cit. 308 cites Halesbury's Law of England, 1973 V.2:697, "possession of the land carries with it possession of everything attached to or under it".

⁹⁵ The treatment of grave goods found in a Viking ship burial at Sutton Hoo, near Ipswich in 1939 is perhaps the most famous example that demonstrates how this law operates today and reveals
(Footnote Continued)

Denning, Master of the Rolls, who reiterated:

"treasures from the earth belong to the King".⁹⁶

Revision of the treasure trove legislation has repeatedly been called for in modern times, and causes considerable problems in States where it exists.⁹⁷

(Footnote Continued)

some of its shortcomings. In this case, the owner of the land made the find a gift to the nation (the British Museum), but was not compelled to do so, since the find, although gold and silver, was clearly not hidden with the intention of retrieval, but was part of the usual grave goods of a burial of its period.

⁹⁶ The Times Law Report, Nov.19, 1981, cites Attorney General of the Duchy of Lancaster vs. G.E.Overton Farms Ltd., [1981]2 W.L.R.379 (CA).

⁹⁷ Times, Nov.28,1981, p.12, a letter to the editor from the Director of the Canterbury Trust cited a case in which a hoard of rare coins discovered near Dover in 1981 escaped designation as treasure trove because even the most unusual coin present, a patard of Charles V of Spain, was only 31% silver, and therefore did not qualify as treasure trove.

IV. THE RENAISSANCE AND ENLIGHTENMENT 1500 - 1800

A. Philosophical Background

Enormous social changes occurred during the 15th century, including urbanization and a new religious climate which favoured increased trade and accepted the profit motive¹ - in short, the advent of capitalism. These changes were especially apparent in the maritime nations - Holland, Spain and England - where exploration of the New World created an influx of wealth which was redistributed throughout Europe via international trading ventures, precipitating the heady inflation of the 16th century.² As political organizations, neither feudalism nor the Church could accommodate these developments and the pressing prerequisite of political stability for successful commercial ventures, brought about the formation of secular, sovereign nation states.

In this new commercial climate, property law evolved rapidly. While a mature market society began to emerge during the 16th century, the new political structures were not fully developed until the industrial and social revolutions of the 18th century - therefore the time frame selected for this section.

¹Previously the Church had prohibited usury, and had taken a negative attitude towards profit. Bainton, History op.cit. 236, " . . the Church was drawn into incipient capitalism."

²H. G. Koenigsberger and George L. Mosse, Europe in the Sixteenth Century, (London: Longmans, 1968)26.

1. Common and Commonwealth

Donald Horne's assumption that "before the industrialized societies, there was no shared public culture" is questionable,³ because it was the Reformation which brought to an end the seamless, common matrix of Medieval Christianity. As the interdependence of economic mechanisms became more clearly understood,⁴ the secular "commonwealth" of the social compact theorists arose, based upon the protection of private property for the common good:

the great and chief end . . . of men's uniting into commonwealths and putting themselves under government is the preservation of property.⁵

This movement created certain expectations,⁶ and influenced the way in which society viewed property and cultural objects.

³Horne, op.cit.2.

⁴The contributions made by various components of the economic system - capitalists, entrepreneurs, inventors, labour etc. came to be understood in the light of the benefit of all. Heilbroner, op.cit.64-69 & 72-87 on Adam Smith (1723-1790).

⁵John Locke, Second Treatise of Civil Government, (1690) in Curtis, op.cit.346. See also Chester op.cit.16; J. W. Gough, The Social Contract, A Critical Study of its Development, (Westport, Conn: Greenwood Press, 1978)99. "Following the execution of Charles I, the social contract became the official theory of the Commonwealth Party," and Kagan, op.cit.75-6 on the origin of the social compact in the Biblical covenant.

⁶Locke's "inalienable natural rights "included equality, property and the right to inherit from parents. Locke, Second Treatise, op.cit. in Curtis, op.cit.345-7. See also Stephen E. Weil, "If Men Were Angels," Museum News 56:1 (September 1977)36 on rising expectations in the modern context.

2. Heritage as future interests

The reinstatement of the Roman will in England by means of the Statute of Wills 1541, displaced the dual proprietorship of feudalism - when "every germ of testamentary power was ruthlessly stamped out".⁷ It marked the transition from the feudal social mentality of status to one of contract.⁸

(i) Inheritance

The law required a properly executed document, but gave the testator considerable freedom to bequeath property. Ultimately, Locke identified this as the "natural" right to inherit:

Every man is born with a right to⁹ inherit with his brethren, his father's goods.

In addition to the medieval dower rights,¹⁰ certain additional protections for heirs evolved; for example, a custom of the City of London, enforced by statute in 1724, prevented the bequest of more than one third of a man's movable property to other than his wife or children.¹¹ By the 18th century, inheritance was understood as a civil

⁷ Frederick William Maitland, Selected Essays, (1936) 157.

⁸ Maine, op.cit. 181 and Gough, op.cit. 94-5.

⁹ Locke, op.cit. in Curtis, op.cit. 347.

¹⁰ Maine, op.cit. 249 on the origins of dower rights, and the role of the Church in fostering them.

¹¹ Jowitt, op.cit. 1298, (Geo.I.cl8.s.17).

right permitted by the State and as such, universally taxable;¹² previously, taxation had been subject to individual arrangements with feudal landlords.¹³

Against the background struggle for consiliar¹⁴ and constitutional government and the development of the "law state"¹⁵, the social contract theorists were wary about the revival of private inheritance, lest this might reinforce the patrimonial theory of the State.¹⁶ By the eve of the French and American Revolutions, Swiss diplomat Emerich de Vattel (1714-69) articulated the distinction in forceful terms:

This pretended right of ownership attributed to princes is a chimera, begotten of an abuse of the laws relating to the inheritance of individuals. The state is not and cannot be a patrimony since a patrimony exists for the good of the owner, whereas

¹² Chester, op.cit. 32-3, "by the time of Blackstone (c1750), the two rights were clearly separate in Britain, with property (accepted) as natural right and succession to property its civilly enacted adjunct."

¹³ The tax varied from a nominal fee, such as payment of a peppercorn on Midsummer's Day, to substantial amounts. Broughton, op.cit. 28.

¹⁴ Under the Tudors, consiliar government introduced the appointment of professionally trained administrators to prominent offices, (rather than the landed aristocracy). The Royal Secretaries were specifically selected from the lower nobility or newly rich bourgeoisie, and Henry VIII was accused of "putting apart well disposed nobles for caitiffs and villeins of simple birth." Holdsworth, op.cit. Vol. 4:26.

¹⁵ H.J. van Hommes, Major Trends in the History of Legal Philosophy, (Amsterdam: North Holland Publishers, 1979) 396-9.

¹⁶ Advanced as the doctrine of sovereignty by Jean Bodin in De Republica 1579.

the prince is appointed only for the good of the state.¹⁷

(ii) Public assets and the Public Trustee

A heightened sense of public responsibility was stimulated by several factors, including the Protestant doctrine of "good stewardship",¹⁸ and a gradual broadening of the perception of "public".¹⁹

Arising from the medieval "use", the common law trust²⁰ was closely connected to ideas about the protection of beneficiaries. During the Reformation, many ecclesiastical responsibilities were secularized, and the creation of charter corporation foundations in 17th century provided the

¹⁷ Emerich de Vattel, Le droit des gens (1758) Book I, Chapter 5, cited in Brierly, op.cit.39.

¹⁸ The Protestants favoured the thrifty accumulation of capital, Bainton, History, op.cit.284-6, and cited Biblical support, especially St. Luke, Chap.12.v.42 "that faithful and wise steward whom his lord shall make ruler over his household . . shall be given his portion . . . in due season."

¹⁹ Williams, Keywords, op.cit.203, the changing meaning of "public" is illustrated by the more extensive use of both this word in the 16th century and its counterpart, "private", which came to indicate exclusivity, privilege, advantage and even to legitimize a bourgeois view of life.

²⁰ The evasion of the "use" was first used to avoid feudal dues, and later as a substitute for testamentary disposition which was otherwise impossible, and finally in conjunction with wills to protect beneficiaries - those potential heirs who could be excluded under the strict application of common law. After Jane Tyrrel's case, 1558, the evasion of "a use upon a use" was renamed a trust. Curzon, op.cit.3.

necessary organizational framework for charitable trusts.²¹
 Now, a significantly enlarged beneficiary - the public at large or a specific segment of it - was formally identified and acquired a legally enforceable entitlement to certain intangible benefits. These were generally the proceeds of a trust, rendered in the form of services.²²

In the new secular custodial institutions created to house cultural objects - museums, galleries, libraries and archives, this theoretically meant access to the collections and the knowledge generated from them. In practice, those who benefitted from the new public heritage were a relatively privileged few.²³

Ultimately, the royal duty of parens patriae came to include vigilance against the possible maladministration of these new legal entities,²⁴ and responsibility was delegated

²¹ Donovan Waters, The Law of Trusts in Canada, (Toronto: Carswell, 1974) 535-6 on the origin of charitable trusts in 17th century.

²² For example, Christ's Hospital, founded 1697, was one of the earliest charitable foundations. ibid. 535-6.

²³ "The original rules and regulations of the British Museum seem to have been expressly calculated to keep the general public out, and to make sure that the few who did eventually make the tour got as little pleasure and profit from it as possible." Kenneth Hudson, A Social History of Museums, (London: MacMillan Press, 1975) 9.

²⁴ As a charity, the British Museum was adversely affected by the Charitable Uses Act, 1735; the strictness of the Act was relaxed upon several occasions to allow the Museum to receive gifts of land, which were normally forbidden to charitable institutions under the Mortmain Acts. See Wald, op.cit. 30-32.

to the King's senior law officer.²⁵ By 1751, the common law confirmed the authority or "standing" of the Attorney General to represent the beneficiaries of a charitable trust, in seeking equitable remedies,²⁶ and to supervise in the broadest sense, the affairs of the charitable trust.²⁷ Although the separate office of Public Trustee did not exist in Britain until 1906,²⁸ the function was very much a result of 17th century thought.

While the Attorney General may proceed on the basis of information provided "at the relation" of a private individual, a member of the general public is still not eligible to prosecute for a breach of a charitable trust

²⁵Until the 17th century, the offices of Lord Chancellor and Attorney General were combined.

²⁶Melanie McWilliams and Colleen Fee, Legal Aspects of a Museum or Comparable Custodial Institution When Viewed as a Public Trust, (May 1983, Unpublished Manuscript prepared for the Canadian Museum Association Annual Conference, Calgary 1983)52 cites Attorney General v.Brereton (1751) [2 Ves Sr.425].

²⁷Stephen Weil, "Breaches of Trust, Remedies and Standards in the American Art Museum," in Beauty, op.cit.166.

²⁸Public Trustee Act 1906. Even in 17th century, the Attorney General was responsible for: maintaining a register of charities, regular submission of accounts, investigations and legal action as necessary. Waters, op.cit.535-6.

in common law states.²⁹ A recent U.S. case which featured cultural objects,³⁰ illustrates the continuity in modern Anglo-American practice of the responsibility of the Public Trustee³¹ to protect the interests of beneficiaries under a charitable trust.

(ii) Institutionalization of cultural objects

By the 17th century, two different approaches were apparent in the institutionalization of cultural objects;

²⁹Weil, "Breaches" op.cit.172 argues against a broadened standing and cites Rowan et al v. Pasadena Art Museum et al. (1981), "A conscientious Attorney General, before engaging a . museum in the expense of such a proceeding, should be obligated to consider the extent to which the proceeding itself might involve a waste of the museum's assets. A third party motivated only by his own self interest might feel no similar constraint. Therein . . . lies a substantial weakness in the argument . . . for broadened standing."

³⁰The Attorney General of New York v. Sothebys, Dr. Alexander Guttmann et al, 1984, as reported in Bonnie Burnham and Linda E. Ketchum, "World War II Art Losses Still Surfacing," Stolen Art Alert, 5:8(Oct.1984)2-4. In June 1983, a group of important Hebrew manuscripts were sold at auction in New York. State Attorney General Robert Abrams brought suit to have the proceeds withheld from the consignor pending trial to determine title to the objects. The consignor, Dr. A. Guttmann had been a faculty member at a rabbinical seminary in Berlin before World War II, and prior to its closure by the Nazis in 1942, the Chairman of the seminary had allegedly requested Dr. Guttmann to smuggle some of the rare books owned by the college out of Germany - on the understanding that, due to the high risks involved, they would become his personal property. The Attorney General's suit sought to restore cultural objects to an institution serving the ultimate charitable beneficiaries of the dissolved charitable trust or its successor organization. Bonnie Burnham & Linda E. Ketchum, "World War II Art Losses Still Surfacing," Stolen Art Alert, 5:8(Oct.1984)2-4.

³¹In New York State, the Attorney General and Public Trustee are still a combined office, in other jurisdictions they may be separate.

the well-documented "mainstream" museum movement, closely connected to the great private collections, and a second trend which responded to commercial influences and emphasized the exhibition of antiquities and contemporary works for purposes of trade.

(a) The Museum Movement

The historiography of the museum movement has recognized the seminal role played by private collectors during this period. The phenomenal interest in the private acquisition of objects related to both the connoisseurship developed by the great families of the bourgeoisie, (particularly in Italy³²) and to the new spirit of scientific inquiry, which led to the assembly of natural science specimens and herbaria for comparison and classification.³³ A third form of collecting activity

³²The landmark de Medici collection was one of the first to demonstrate any kind of collecting mandate or policy; it consisted of highly portable, investment items, such as antique and contemporary gems, stone vases, intaglios, cameos, medals and enamels, (often mounted in elaborate settings by contemporary masters) as well as manuscripts and tapestries. These investments proved sound, particularly with the rapid decline of the family fortune, as two branches of the de Medici bank collapsed in quick succession; by 1490, the Florentine currency had depreciated to one fifth of its value only a decade earlier. J.H. Plumb, Renaissance Profiles, (New York: Harper, 1961)89 and Lewis, "Collections," op.cit.11.

³³The contribution of physicians has not been fully explored; of the collections formed during this period, a significant proportion were owned by medical practitioners. There was a substantial increase in the number of medical doctors graduating from the universities between 1500 and 1600, since medicine attracted many who had previously looked to the Church for a career. Koeningsberger
(Footnote Continued)

was the "scramble for art" characteristic of belligerent actions in the 17th and 18th centuries, in which the major powers, as well as their colonial holdings, experienced losses via plunder and looting.³⁴

As the popularity of the religious relic waned,³⁵ the cult of the secular relic - the veneration of objects associated with notable, (and at times, notorious) persons - gained considerable momentum. Apart from objects associated with royalty, there had been little evidence of this trend before the 16th century.³⁶ The many historic

(Footnote Continued)

op.cit. 361 cites Wrightman, Science and the Renaissance, Vol I:234. The University of Basle graduated a total of 9 medical doctors between 1532-1560, but in the next fifty years, there were 454 graduates.

³⁴ One of the most notorious appropriations of this era, the fragments of the marble pediment and metope carvings from the Acropolis in Athens (the "Elgin Marbles"), is still unresolved today. See Merryman, "Elgin Marbles," op.cit. 1880-1923, for a discussion of the present restitution controversy and C.P.Bracken, Antiquities Acquired - The Spoliation of Greece, (Newton Abbot: David & Charles, 1975) for an account of the actual removal of the material from Greece.

³⁵ The Protestants condemned relics; Calvin's Treatise on Relics (1543) and Zwingli On the True and False Religion (1525) in Roland Bainton, The Age of the Reformation, (Princeton: Van Nostrand Co.Inc. 1956) 127. By the 17th century, the Papacy controlled ever more strictly the canonization of saints and thereby the authentication of new relics, and founded the Sacred Congregation for Indulgences and Relics to "regularize" the tendency for spontaneous declarations. The present code of canon law avoids the use of the word relic, but requires the express permission of the Holy See for the alienation of such items, which may not be converted to profane use. Coriden et.al. op.cit. 881, (Canon 1292, sec.2).

³⁶ In England, an early example was the skull of the Lord Protector, Oliver Cromwell (d.1658), which came to be

(Footnote Continued)

sites furnished with the memorabilia of famous and lesser figures from inventors to revolutionaries³⁷ are modern survivors of this phenomenon.³⁸

The eventual transfer of many collections from private hands to the public sphere is well documented, and the provision of facilities - public versions of the private cabinets, salons, galleries and sculpture gardens - offers a significant indication of the shift from church to state in the systemization and more general diffusion of knowledge.³⁹

(b) Commercial Influences

The enormous bourgeois appetite for portable, decorative objects which culminated in the 17th century changed earlier patterns of patronage. The availability of contemporary works, produced "on speculation" instead of for

(Footnote Continued)

owned by an actor, Samuel Russell, and in 1773, was exhibited in his private museum near London. Bently, op.cit. 187. By 1813, the skull was offered to William Bullock, "still intire withe the flesh having been embalmed," Edward P. Alexander, "William Bullock: Little Remembered Museologist and Showman," Curator 28:2 (1985)124.

³⁷Olivery Impey and Arthur MacGregor, The Origins of Museums, (Oxford: Clarendon Press, 1985)3, and Anthony Burton, "Artistic Shrines," Museums Journal 80:3 (1980)142 on the German term Personalmuseum coined in 1912.

³⁸As recently as 1986, the padded, dressed and glass-encased skeleton - the "auto icon" - of social reformer and utilitarian philosopher, Jeremy Bentham, (1748-1832) was taken to functions at University College, London, following the explicit instructions in his will. Russ Laver, "Skeleton in the Corridor," McLeans, (Nov.10,1986)12.

³⁹"Museums have supplanted churches as the emblematic focal point of the city," Lovatt Dickson, The Museum Makers, (Toronto: Royal Ontario Museum Press, 1986)192.

a specific patron, fostered a thriving commercial art market with dealers, auction houses and organized exhibitions and sales. Even pawnshops were part of the monetization of cultural objects;⁴⁰ and by the 18th century, they were used by the wealthy, for loans of cash against collateral.⁴¹

Since England was particularly backward in the public display of art, auction rooms⁴² were one of the few places the public could view contemporary cultural objects.⁴³ The diarist Samuel Pepys attended auctions regularly by 1662.⁴⁴ Today, 50% of all art is sold at auction.⁴⁵

In 1746, a group of prominent artists, including

⁴⁰ As early as 1462, the Franciscans provided interest free loans sedured by personal property (montes pietatis) as a charitable function.

⁴¹ An Act to Establish the Business of a Pawnbroker 1786 (I. Geo.III.c.43). Retail banking for personal use was not well developed before the 20th century.

⁴² The ascending bid auction was known to the Romans; in England it dates to shortly after the Restoration when book dealers adopted the practice from their Dutch counterparts. J.A.Och, "Sotheby's, Anatomy of an Auction House", in International Sales of Works of Art: Geneva Workshop, April 11-13, 1985, edited by Pierre Lalive, (Geneva: International Institute of Business Law and Practice, 1988)251.

⁴³ Kenneth W. Luckhurst, The Story of Exhibitions,) New York: Studio Publications, 1951)15.

⁴⁴ Brian W. Harvey and Frank Meisel, Auctions, Law and Practice (London, Butterworths, 1985)5 & 315. Catalogues were in use by 1689; the two major English auction houses, Sotheby Park Bernet & Co. and Christie, Manson & Woods Ltd. held their first auctions in 1744 and 1766 respectively.

⁴⁵ Leonard Duboff, Art Law (St. Paul: West Publishing, 1984)53. Popular magazine advertisements describe "Christie's - the museum where art is for sale," House and Garden, (October 1987)38.

Hogarth, Reynolds and Gainsborough (who all frequented James Christie's "Great Rooms" in Pall Mall), donated paintings for a public exhibition at the Foundling Hospital in Bloomsbury; the huge success of this venture encouraged them, a few years later, to approach the Society for the Encouragement of Arts, Manufactures and Commerce⁴⁶ for the use of their premises in the Strand. In the French tradition, exhibitions of Academy painters became a regular feature of the Society's activities after 1760.⁴⁷ The interest and encouragement of such non-profit associations bridged the gap between the commercial milieux and the gallery or museum exhibit as we know it today.

3. All Mankind

The humanist literati had introduced the classical and Islamic worlds to Europe; the voyages of discovery and subsequent colonization and/or trade with the Americas, India, Africa and China provided even the uneducated with information about non-European civilizations.

(i) A Multiplicity of Cultures

As archaeology, anthropology and ethnology emerged as legitimate fields of study,⁴⁸ an appreciation of multiple,

⁴⁶ Now the Royal Society of Arts.

⁴⁷ Derek Hudson and Kenneth Luckhurst, The Royal Society of Arts 1754-1954, (London: John Murray, 1954) 36-7. In 1669, Louis XIV had authorized the first of the annual exhibitions in the Grand Salon of the Louvre.

⁴⁸ Prott and O'Keefe, Heritage, op.cit. 72 note the
(Footnote Continued)

co-existent cultures emerged,⁴⁹ and the great European museums were founded to collect and study the material evidence - the cultural objects - of foreign civilizations. The 17th century understanding of "all mankind" encompassed not only various non-European civilizations, but also a more egalitarian view of the domestic population.

John Locke popularized the work of earlier writers⁵⁰ by fusing the classical idea of natural justice with the notion of inalienable "natural" rights. The social compact theory, built on the twin foundations of individualism and equality, was incorporated into the international sphere in the 18th century as nat[✓]ualist writers developed the idea of independent but equal states.⁵¹

(ii) Equity and Equality

In England, the application of justice, regardless of the letter of the law, had been partially resolved by the symbiotic relationship of the common law and equity

(Footnote Continued)

founding of foreign schools of archaeology, e.g. the French Academie des Inscptions 1663.

⁴⁹ The German Romantic writers such as Johann Christophe Adelung, Essay on the History of the Culture of the Human Species (1782) and Johann Gottfried Herder, Ideas on a Philosophy of the History of Mankind (1784-91) first wrote of "cultures" in the plural and attacked the assumption that the self-development of humanity (culture) is a unilinear process. Williams, Keywords, op.cit. 79.

⁵⁰ Locke borrowed from his predecessors in none too consistent a manner, see Chester, op.cit. 14-17 and A. Lloyd Moote, The Seventeenth Century, Europe in Ferment, (Lexington: D.C. Heath & Co. 1970) 388.

⁵¹ Brierly, op.cit. 131.

courts.⁵² Ultimately, a conflict developed between the two⁵³ and during the reign of James I, Francis Bacon,⁵⁴ voiced the doctrine that has survived:

where the common law is in conflict with equity,
equity should prevail.⁵⁵

Integral to the controversy was the definition of the equitable right of a beneficiary under a trust. Chancery had interpreted this as a right in personam;⁵⁶ gradually, arguments were advanced for the transformation of this contractual right into a real right, analogous to ownership, to give the beneficiary a right in rem - not merely to a certain performance from another, but in the property itself.⁵⁷

Elsewhere in Europe, the same desire for equality

⁵² Described by the first Lord High Chancellor, William Cowper (1665-1723), "Equity is no part of the law, but a moral virtue. . . to assist the law where it is defective and weak... and defend the law from crafty evasions, delusion and new subtleties invented and contrived to evade and delude the common law, whereby such as have undoubted right are made remediless." Curzon, op.cit.3.

⁵³ Which mirrored the dispute between the Royalists supporting the theory of the divine right of kings, proposed by James I (1566-1625), in The Trew Law of Free Monarchies 1598, and Parliament, which stood for the sovereignty of the law itself.

⁵⁴ Then both Lord Chancellor and Attorney General.

⁵⁵ Attorney General v. the Earl of Oxford 1615.

⁵⁶ Chancery used the injunction to ensure that a beneficiary received a certain performance from the party named in the trust.

⁵⁷ Kagan, op.cit. 37/8 gives a history of the debate; also, Lawson, op.cit.48.

before the law took a different form. The reception of the Roman civil law tradition in Europe in the 16th century was a reaction to the fixed social hierarchy of feudalism, and the anti-judicial ideology of the French Revolution gave rise to the theory of the "certainty of the law," so that the code, which incorporated and superseded all previous laws, became the only acceptable guideline, although this principle is somewhat relaxed today.⁵⁸

B. Legislation

The commercial renaissance of the 15th century, with its numerous and complex trading transactions necessitated a legal system which focussed on movable personal property instead of land, and recognized the special problems of vendors and buyers.⁵⁹

1. Codification

At the great medieval fairs,⁶⁰ a "Pie Powder Court"

⁵⁸ Merryman, Civil Law, op.cit. 27-34.

⁵⁹ These might include: banking regulations, insolvency and bankruptcy, the concept of agency, the responsibilities of shippers and carriers, insurance, and so on.

⁶⁰ Herbert Heaton, Economic History of Europe, (New York: Harper & Row, 1948) 168-72. In England, fair franchises were awarded to a lord, borough or religious foundation. The Sturbridge Fair, held until the 18th century near Cambridge, was one of the four great wool fairs of 3 weeks duration; first chartered in 1211 by King John, who empowered the Lepers' Hospital of St. Mary Magdalen to hold a fair at the close of the Vigil and Feast of the Holy Cross.

had provided for the speedy settlement of disputes.⁶¹ As permanent quarters replaced the temporary fairgrounds,⁶² a new commercial legal framework developed. The subsequent rapid assimilation of merchant law into the common law system was part of a widening circle of legal codification, that encompassed equity, international law, and on the continent, civil law - which became firmly separated from English common law.⁶³

(i) Mercantile Law

Distinctive elements of the lex mercatoria were the need for speed, and the "good faith" nature of commercial dealings, unhampered by the Roman predilection for notarial attestation.⁶⁴ The legal approach which evolved from

⁶¹ George W. Keeton, The Norman Conquest and the Common Law, (London: Ernest Benn Ltd., 1966)196, from pieds poudreux, since the court was frequented by traders with feet still dusty from the fairgrounds; these courts operated with customary rather than statutory law.

⁶² Heilbroner, op.cit. 49 notes that it was in the forests surrounding the castles and abbeys that these new commercial quarters arose; hence the French foris burgis and faubourg (suburb), bourgeoisie, and the English, burgess.

⁶³ Civil law as it developed in the rest of Europe rejected the common law principle of stare decisis - to decide similar cases similarly based on precedent - and the Code Napoleon 1804 was the model for most civil law codes later adopted in Germany, Spain and Latin America.

⁶⁴ Wyndham A. Bewes, The Romance of the Law Merchant, (London, Sweet & Maxwell Ltd., 1923)19; such a legal system was also necessitated by the rudimentary communications and transportation facilities of the day.

the fairground courts⁶⁵ was the precursor of private international law, which (at first separate from both the common law and canon law), represented the codification of practices already known to merchants throughout Christendom, as well as to the foreign traders of other faiths.⁶⁶

By Tudor times, the common law had incorporated commercial law, and Chancery - already versed in property law disputes, assumed jurisdiction for mercantile matters.⁶⁷

(ii) Natural Law and the Law of Nations

The Renaissance allegory of the Golden Age was used to popularize the idea of natural law;⁶⁸ which the humanists⁶⁹ proposed as a foundation for a "law of nations" with antecedents in the practical, international, ius gentium of

⁶⁵ Mercantile law developed simultaneously in many areas and was closely connected with maritime law. In Italy, both maritime and merchant law were administered in the same court, as practiced by the Pisan Curia Maris.

⁶⁶ Pollock and Maitland, op.cit. 467. The Crusaders had been surprised by the sophisticated trading techniques and widespread use of money as a medium of exchange in the East. Many Arabic words entered French and English to describe commercial concepts still unknown in Europe: e.g. tariff, douane, barque, barge, risque, etc.

⁶⁷ Keeton, op.cit. 196.

⁶⁸ Jacob Burckhardt, The Civilization of the Renaissance in Italy, 2 Vols. (New York: Harper & Row, 1958) II:407, describes a trionfo (procession based on Roman triumph) welcoming Charles VIII of France to Turin, in which a pastoral scene, the myth of the Golden Age as a primeval and innocent state of nature, symbolized the Law of Nature.

⁶⁹ The legal profession was the first to benefit from the inquiries of humanist scholarship, and it proceeded to unravel the sources of natural law theory.

antiquity.⁷⁰

The most respected of the Northern scholars, Desiderius Erasmus (1466-1534), combined the principle of consent inherent in classical natural law theory with the Thomistic premise of natural law as an element of divine, revealed law,⁷¹ and visualized:

Peace . . . achieved by concord among small independent political units . . . more attainable in a society . . . where the universal monarch is Christ himself.⁷²

However, his Italian contemporary, Niccolo Machiavelli (1467-1527) reflected the confident Renaissance leitmotif of the secularized, central position of man in the cosmos - uomo universal - in his theory of political realism, which separated the actual practice of rulers from medieval

⁷⁰ Roman law had combined the Aristotelian conception of natural justice with an existing element of Roman private law - ius gentium - the law accepted as binding by all peoples. This early form of mercantile law was based on a comparison of the customs of those peoples excluded from Roman law, and was used to judge disputes with foreigners. It reflected actual practice and clearly operated on the basis of consent; Maine op.cit. 78, the point is clarified in the notes written by Frederick Pollock. See also supra, The Ancient World.

⁷¹ Keeton, op.cit. 215. The influence of Thomas Aquinas was particularly strong in law schools in England, the most orthodox of Catholic nations until Tudor times.

⁷² Roland Bainton, Erasmus of Christendom, (New York, Charles Scribner's Sons, 1969) 118. In one of Erasmus' most significant political works, Querela Pacis (1517) the personification of Peace seeks refuge only to be rejected by all quarters; Erasmus concluded with an appeal to the powerful princes of the day and called for an early international body - a Council of Princes - to resolve conflict.

Christian ideals.⁷³ Success, power, and expediency became the standards for his era of incipient nationalism and absolutism and created the foundation upon which the positivist school of legal theory was built.⁷⁴

The egalitarian, classic, natural law⁷⁵ theme of consent by the governed was reintroduced by Dutch lawyer and historian, Hugo Grotius (1583-1645) who was especially aware of the realities of warfare⁷⁶ so prevalent in his time and injurious to commerce.⁷⁷ He identified the need for a law of nations to guide and bind sovereign states in their

⁷³In Il Principe (c.1513), Machiavelli was above all a nationalist who sought the unification of Italy and her liberation from foreign powers. James Burnham, The Machiavellians, (Chicago; Henry Regnery Co., 1943)35.

⁷⁴Hommes, op.cit.133 on the need of newly formed states to reject natural law in favour of a positivist law. Also Sharon A. Williams and Armand L. C. De Mestral, An Introduction to International Law, (Toronto: Butterworth, 2nd. ed. 1987) on Cornelius van Bynkershoek (1673-1743) "the first great positivist".

⁷⁵Grotius accepted the actual existence of a valid, determinable natural law: he proposed that since men in their natural state were equal, sovereign states, as aggregations of men and as members of an international society, must also be equal. Brierly, op.cit.32-3.

⁷⁶Charles S. Edwards, Hugo Grotius, (Chicago: Nelson Hall, 1981)21-2. Hugo de Groot, (Grotius) was employed as the legal counsel for a large trading company, and was especially cognizant of the deleterious influences of warfare on trade. As a citizen of a Protestant State, he was also aware that with the sanction of the Pope, Spain and Portugal were attempting to divide up the New World among themselves. Edwards notes that Samuel Pufendorf (1632-94) a writer of the next generation, popularized Grotius' work.

⁷⁷Heaton, op.cit.225 notes that in the 16th century, there was fighting nearly every year in Europe, that in the next century, there were only 7 calendar years of peace.

relationships with one another, and devised international laws to distinguish between just and unjust wars, permissible and forbidden acts of war and, more importantly, disputes arising from the distribution or redistribution of state and private movable property during times of war.⁷⁸

2. Definitions of Property

Cultural objects had been specifically identified for legislative purposes since at least the 15th century in Europe.⁷⁹ The Papal States attempted to protect the archaeological heritage as early as 1425;⁸⁰ in 1598, James I reiterated the Crown's rights to certain valuables:

if a hoorde be found under the earth, because it is no more in the keeping or use of any person, it of the law, pertains to the King.⁸¹

and this principle became statute law in 1688.⁸² Even

⁷⁸ Brierly, op.cit. 32-3. Grotius drew upon many contemporary and historic sources and certainly did not originate the idea of a law of nations, but timing and circumstance contributed to his immensely influential publication, De jure belli ac pacis, 1625.

⁷⁹ Cultural objects had been the object of indirect legislation much earlier; supra Ancient Era.

⁸⁰ Prott and O'Keefe, Heritage, op.cit. I:34, cite Papal declarations and Bulls 1425 - 1802, including the Bull of Pius II, Cum alman nostram urbem . . . for the protection of the ancient monuments of Rome.

⁸¹ James I, The Trew Law of Free Monarchies (1598) in Curtis, op.cit. 282, in reference to treasure trove.

⁸² Heaton, op.cit. 316, after judicial decisions as early as 1568.

sumptuary laws⁸³ made a brief appearance in England after the Restoration to specify Church furnishings and decoration.⁸⁴ However, some uniquely mercantile principles have survived to affect cultural objects today.

(i) Market Overt and Bona Fide Purchases

The doctrine of market overt represents a significant deviation from the common law principle that an owner must have clear title to property before it can be passed to another,⁸⁵ in favour of the mercantile preference for "good faith" practices. This principle recognized that after partial or token payment had occurred as evidence of a verbal agreement,⁸⁶ a bona fide purchaser who was unaware of the origin of stolen goods should not be penalized by becoming obliged to return them to the original owner.⁸⁷

⁸³ Such legislation originated in Italy and included the regulation or restricted use of luxury goods such as gold embroidered garments and silk wigs, Burkhardt, op.cit. Vol.II, 362-4.

⁸⁴ E. Garth Moore, An Introduction to English Canon Law, (Oxford: Clarendon Press, 1967). The Act of Uniformity 1662, even specified acceptable altar coverings!

⁸⁵ Richard Crewdson, "Art Trade and Comparative Law; Some Aspects of the Law As it Affects Dealers in England," in International Sales of Works of Art, op.cit. 48.

⁸⁶ "Earnest money," a symbolic payment which might be a ring or other token as well as actual coin. Bewes, op.cit. 31-38.

⁸⁷ Bewes, op.cit. 39-40. Difficulties of communication and transportation combined with the high level of illiteracy were salient factors. The principle was found as early as the Code of Hammurabi, and appeared in early medieval codes, such as the Visigothic Code A.D.506, "if the merchant of overseas parts sells gold or silver or cloth. . .
(Footnote Continued)

In 16th century England, the principle of market overt became accepted into the common law on the basis of earlier judgements, in market towns on designated days, and in the City of London every day. The sale of goods in daylight hours⁸⁸ by a vendor who customarily dealt in such merchandise (i.e. a legitimate shopkeeper and not a temporary vendor) was binding, not only upon the purchaser and vendor, "but also upon all those that have any right or property therein," that is, even against the true owner in the event that the goods had been stolen.⁸⁹

The principle is still upheld today and can affect sales of cultural objects sold in the City of London only. Such transactions may be adverse to the owner and favourable to those who deal in good faith, since they are binding unless the original owner can identify and prosecute a thief to conviction⁹⁰ in which case, a bona fide buyer may

(Footnote Continued)

. to a man of our kingdom, if they are purchased at a reasonable rate although they be the proceeds of theft, he who has bought them ought not to incur penalty, although they are proved to be stolen.

⁸⁸ Holdsworth, op.cit. 5:110. The concern with daylight hours follows the custom of the Roman res mancipi transfers and Saxon law, which prohibited sales unless they took place in an open market before creditable witnesses.

⁸⁹ Sir William Blackstone, Commentaries, op.cit. Book II Chap 30. The principle was practiced all over Europe; in France and Spain, it originally applied to all sales wherever they might take place. In England, the general exceptions were to the sale of horses and property belonging to the Crown.

⁹⁰ Crewdson, op.cit. 50. In England, under the Sale of Goods Act 1893, Revised 1972, Sec. 22 & 24.

receive compensation.⁹¹ However, the original owner must initiate an action⁹² within a prescribed period of time, and be able to provide satisfactory evidence of ownership.⁹³

By comparison, the right of the bona fide purchaser is upheld in civil law states, for in these jurisdictions:

when the buyer is of good faith, peaceful and unequivocal possession of the object is enough to paralyze⁹⁴ any claim that may be made by the true owner.

⁹¹ *ibid.* under the Criminal Law Amendment Act, 1867, sec. 9 and the Larceny Act, 1916 sec. 45.3 The compensation may be a loss taken by the purchaser, often a vendor/dealer, who is considered to be in a privileged position, possessed of the means to enquire as to the source of supply.

⁹² A replevin action for the recovery of goods or chattels wrongfully taken or detained.

⁹³ Burnham and Ketchum *op.cit.* 2-4, and Philip W. Amram, "The Georgia O'Keefe Case, New Questions about Stolen Art", Museum News, 57:1(1979)49-51, and Stephen Weil, "Art and the Law: Repose," International Foundation for Art Research Reports, 18:6 (1987) on different interpretations in different jurisdictions. In the U.S., the famous Menzel v. List [267 N.Y.Supp.2d.894 (1966)] case was a lower court decision in New York State, which established that the statute of limitation began to run when the plaintiff first learned of the location of the stolen item; in O'Keefe v. Snyder [N.F.S.A.2A:14-1], a superior court decision in New Jersey, the statute of limitations was considered to have begun when the theft took place, and had in fact expired by the time of the action. In the U.K., different statutes of limitation apply for different types of offences. More recently, the concept of "due diligence" on the part of the buyer has begun to emerge in the U.S., see William H. Honan, "Deciding How Diligent Art Collectors Have to Be," New York Times, June 4/1989, page E9 on the Autocephalous Greek Orthodox Church et al v. Goldberg, still in process a time of writing.

⁹⁴ Jacques Ghestin, "French Domestic Law on the Sale of Objects of Art and Collector's Items", in International Sales of Works of Art, *op.cit.* 133.

(ii) Individualization of Cultural Objects

Renaissance mercantilism was largely concerned with portable trade goods, and emphasized the inherent characteristics of movable property, instead of the identity of the owner, as in earlier legal systems.⁹⁵ With increased trade, goods were lost, damaged or stolen more frequently, and the need to identify readily exchangeable items for the purpose of compensation, was a new factor to be provided for.⁹⁶

This was achieved by reviving certain old definitions; Justinian's res nullius still applied to the property of enemies⁹⁷ and the old Roman civil law designation of res fungibiles - consumable or perishable goods that could replace and represent one another - was widely applied.⁹⁸ As a side effect, individualized items - rare or unique objects that were not easily replaceable - were also

⁹⁵ The Corpus Juris Civilis of Justinian A.D. 529-34, listed five categories of property based on ownership; supra Ancient World.

⁹⁶ Commercial insurance was one solution, and after the Great Fire of London in 1666, early forms of property insurance developed rapidly, by 1769, after several decades of informal business transactions, the Lloyds group became a formal corporate body accepting marine risks.

⁹⁷ Strahan, op.cit. 223. This principle provided the legal basis for privateering, which was only appropriation by usucaption. By 1664, "privateer" was in common use to indicate an armed vessel issued a government commission (letters of marque) authorizing the attack of merchant and other shipping belonging to an hostile State.

⁹⁸ Merryman, Civil Law, op.cit. 58 "fungible acts" in civil law systems indicate activities that can be performed by others. In the common law system, fungible was in common use by 1765 to indicate goods that could replace one another.

defined by default. Into this category fell the cultural objects of the day, which then as now, were "upgraded" to this status⁹⁹ due to their low survival rate from previous eras and consequent scarcity.

But it remained for Emerich de Vattel to connect the individualized nature of cultural objects to the reality of loss, damage and compensation in the international context of, not trade, but warfare. While Vattel accepted the notion that any means used to weaken and vanquish an enemy was lawful, he maintained:

the wanton destruction of public monuments, temples, tombs, statues, paintings...is absolutely condemned.. as never being conducive to the lawful object of war.¹⁰⁰

Vattel's writings were so influential on both sides of the Atlantic,¹⁰¹ that his almost peripheral observations about cultural property had unusually wide impact. The acceptance of his approach at an international level is demonstrated by a naval incident which occurred about fifty years after his publication. When the U.S. vessel, the "Marquis de Somereules" was captured by the British as part of the hostilities of the War of 1812, its cargo included a

⁹⁹ Susan Sontag, "One Culture and the New Sensibility" in Against Interpretation and Other Essays, (New York: Dell Publishing, 1961)300.

¹⁰⁰ Williams, Protection, op.cit. 6 cites Emerich de Vattel, Le droit des gens (1758), ed.Chitty (1844,)370.

¹⁰¹ The first copy of de Vattel's Le droit des gens was received in the American colonies in 1775. Brierly, op.cit.39.

collection of paintings and prints intended for the Academy of Natural Sciences of Philadelphia, which had just been founded. The Academy petitioned the British Admiralty Court for restitution, which was granted, accompanied by the following explanation:

The arts and sciences are admitted amongst all civilized nations as an exception to the severe rights of warfare . . . they are considered not as the peculium of this or that nation, but as the property of mankind at large, and as belonging to the common interests of the whole species.¹⁰²

¹⁰² Merryman and Elsen, op.cit.1:1:100 cite (Stew Adm.482 1813).

CHAPTER FOUR - THE MODERN ERA

I. Philosophy - The Common Heritage of all Mankind

While the principle of the common heritage of all mankind has begun to exercise a profound effect upon cultural policy, (at both the national and international levels), and thereby upon attitudes towards cultural objects - it still has connotations of "legal science fiction"¹, because it evokes the dualism inherent in all international relationships. That is, the short-term political aspirations of sovereign nation States pitted against the long-term enlightened self-interest of a worldwide community. This is demonstrated by the emerging doctrines evident in the major United Nations Conventions on cultural objects.² The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954, was conceived in an international framework:

Being convinced that damage to the cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind...

Whereas, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, retreats to a nationalistic stance:

¹ Bedajoui, op.cit. 238.

² Geoffrey Lewis, "The Return of Cultural Property" Journal of the Royal Society of Arts, 129:5299(1981)437.

³ From the Preamble to the Convention. United Nations Treaty Series 249(1954)240-66.

Considering it is incumbent upon every State to protect cultural property existing within its territory against the dangers of theft, clandestine excavation, and illicit export . . .⁴

This Chapter examines some recent contributions to the philosophy of the common heritage of all mankind in view of the themes identified earlier, that is: future interests arising from private inheritances, public assets and the newest manifestation - a global heritage.

A. Future Interests as Private Inheritance

After the owner's right of testamentary disposition was guaranteed by law,⁵ it occasionally resulted in the disherison of legitimate heirs. Interference in the rights of the testator began in Britain under Elizabeth I, with An Acte to Reforme Deceits and Breaches of Trust 1597,⁶ and further restrictions were added in a piecemeal fashion.⁷

Utilitarian philosopher and economist John Stuart Mill - long a proponent of equality - characterized inherited wealth both as an unjust advantage for a few, and unearned income derived from the savings of others, and proposed:

⁴From the Preamble to the Convention, International Legal Materials 10(1971)289.

⁵In England by the Statute of Wills 1541, (32.Hen.VIII.c.1.).

⁶The Charitable Uses Act, 1597: 39.Eliz.I.c.6, amended in 1601, ensured that property willed for the "relief of the poor" was not misused; it also made forfeit to the Crown property willed to "superstitious" purposes, notably, the endowment of chantries. Jones, op.cit.13.

⁷For example, under George I, minimum inheritance levels were set for wives and children.Geo 1.c.18.s.17.1724, Jowitt, op.cit. 1298.

inheritances and legacies⁸ . . are highly proper subjects for taxation.

However, nineteenth century legal attitudes were still dominated by William Blackstone's eighteenth century distinction between property as a "natural right" and:

wills, testaments, rights of inheritance and succession, are all of them creatures of the civil or municipal laws and are regulated by them.⁹

Hence, the various estate, duty or probate taxes were levied not upon the property per se, but upon the transaction of transmittal "permitted" by the civil authorities.

The determination of future interests that once favoured the heir in an entirely automatic manner, passed first to the bequeathor, and then, largely to the State. Today, some domestic legislation actually requires that inherited antiquities pass into State collections within a specified time period,¹⁰ or merely encourages this by allowing the donation of cultural objects to public institutions to offset death, estate or probate taxes.

In fact, the erosion of the institution of private inheritance is virtually complete, and today it is viewed

⁸ John Stuart Mill, "Principles of Political Economy," Bk.5, Chap.2, #3, in The Collected Works of John Stuart Mill, edited by V.W.Bladen and J.M.Robson, (Toronto: University of Toronto Press, 1965). Mill's works were published in the US by 1878, and were enormously influential on both sides of the Atlantic in shaping attitudes towards inheritance.

⁹ Blackstone, Commentaries op.cit. 978.

¹⁰ "New Antiquities Law," Stolen Art Alert, 3:9(Dec.1982)2 notes Costa Rica, Law No.6703, 19 January 1982.

and taxed by most modern States as a recognizable obstacle to egalitarianism.¹¹

B. Future Interests as Public Assets

At the national level, the recognition of cultural objects as public heritage is now well established, and funding, regulatory or service agencies have developed to finance or monitor these public assets.¹² In certain States,¹³ it is government policy to encourage the movement of cultural objects from the private sector to the public sphere by various means, such as nationalization or substantial tax benefits for "gifts" to public institutions,¹⁴ or as payment in kind in lieu of death duties.

Even the smallest or poorest States have enacted

¹¹ Chester, op.cit 8 & 64, cites early 20th century Italian economist Eugenio Rignano, who saw the State as "co-heir" to inherited fortunes.

¹² As early as 1886, the Comptroller and Auditor General of Great Britain had recommended that the "articles in the National Museums and Galleries be properly recorded and . . . checked by independent officers and not by the curators in charge." The Second Report of the Parliamentary Public Accounts Committee for 1912. (London: HMSO, 1912) 539 item 5.

¹³ Of the States covered by this study, Canada, England, and USA provide such tax benefits. See also: Funding the Arts in Canada to the Year 2000 ("The Bovey Report") Chapter 9, (Ottawa: Government of Canada, 1986) 91 for a synopsis of different tax structures in these three States.

¹⁴ See Stephen E. Weil "Private Giving for Public Purposes" Museum News 54:5 (May 1976) 32-3 & 49-51; also J. Michael Montias, "Are Museums Betraying the Public Trust?" Museum News, 51:9 (May 1973) 25-31, who notes that tax deductible donations are not gratuitous gifts at all, but a "purchase" usually at current market rates, financed by the tax paying public.

legislation to protect specific cultural objects, usually indigenous antiquities,¹⁵ but this development was not accompanied by the perception that other countries and cultures equally possessed the right to cultivate their own national heritage.¹⁶ Two factors have heightened an awareness of cultural objects as national public assets: they are: the politicization and monetization of cultural objects.

1. Politicization

Events such as the series of UNESCO-sponsored Conferences on Cultural Policy 1970-82,¹⁷ provided international fora for the politicization of cultural issues. A successful correlation has been established between cultural objects, national identity, and self

¹⁵ See UNESCO, The Protection of Movable Cultural Property, Compendium of Legislative Texts, Vols. I & II, (Paris: UNESCO, 1984) for antiquities legislation in states such as Malawi and Bahrain as examples of poor or small States. Under some legislation, "foreign" cultural objects are also protected after a certain time period; e.g. Canadian Cultural Property Export and Import Act, 1977.

¹⁶ Harrie Leyton, "Return or Restitution of Cultural Property: Playing the Game," ICOM News 5(June 1983)19.

¹⁷ Intergovernmental Conference on Institutional, Administrative and Financial Aspects of Cultural Policies, Venice, 1970 ... on Cultural Policies in Europe, Helsinki, 1972; ... on Cultural Policies in Asia, Yogyakarta, 1973; ... on Cultural Policies in Africa, Accra, 1975; ... on Cultural Policies in Latin America and the Caribbean, Bagata, 1978; ... on Cultural Policies in Arab States, Baghdad, (1981); World Conference on Cultural Policies, Mexico City, 1982.

determination;¹⁸ seen alone, these are not new ideas, but their sum is greater than the parts.

The greatly increased volume of repatriation claims,¹⁹ made directly government to government, or indirectly through international organizations such as the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property or its Restitution in Case of Illicit Appropriation,²⁰ is evidence of the efficacy of this triad of ideas. Such claims characterize the desired object as the very essence of the national identity of the requesting State, vitally necessary for its continued well-being.²¹

¹⁸Paul Chutkow, "Culture by Consensus," Connoisseur 212:850 (1982)106 noted that at the World Conference on Cultural Policies 1982, Jack Lang, then French Minister of Culture, defined culture as "the recognition for each people to freely chose its form of government". See also, World Conference on Cultural Policies, Final Report, Mexico City, 26 July - August 1982, (Doc.CLT/MD.1)59-60, Recommendations 2,3,4,

¹⁹Sharon Williams, "Recent Developments in Restitution and Return of Cultural Property," Journal of Museum Management and Curatorship 3(1984)117-129.

²⁰See "Return & Restitution of Cultural Property," Museum 31(1979)59-61 on the history of the Committee and Salah Stetie, "The Intergovernmental Committee: Mechanisms for a New Dialogue," Museum 33:2(1981)116-118, and Lewis "Return . ." op.cit.443 on the Committee as a response to colonialism.

²¹John Henry Merryman, "The Protection of the Artistic National Patrimony Against Pillaging and Theft," in Law and the Visual Arts, edited by L.D.Duboff and M.A.C. Du Boff, (Portland:1974)153, on the 1973 claim for the Afro-A-Kom made by the Cameroon Embassy in Washington D.C., "it is the heart of the Kom, what unifies the tribe, the spirit of the nation, what holds us together" and by the same author, "Thinking about the Elgin Marbles", op.cit. 1881, on the 1983 appeal by the Greek Minister of Culture, "this is our history, this is our soul".

Clearly, the old link between cultural objects and the issue of national sovereignty has been maintained and strengthened.

2. Monetization

Almost every aspect of Western society is regulated by market forces;²² problems of distribution and scarcity are major components of this economic perspective. Scarcity results in the classical response of increased values, such as the appreciation of the "masterpiece/treasure"²³ and the advancement of the mere "collectible" from relative obscurity to a status desired by both private and public collectors. As the major works entered museums, there was more competition for the minor ones; and the revival and re-evaluation of schools and artists began in earnest. Stephen Weil notes: "deprived of one thing to collect, collectors simply turn to another."²⁴

Post World War II expansionism, the liquidity of modern capital, inflation, all combined with the scarcity factor to realize the idea of cultural goods as a speculative

²²Heilbroner, op.cit.18-19.

²³See Keiko Yamakura, "Hakubutsukan - the Imperfect Adaptation of Western Ideas in the Development of Japanese Museums", Museum Quarterly 15:4(1987)26-30 on the museum as a sacred treasure house in Japan, one of the most significant art importing nations; in 1987 a Japanese bidder paid the highest recorded price to date for a Van Gogh painting at auction in London.

²⁴Stephen Weil, "An Inventory of Art Museum Roles," in Beauty and the Beasts: On Museums, Art, the Law and the Market, (Washington: Smithsonian Institution Press, 1983)43.

investment commodity with instant international currency convertability.²⁵ There is no historical precedent for the soaring price structure of all types²⁶ of cultural objects in the late 20th century, as documented by publications such as The Times-Sotheby Index.²⁷

This price structure stems from a root system of scholarship, criticism, journalism, even museum policy - for saleability is enhanced by a pedigree. Escalating values have encouraged the proliferation of specialized service industries, (which had always existed on a smaller scale) and increased government regulation, including both taxation and tax benefits for donors of cultural objects to public institutions. With so many incentives in place, a lucrative "black market" arose,²⁸ which exceeded domestic boundaries to become part of international organized crime. Here,

²⁵ Lewis, "Museums" in International Sales, op.cit. 563 illustrates the change in attitude from "what is it?" to "what is it worth?" as a question frequently asked of museum curators. See also Hughes de Varine, "The Rape and Plunder of Cultures: an aspect of the deterioration of the terms of cultural trade between nations," Museum, 35:3(1983)152-7, on "cultural goods".

²⁶ Examples of the escalation of values of specific items were known, (e.g. the 17th century values of tulip bulbs in Holland) but today all types of collectibles, from comic books to fine art, are appreciating, some very rapidly.

²⁷ The Index first appeared in 1966. See Geraldine Keen, Money and Art; A study based on the Times-Sotheby Index, (New York: G.P.Putnam's Sons, 1971) and particularly, Stephen Weil's review of this book in Beauty, op.cit. 243-52.

²⁸ See Burnham, Art Theft, op.cit. 9.

cultural objects may be used as a "barter commodity"²⁹ or to launder illicit funds through purchases or tax shelters, and for fabricated insurance claims.³⁰ A decade after the UNESCO Convention, the Secretary General of ICOM reported:

Paradoxically, past efforts to curb illicit traffic of cultural heritage . . . have entered . . . a deadlock. At the governmental level. . . distressing facts have been recorded: . . . the inability of administrations to enforce national legislation for the protection of the country's heritage by means of providing adequate control measures at technical, police and customs levels . . .³¹

In spite of efforts by the professional associations of archaeologists to advance the idea of the stewardship of public resources by opposing the establishment of monetary values for archaeological material,³² cultural objects of

²⁹ Royal Canadian Mounted Police, Theft of Cultural Property in Canada, (Ottawa: 1985)2.

³⁰ For example, the Houshang Mahoubian case which involved the "arranged" theft of forgeries of gold and silver Middle Eastern antiquities, (the unsold stock of a London dealer), which were "over appraised", insured for U.S.\$18.5M, and became the subject of an insurance claim after a "loss" occurred during transit to the USA. Lynn Stowell Pearson, "Two Convicted in Theft of Antiquities From Warehouse", International Foundation for Art Research Reports, 8:5 (June 1987)4-5.

³¹ Twelfth General Conference of ICOM, Mexico City, Oct. 24-Nov.4 1980, Secretary General's Report for the Period 1977-1980, (DOC.80/CG.24).

³² Canadian Cultural Property Export & Import Act Annual Report, 1984-5, (Ottawa: Department of Communications, 1985)34. Details of Permit Application #02068, Human seated figure stone bowl, "the signing expert examiner, in accordance with a (1979) resolution of the Canadian Archaeological Association . . . requested that the Review Board declare the fair market value of the bowl to be zero". See also Hester A. Davis, "Approaches to Ethical Problems by
(Footnote Continued)

all types are completely integrated into the economic marketplace.³³ As such, they are subject to the same treatment as other valuable, scarce or even dangerous commodities,³⁴ that is: taxation, regulation, and in the event of contravention, the application of sanctions. In this respect, as already noted, increased values have contributed to the criminalization of offences involving cultural objects.

C. Future Interests as Global Heritage

John Henry Merryman suggests that the principle of the common heritage of all mankind was first used in legislation in direct reference to cultural objects in the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954.³⁵ But the concept - sometimes expressed in other terms - was articulated earlier in the twentieth century. In 1939, the League of Nations through its International Office of Museums, issued guidelines for

(Footnote Continued)

Archaeological Organizations" in Ethics and Values in Archaeology, edited by Ernestine L. Green, (New York: Macmillan, 1984) 13-21.

³³ "Finance Makes a Bold Bid for Profits in Art," New York Times, 3 Feb. 1985, E4, notes major financial institutions such as Citibank, Chase Manhattan Bank as well as the auction house, Sotheby Park Bernet, provide financial loans using cultural objects as collateral.

³⁴ For example, firearms, gold, liquor, tobacco, drugs, toxic chemicals, even food during wartime, etc. In 1974 the UK attempted to introduce a Wealth Tax on cultural objects in private hands, see Select Committee on a Wealth Tax, Session 1974-5, Vols. I-IV. (London: HMSO, 1975).

³⁵ Merryman, "Elgin" op.cit. 1916.

the protection of monuments and works of art in wartime:

du patrimoine artistique and historique commun
pour l'humanité tout entière.³⁶

and in a 1949 UNESCO-sponsored appeal, World War II art losses were described as "the common patrimony of mankind;"³⁷ the 1946 UNESCO Constitution refers to "le patrimoine mondial . . ."³⁸

Although World War II had created the context for these developments, there are other sources: nineteenth and twentieth century legal and political theories, recent developments in the management of natural resources, the criminalization of offences relating to cultural objects and the activities of international organizations of all types.

1. New Political and Legal Theories

In reviewing current maritime disputes,³⁹ a former member of the International Law Commission suggests that some roots of the principle of the common heritage of all mankind are found in the nineteenth century rationale for

³⁶ "La Protection des Monuments et Oeuvres d'art en Temps de Guerre, Manuel Technique et Juridique", Communiqué of the International Office of Museums, (Paris: September 1939) 228.

³⁷ Jean Leymarie, Art Museums in Need, (printed and circulated in the USA: UNESCO, 1949).

³⁸ Act Constituting UNESCO 1946, Article 1:2(c), (Doc. S2-C 4UNTS.275) "présent de garantir l'accès du public au patrimoine et d'assurer sa protection. . . le patrimoine mondial en livres, oeuvres d'art, monuments historiques et scientifiques. . ."

³⁹ See supra "The Management of Natural Resources".

colonization and imperialism:⁴⁰

acts of civilization on which the common good of all mankind rested, as justification to help backward peoples to harness the common treasures of mankind to serve the Europeans who, at the time, were alone capable of using this treasure in accordance with the principle of the right of the strong to help the weak.⁴¹

The theory of "limited sovereignty" proposed at the 1974 UN General Assembly, which portrayed States as trustees that exercise only a guardianship role over resources with relative rights of management and limited ownership,⁴² is an unfortunate indication of the survival of this approach. Nevertheless, it is clearly the political ideology of socialism (which has been accepted in modified form in even the most capitalistic States),⁴³ that has made a major contribution to the concept of enlightened self interest and the mutual advantage of shared resources.

⁴⁰ Manifest in international agreements such as the 1885 Berlin Conference on Africa, which assured freedom of navigation on the Congo and Niger Rivers for all States, Brierly, op.cit. 228.

⁴¹ Bedajoui, "Contradictions in the Formulation of a New Legal Language: the Example of the Common Heritage of All Mankind" in Towards, op.cit. 222; also cites H.Grimal, La Decolonization, (Paris: Armand Colin, 1965).

⁴² Proposed by the UK representative at the Sixth Special Session of the UN General Assembly, 1974. (Doc.A/PV 2209). This must also be seen in the light of the 1974 energy crisis and the economic policies of certain oil-rich states (the OPEC cartel) in relation to the industrialized powers.

⁴³ Albert Fried and Ronald Sanders, Socialist Thought: A Documentary History, (New York: Doubleday & Co., 1964) 2/3 note the variety of "socialist" applications in the modern era.

Modern States are increasingly subject to the interests asserted by various elements of the society they govern; Prott and O'Keefe used the theory of "claims of substance"⁴⁴ to identify interests specific to cultural objects, culminating in the interests of unborn generations.⁴⁵ This responsibility is often depicted as the key element⁴⁶ of the principle of the common heritage of all mankind, since its central concept - heritage - derives from inheritance, the social mechanism developed to protect future interests in property.

To place this idea in a broader context, the decade of the 1960's saw a coalition of developing States - "the Group of 77" (G77) - achieve prominence⁴⁷ and demand better terms of trade and a "fair share" of opportunities and resources for the Third World,⁴⁸ using the forum of the United Nations

⁴⁴ Developed by U.S jurist Roscoe Pound, Jurisprudence, 3 vols, (St. Paul: West, 1959)3:16.

⁴⁵ Prott & O'Keefe, Law and the Cultural Heritage, op.cit.15-27, identify a great variety of diverse groups, such as tourists, professionals or experts like archaeologists or museum staff, etc.

⁴⁶ René Jean Dupuy, "The Law of the Sea," Collected Courses of the Hague Academy of International Law, Vol.I, (1973)71, and S .E. Nahlik "International Law and the Protection of Cultural Property in Armed Conflict," Hastings Law Journal 27(1976)1069.

⁴⁷ At the first UN Conference on Trade and Development 1964.

⁴⁸ Myrdal, Asian Drama op.cit.I:299 discusses the semantics of "backward", "undeveloped", "underdeveloped" and "developing" as applied to what are now generally termed "Third World" countries.

General Assembly to adopt Resolutions to escalate their demands into a full fledged initiative for "a new international order".⁴⁹ The influence of G77 was keenly felt within UNESCO,⁵⁰ and it was not long before cultural policy specialists, building on the idea of cultural rights as human rights⁵¹ identified culture in the future world order as a "legitimizing force".⁵²

In 1978, UNESCO sponsored a Meeting of Experts on the Establishment of a New Economic and Cultural Order,⁵³ which identified:

the need to recast the system of international relationships...to establish the world order on new bases with a legal system founded on principles that are acceptable to all...to redefine international reality, and set out the law that governs it.⁵⁴

⁴⁹ A direct outcome was the Charter on the Economic Rights and Duties of States, 1974 adopted 12 Dec.1974 by United Nations General Assembly Resolution 3281 (XXIX) in which sovereignty was reinforced as a safeguard for developing States; an interesting new aspect, found in Article 29, was the emphasis upon "the particular responsibilities" of each State with regard to all others in the international community.

⁵⁰ For the first time, the Third World possessed the weight of numbers in the political organs of the UN, and began to realize its potential to create new or additional international legislation.

⁵¹ UNESCO, Cultural Rights as Human Rights, op.cit.12.

⁵² D.Paul Schafer, "Towards a New World Order: The Age of Culture", Cultures II:3 (1975) and "The Age of Culture; Prospects and Implications", Cultures II:4(1975)14.

⁵³ Meeting of Experts on the Rights and Duties Deriving, for States and Groups, from the Establishment of a New Economic and Cultural Order, Algiers, 10-13 April, 1978.

⁵⁴ Working Paper prepared by UNESCO Secretariat, Jan.
(Footnote Continued)

This event firmly connected culture to the topics proposed for international reconsideration. This movement that began as an economic equalizer became closely associated with the politicization of cultural objects. A salient reason was the vigorous role played by UNESCO Director General, Amadou-Mahtar M'Bow of Senegal,⁵⁵ who perceived a reformulated international order as: "a demand incomprehensible without reference to culture."⁵⁶

2. Management of Natural Resources

The conservation and economics of natural resources is the field where the most significant theoretical development of the principle of a global inheritance has taken place.⁵⁷ The protection of the environment in the broadest sense relates to just those res communes identified in Justinian's Code;⁵⁸ and the risks posed to cultural objects by man's impact on these surroundings was recognized in the UNESCO

(Footnote Continued)

31/78 for the Meeting of Experts on the Rights and Duties Deriving, for States and Groups, from the Establishment of a New Economic and Cultural Order. (Doc.SS-78/CONF.604/3).

⁵⁵ See Gordon Crovitz, "Boss M'Bow", Connoisseur, 214:867 (May 1984)118-121.

⁵⁶ General Conference of UNESCO, 18th Session, Paris, 1974, "Comments and Suggestions of the Director General on Ways and Means Whereby UNESCO Could Contribute to the Establishment of a New International Economic Order." (Doc.18C/103/Oct.1974).

⁵⁷ Williams, Protection, op.cit. 58.

⁵⁸ The air, sea, sea shores, and running water; see supra Chapter Three, the Ancient World and J.A.C. Thomas, Institutes, op.cit.65-7.

Convention on the World Cultural and Natural Heritage
1972.⁵⁹

Against the backdrop of G77 activity, the lengthy Third United Nations Conference on the Law of the Sea 1977-82 (UNCLOS III) was convened. Clearly cultural objects were only a minor, peripheral issue in the Convention on the Law of the Sea 1982 that evolved from UNCLOS III;⁶⁰ but due to lessons learned from certain omissions in an earlier Convention,⁶¹ cultural objects were specifically considered in two Articles. The final text is a series of carefully phrased compromises,⁶² accepted by many States in return for

⁵⁹ Abbreviated to the World Heritage Convention, adopted by UNESCO General Conference 1972. (1972)11 International Legal Materials 1358; it called for appropriate legal, scientific, technical and administrative steps at a national level to protect sites of "outstanding universal value". See also A Legacy for All - The World's Major Natural, Cultural and Historical Sites, (Paris: UNESCO, 1982) with introduction by Amadou Mahtar M'Bow.

⁶⁰ UN Convention on the Laws of the Sea; (1982)6 Int. Law.Mat.1245.(UN Doc.A/CONF.62/122) This Convention was largely concerned with the exploitation of the economic resources of the deep sea bed and the determination of the extent of the territorial sea, fishing zones and the extent of the continental shelf, for each nation.

⁶¹ Attempts had been made to interpret the Geneva Convention on the Continental Shelf 1958, which designates "non living resources" Art. 2(4), to include cultural objects found in underwater archaeological excavations. However, it is clear that the original intent of the drafting Committee was to exclude cultural objects from the Convention, (1956 International Law Commission, Vol. II 298), and subsequent reinterpretations have been unsuccessful. Prott, op.cit. 95.

⁶² Beginning with the Informal Single Negotiating Text 1975 (UN Doc.A/CONF.62/WP.8), wordings were re-negotiated in 1976, 1977, 1979 and 1980. Prott, op.cit. 97.

other concessions. Article 303 cautions:

States have the duty to protect objects of an archaeological and historic nature found at sea and shall co-operate for this purpose.⁶³

In addition to this general statement concerning cultural objects found on the continental shelf, another Article indicates that the resources of the "Area" beyond the limit of State jurisdiction are to be administered by an international régime, the "Authority":⁶⁴

all objects . . . found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin . . . ⁶⁵ cultural origin or historical and archaeological origin.

The Convention cannot possibly be considered "in force", while the major powers avoid any restriction of their present or future activities in the deep sea bed.⁶⁶ Concurrent with this position in 1984/5 was the withdrawal, or threatened withdrawal, of these same States from UNESCO and diminished political support for the United Nations.⁶⁷

⁶³UN Convention on the Laws of the Sea 1982, op.cit. Art.303.

⁶⁴The International Seabed Authority, will be essentially concerned with mining ventures, and may not be competent to deal with cultural objects. Prott, op.cit.97.

⁶⁵UN Convention on the Laws of the Sea 1982, op.cit. Art.149. Author's emphasis.

⁶⁶The USA and UK have not ratified the Convention on the Laws of the Sea 1982; this Convention requires 60 ratifications to be in force, as of October 1986, only 32 ratifications were in place.

⁶⁷The USA withdrew from UNESCO in 1984, and the UK and
(Footnote Continued)

While the concept of the common heritage of all mankind had been invoked in earlier UN Declarations on natural resources,⁶⁸ it found only a theoretical expression in the Convention on the Law of the Sea; in practice, the present situation is just that anticipated in 1971 by Alva Myrdal, then Swedish Minister for Disarmament, who described:

the superpowers who possess the extraordinary means for access to our "common" heritage.⁶⁹

3. Criminalization of Offences Involving Cultural Objects

Until recently, offences involving cultural objects were often treated as "clean" or victimless crime, somehow less serious than other types of theft, smuggling or fraud. This attitude is changing.⁷⁰

In 1985, the Committee of Ministers of the Council of Europe adopted the European Convention on Offences Relating

(Footnote Continued)

Canada considered withdrawing in 1985, due to political pressure exerted by the USA. Approximately 25% of the 1984/5 budget of US\$M374.4 was provided by the US, and 4.6% by the UK. See Nick Clark, "Will UNESCO Break Up? The Americans regard UNESCO as a test case for the whole UN system," Listener (7 March 1985)7-9. Since that time, there has been considerable rapprochement, probably due to the interest of the USA in negotiating other issues with the USSR.

⁶⁸ Declaration of the Legal Principles Governing the Acts of States in the Exploration and use of Outer Space, International Law Materials 3(1963)157.

⁶⁹ Alva Myrdal, "Preserving the Oceans for Peaceful Purposes" in Collected Courses of the Hague Academy of International Law, 133(1971)1-14.

⁷⁰ Burnham, Art Theft op.cit.26 and Jean Chatelain, Means of Combatting the Theft and Illegal Traffic in Works of Art in the Nine Countries of the European Economic Community, (Brussels: EEC, 1976)83.

to Cultural Property.⁷¹ This was not an easy venture; the subcommittee, including representatives from UNESCO and ICOM, began work almost a decade earlier by adopting the accepted International Criminal Law notion of the "internationalization" of offences involving cultural objects. This approach, modelled on that used for terrorism, sea piracy and aircraft hijackings, identifies activities which are detrimental to the interests or property of the international community.

While the Convention has many shortcomings, for example, the issue of bona fide possession is not resolved, it goes considerably further than the UNESCO Convention to secure the systematization of legislation by means of mutual recognition of domestic laws,⁷² and may begin to offer a solution to the issue of lex situs - the identification of the appropriate domestic legislation⁷³ concerning ownership governed by the laws of the State in which

⁷¹The European Convention on Offences Relating to Cultural Property 1985. (Doc.AS/Cult/AA(36)10.

⁷²See Staf Dokx, "The Council of Europe Draft Convention on Stolen Art" Art Research News, 2:1(1981)12-17, and Ekkehart Muller-Rappard, "The European Convention on Offences Relating to Cultural Property", in International Sales, op.cit.575-579.

⁷³See Peter D. Carter, "The Art Trade and English Private International Law," 317-331; Georges A.L. Droz, "The International Protection of Cultural Property and Works of Art Seen From the Point of View of a Private International Law Convention," 535-543 and Quentin Byrne-Sutton, "Who is the Rightful Owner of a Stolen Work of Art - A Source of Conflict in International Trade," 483-500, all in International Trade, op.cit.

an object is situated at the time of an alleged illicit transfer. The codification of domestic legislation has also been investigated by UNESCO, and a study commissioned in 1983 recommended:

UNESCO undertake a major initiative, (possibly by supporting a Unidroit or Hague Conference survey) ... to encourage an intergovernmental Convention on the improvement and unification of rules of private international law affecting the cultural heritage.⁷⁴

4. Activities of International Organizations

The contribution of a number of UN specialized agencies and organizations is discussed in detail in the following section. It should be noted that the trend towards the criminalization of offences connected with cultural objects may impinge upon the activities of the recently formed Intergovernmental Committee for Promoting the Return of Cultural Property or its Restitution in Cases of Illicit Appropriation, in that the role of "good offices" and arbitration become, in a sense, more important, but also less effective, because there is increasing recourse to legal action.⁷⁵

However, a great variety of non-UN international

⁷⁴ Lyndel V. Prott and Patrick J. O'Keefe, National Legal Control of Illicit Traffic in Cultural Property, (Paris: UNESCO, 1983)137.

⁷⁵ It could be argued that the role of the Committee is largely concerned with historic misappropriations, and that the new tendency towards criminalization of offences involving cultural objects will be concerned with contemporary incidents. However, there will be overlap concerning post 1970 situations.

bodies have also undertaken activities to heighten public awareness of the concept of the common heritage of all mankind. The activities of groups such as professional associations of archaeologists, museum staff, art historians, and so on, were noted earlier, but there are less obvious examples.

In 1986, an annual international moot court competition⁷⁶ organized by the American Society of International Law selected an hypothetical case, "Avon v. Misra", which featured the illicit appropriation of cultural objects.⁷⁷ This event alone ensured that students from over 200 law schools around the world (which participated in the competition), gained some familiarity with both the relevant legislation and the issues surrounding the concept of the common heritage of all mankind.

II Legislation

The dream of an international body to foster peace and the common interests of States was articulated by Desiderius Erasmus in the The Complaint of Peace 1517; it was four centuries before his idea came to fruition.⁷⁸

⁷⁶The Phillip C. Jessup International Law Moot Court.

⁷⁷James A.R. Nafziger, "Avon v. Misra: Law Students Discover and Excavate Cultural Property Law," Journal of Field Archaeology, 14(1987)219-221.

⁷⁸Desiderius Erasmus, "The Complaint of Peace," in The Essential Erasmus, introduction by John P. Dolan, (New York: New American Library Inc., 1964)177-204, which concludes with a recommendation for a Council of Princes composed of the powerful leaders of his day.

A. Codification of International Law

Governmental and non-governmental international congresses and organizations developed in the 19th century.⁷⁹ But not until 1920 was a permanent body convened to deal with international issues on a routine basis. Two years later, that body, the League of Nations, considered a report on the serious dilapidation of the cultural heritage,⁸⁰ and by 1928 had drawn up a Convention Relating to International Exhibitions.⁸¹ Its successor, the United Nations,⁸² is the only global organization⁸³ that has come into being for much the same reasons proposed by Erasmus.

⁷⁹Brierly, op.cit. 98 & 102-4. Between 1864 and 1914, over 250 international legislative conventions were concluded at conferences assembled to resolve specific issues. It was apparent that governments could not be even reasonably efficient on the basis of a purely national organization, and the public international unions were created, e.g. International Telegraphic Union 1865, Universal Postal Union 1874, Copyright Union 1886.

⁸⁰Prott & O'Keefe, Law and the Cultural Heritage, op.cit. 73.

⁸¹Luckhurst, op.cit. 160, 218-9.

⁸²Founded at the San Francisco Charter Conference 1945.

⁸³Other regional organizations have been set up for limited purposes with limited membership, e.g.: Council of Europe, founded in 1949; Organization for European Economic Co-operation (OEEC), founded 1949; Council for Mutual Economic Assistance (CMEA), founded 1949; European Coal and Steel Community (ECSC), founded 1951; European Atomic Energy Community (EURATOM), founded 1957; European Economic Community (EEC), founded 1957; (ECSC, EURATOM, EEC are all part of the European Community and report to the European Parliament.) Other examples of regional organizations are: Organization of American States, Organization of Andean States; League of Arab States; Organization for African Unity; Organization of the Islamic Conference.

Within the UN, the International Law Commission (ILC)⁸⁴ was established: "to encourage the progressive development of international law and its codification."⁸⁵ But the Commission rarely breaks new ground, its main contribution has been the codification of draft international treaties, which usually deal with matters for which consensus is readily available.⁸⁶ Nevertheless, the activities of the ILC have encouraged the use of the more concrete treaty form, rather than the vagueness of customary international law.

1. Sovereignty

Although a considerable body of international law now exists, few States submit disputes to the UN judicial body, the International Court of Justice, which was established simultaneously with the parent body.⁸⁷ Urban G. Whitaker elaborates on the difficulties inherent in such international bodies:

One of the most troublesome barriers to the effective functioning of international organizations is the

⁸⁴ Members of the ILC are "eminent and independent international lawyers" that do not represent their respective States. Brierly, op.cit. 81-2.

⁸⁵ Charter of the United Nations, 26 June 1945, Article 13:1(a).

⁸⁶ A. Ross, The United Nations, Peace & Progress, (New Jersey: Bedminster Press, 1966)347.

⁸⁷ The ICJ is modelled upon the Permanent Court of International Justice of the the League of Nations, under the Statute of the International Court of Justice, 1945, Higgins, op.cit. 381.

difficulty of reconciling the uneven distribution of de facto power with the legal fiction of sovereign equality.⁸⁸

Unlike its namesake,⁸⁹ the "sovereign" nation State recognizes no suprapower, hence the theory of its independence.⁹⁰ From this shaky foundation arose the concept of the equality of States, based upon an unsound but popular premise of naturalist writers.⁹¹ To secure initial support, the concept of sovereignty was enshrined in the UN Charter⁹² and has been regularly endorsed since then.⁹³ This commitment ensures that international law is almost entirely

⁸⁸Urban G. Whitaker, "Reconciling Power and Sovereignty" in Seventeenth Report of the Commission to Study the Organization of Peace - New Dimensions for the United Nations: The Problems of the Next Decade, edited by C. M. Eichelberger, (Dobbs Ferry: Oceana, 1966)63.

⁸⁹The State was personified using the model of the medieval European sovereign, who had generally been forced to recognize the supremacy of the Church as the earthly representative of a Christian deity.

⁹⁰The European Economic Community is an exception to this principle; it is a supra-national power in that its institutions have been given authority by member States to take decisions on specific matters, on which member governments can no longer take unilateral decisions. It is, however, limited in its powers, and still based on the principles of delegation and consent. See John Pinder, "The European Economic Community" in The Evolution of International Organizations, edited by Evan Luand, (London: Thames & Hudson, 1966)301-2.

⁹¹Brierly, op.cit.131.

⁹²Charter of the United Nations, 26 June 1945, op.cit. Article 2(1) "The Organization is based on the principle of the sovereign equality of all its members."

⁹³For example, UNESCO Declaration on the Principles of International Cultural Co-operation, Nov.4 1966, Article XI.

consensual - a law between but not above States. However, it is often the political organs of the UN, notably the the Economic and Social Council (ECOSOC), that play a prominent role in the development of international law.⁹⁴

ECOSOC is empowered to enter into agreements with any of the Specialized Agencies established by intergovernmental agreement, thereby bringing these organizations into the UN "family".⁹⁵ From a cultural viewpoint, the most significant is the United Nations Educational, Scientific and Cultural Organization (UNESCO), which has traditionally served as a catalyst rather than as a delivery system.⁹⁶

2. The Role of UNESCO and ICOM

To offset the effect of sovereignty in the application of international law, some UNESCO member States have indicated a desire to move beyond the so-called "para legislative" or convention and treaty making mode which calls for specific consent. In this regard, a "quasi

⁹⁴The UN General Assembly, the Security Council, the Trusteeship Council are other political organs that are vitally concerned with the development of international customary law. See Higgins, op.cit. 2-3, who also proposes that the Secretariat although not a political organ, has a role.

⁹⁵Charter of the United Nations, 1945, op.cit. Article 63(i).

⁹⁶"UNESCO is not. . and never was intended to be - a relief agency. We can survey needs .. suggest .. inspire .. and co-ordinate action by government and non-government agencies". Jaime Torres Bodet, Director General of UNESCO in 1949, from the Introduction to Leymarie, op.cit. 1.

legislative" process⁹⁷ has developed, whereby international regulations or standards are accepted by a majority of votes in a plenary or executive body, and instead of specific consent, States opt out by means of a notification process.⁹⁸ However, to date, the principle of formal consent still prevails both within the UN proper and UNESCO.⁹⁹

Nevertheless, the work of UNESCO during the past four decades has been impressive:

It has been responsible for developing an important body of cultural heritage law embodied in Recommendations and Conventions . . . promoting studies and policies in . . . cultural heritage protection and for conducting some major programs, (Aswan Dam, Egypt; Borobodur, Indonesia; Mohenjodaro, Pakistan) . . . it must be remembered that cultural matters are not always given the first priority by States . . . struggling . . . with major problems of literacy and economic development.¹⁰⁰

The 1946 UNESCO Constitution clearly outlined its intended role in relation to cultural objects and the

⁹⁷ Charles H. Alexandrowicz, Lawmaking Functions of the U.N. Specialized Agencies, (Sydney:Angus Robertson, 1973) 152.

⁹⁸ ibid. 23 & 40. This approach used by the World Health Organization (WHO), the International Civil Aviation Organization (ICAO); and the Inter-governmental Maritime Organization (IMCO), formerly the Inter-governmental Consultative Organization.

⁹⁹ Ralph Zacklin, The Amendment of the Constitutive Instruments of the U.N. and Specialized Agencies, (Leyden: A. W. Sijthoff, 1968).

¹⁰⁰ Prott & O'Keefe, Law and the Cultural Heritage, op.cit. 74.

concept of the common heritage of all mankind;¹⁰¹ almost forty years later, the Organization has declared its "prime concern" for the protection of the cultural heritage.¹⁰²

As a UN Specialized Agency, UNESCO provides funding to certain international non-governmental organizations, like the International Council of Museums (ICOM),¹⁰³ an autonomous body established in 1946, which provides professional advice to UNESCO as requested. James Nafziger fits ICOM into a "nesting" of organizations which participate in an emerging régime of both legalistic and other forms of control, and describes it as:

An organization showing signs of transformation from a static, conference orientation to a dynamic instrumentality of action . . . with the greatest potential as an effective transnational mechanism of control.¹⁰⁴

¹⁰¹ Act Constituting UNESCO 1946, Article 1:2(c), (Doc. S 2-C4 UNTS.275), "to maintain, increase and diffuse knowledge by assuring the conservation and protection of the world's inheritance of books, art and monuments of history and science".

¹⁰² Riccardo Monaco, "The Contribution of Unidroit to the International Protection of Cultural Property," in International Sales op.cit. 567-73.

¹⁰³ Other similar organizations are: the International Centre for the Study and Preservation and the Restoration of Cultural Property (ICCROM); International Committee on Monuments and Sites (ICOMOS); International Union for the Conservation of Nature (IUCN); International Organization of Land Archaeologists (IOLA); International Organization for the Protection of Works of Art (IOPA).

¹⁰⁴ James Nafziger, "Regulation by the International Council of Museums: An Example of the Role of Non Governmental Organizations in the Transnational Legal Process", Denver Journal of International Law & Policy, (Footnote Continued)

The many national¹⁰⁵ and international specialized committees of ICOM operate in diverse legal environments, and the official position of the Council is to encourage "explicit and workable"¹⁰⁶ legislation pertinent to cultural objects at a national level, and the recognition of appropriate international Conventions. In practice, ICOM looks to its member institutions (and individual museum professionals) to seek a self-regulatory approach as an interim measure.¹⁰⁷

3. International Legislation

International law today is the study of the variety of ways in which mankind goes about regulating and allocating all those values which touch on more than one country. One such discrete value is the world's stock of art.¹⁰⁸

The traditional vehicle for international action, the bilateral or multilateral treaty, has continued in use for

(Footnote Continued)

2(1972)231,244 and "I Like It But Is It International Law" in Law & the Visual Arts Conference, op.cit. 295-302.

¹⁰⁵ Ellen Herscher, "Serving the World's Museums: ICOM in 1985," Museum News 63(1985)61-66.

¹⁰⁶ Geoffrey Lewis, "Museums: International and National Self Regulation," in International Sales, op.cit. 563.

¹⁰⁷ For example, by encouraging the development of institutional acquisitions policies and codes of ethics. See "Ethics of Acquisition" ICOM News, 22:3(1969)49-52, 23:1(1970)54-57, 23:2(1970) 49-56 and ICOM Code of Professional Ethics adopted at the 15th General Assembly, Buenos Aires, November 1986. Henceforth, agreement to adhere to the Code is condition of membership in ICOM.

¹⁰⁸ William D. Rogers, "The Legal Response to the Illicit Movement of Cultural Property", Law and Policy in International Business, 5(1973)932.

purposes connected with cultural objects.¹⁰⁹ In fact, the application of international law has broadened because of the universality of membership in the UN and the participation of States in both the formation of and activities in, intergovernmental organizations. The "sheer amount of legislation"¹¹⁰ is evidence of the desire of the international community for a degree of international order rather than chaos.

Today, the 51 UN Charter Members of 1945 are outnumbered three to one by a new majority of developing States that achieved independence via decolonization since World War II. These newcomers have provided the momentum for initiatives by the Specialized Agencies,¹¹¹ particularly in the area of cultural policy and legislation specific to cultural objects.

Upon its inception, the UN addressed the issues which

¹⁰⁹ For example, the Treaty of Co-operation Between the United States of America and the United States of Mexico Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, 1971 (22 U.S.T.494); European Cultural Convention, 1957; European Convention on the Protection of the Archaeological Heritage, London, 1969; Convention on the Protection of the Archaeological, Historical and Artistic Heritage of the American Nations, Santiago, 1976, and so on.

¹¹⁰ Specifically, Conventions and treaties; see Williams and de Mestral, Introduction, op.cit.⁹ who note that to an increasing degree, jurists, government officials, and diplomats treat international law not as moral justification, but as a binding obligation. In the broadest terms, this includes custom, which is not codified.

¹¹¹ Peter Calvocressi, World Order & New States, (London: Institute for Strategic Studies, 1962)99-113.

had occupied many pre-League of Nations Congresses regarding the conservation and protection of all resources - human, man-made and natural. The climate of the day set the priorities, and the four Geneva Conventions of 1949 dealt exclusively with human resources;¹¹² nevertheless, it is remarkable how quickly the UN (through UNESCO) identified cultural objects as a non-renewable resource deserving of special attention, in the Convention for the Protection of Cultural Property In the Event of Armed Conflict 1954,¹¹³ at a session of the Diplomatic Conference in the Hague, initiated by Italy and attended by 86 nations. Clearly, World War II was the impetus for this Convention which focussed on culture,¹¹⁴ perhaps reflecting a popular foreign

¹¹²The Geneva Convention on the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, ... for Sick and Shipwrecked Members of Armed Forces at Sea....Relative to the Treatment of Prisoners of War... Relative to the Protection of Civilian Persons in Times of War. (1949)75 U.N.T.S.287. The first Geneva Conference on this topic took place in 1864. Brierly op.cit.96.

¹¹³Abbreviated to "the Hague Convention". United Nations Treaty Series, 249(1956)240-66. This Convention was intended to supplement the earlier Hague Conventions of 1899 and 1907, and the Roerich Pact of 1935, Article 36. It calls for an International Register of Cultural Property under "special" protection, consisting of "refuges", "centers with monuments" and "other immovable cultural property of very great importance"; the placement of a distinctive emblem to facilitate recognition and provisions for technical assistance and transportation. See Williams, op.cit. 34-48 for a discussion of the terms of the Convention.

¹¹⁴See UNESCO, Protection of Movable Cultural Property: Compendium, Vol.II op.cit. 329. Of a total of 71 States which had deposited an instrument of ratification or accession as of November 1983; only 28 had done so by 1960,
(Footnote Continued)

policy strategy, whereby cultural agreements often prepare the way for weightier economic arrangements between States.¹¹⁵

When armed conflict of a non-international nature was added to the 1949 Geneva Conventions and adopted in 1977, Protocol II called for:

the protection of cultural objects and places of worship and prohibits acts of military hostility directed against historical monuments, works of art, or places of worship which constitute the cultural or spiritual heritage of people.¹¹⁶

This apparent intrusion into the domestic affairs of member States was a significant departure from UN policy, and the special mention of cultural objects of a religious nature continued the philosophy of the Code of Justinian.¹¹⁷

The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of

(Footnote Continued)

within four years of the Convention coming into force. With regard to the States highlighted in this study, Canada, the USA and the UK have not ratified or acceded as of 1989.

¹¹⁵Pinder, op.cit. 302, notes that "a sense of cultural identity". . . is a prior condition for successful regional organizations such as the European Economic Community.

¹¹⁶Protocol II Additional to the Geneva Conventions, Article 53. (U.N.Doc. CDDH/1/274). The Draft Protocols were proposed by the International Red Cross in 1972 and supported by the Canadian delegation in 1975 at the 29th meeting of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, 1974-77. Ultimately, Protocol II was not ratified. See Williams, op.cit. 46/7 and 51 at note 120.

¹¹⁷Institutes of Justinian II:i:2. Thomas, op.cit. 65, "things sacred, religious or hallowed . . . (are) not the property of anyone". See supra "Ancient World."

Ownership of Cultural Property 1970,¹¹⁸ came about as a result of an appeal by Mexico and Peru, made a full decade earlier.¹¹⁹ As the title suggests, its raison d'être was a more recently identified emergency - the enormous peacetime traffic in stolen and smuggled cultural objects.¹²⁰ This Convention brought a number of issues into sharp focus - the thorny problem of state sovereignty, the relationship between domestic and international law, and the fine line

¹¹⁸ Abbreviated to "the UNESCO Convention". United Nations Treaty Series 823(1972)231. It which provides for: the identification of cultural property, and establishment of national services such as inventories, a system of export certificates and import controls. Member States agree to prohibit the import of cultural objects stolen from public institutions, both secular and religious, such as museums and churches, provided there is suitable documentation to prove theft, and to take appropriate steps to recover and return such cultural objects at the request of a Member State. See Williams, op.cit. 180-90 for a discussion of the Convention. Of a total of 60 States which have deposited an instrument of ratification or accession to the UNESCO Convention as of 1988, only 22 had done so by 1974, within four years of the Convention coming into force. UNESCO, Protection, Vol.II op.cit. 331. Regarding the States surveyed by this study, only the UK has not ratified as of 1989.

¹¹⁹ At the Eleventh Session of UNESCO 1960, the Director General was charged with the preparation of a Report on appropriate means to deal with illicit trafficking of cultural objects. Other States, including India, desired research for a draft Convention, but it was 1964 before a draft Recommendation was tabled.

¹²⁰ Journalist Karl E. Meyer, The Plundered Past: The Traffic in Art Treasures, (New York, Atheneum, 1973) and academic Clemency Coggins, "Illicit Traffic in Pre-Columbian Antiquities," Art Journal 29(1969)94 and "Archaeology and the Art Market," Science 175(1972)263, were among the earliest authors to popularize information about the illegal international trade in South American Pre-Columbian antiquities.

which divides official and clandestine acts. Above all, it illustrated the economic complexion of the problem and the role of major financial interests, (both legitimate and otherwise) by effectively identifying supplier and consumer blocs as well as a number of "intermediary" or transit States, which have not become party to the Convention.¹²¹ Often these intermediary States have a tradition of civil law "good faith" purchase legislation, so that cultural objects owned by a party (with less than clear title by common law standards) may be legally exported, and thereby legally imported, into another State.

The shortcomings of this Convention have been discussed at length,¹²² and little remains to be added here save to note in the most general terms, difficulties in the administrative and customs areas, beginning with the imprecise definitions of cultural objects, the lack of a uniform export permit or certificate, the exclusion of private collectors and organizations that are not State controlled, and most especially, the costs associated with national inventories, particularly for developing nations.

¹²¹ e.g. Switzerland. Williams, op.cit.189.

¹²² Paul Bator "An Essay on the International Trade in Art" Stanford Law Review 34(982)275; Marie Malero, op.cit. 65-75,90; Merryman, "Elgin," op.cit.1891-4; and "The Protection of the Artistic National Patrimony," op.cit. 153-172; James Nafziger, "Article 7(a) of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and transfer of Ownership of Cultural Property," in Law and the Visual Arts, op.cit.267-70; Williams, op.cit.187.

4. Domestic Acceptance of International Conventions

Even States which vote in favour of a Convention at an international conference may be obliged to negotiate at home with governmental and non-governmental power groups,¹²³ and experience significant delays before actually ratifying or acceding to the Convention, and then passing enabling domestic legislation.¹²⁴

For example, both India and Canada supported the original 1964 Recommendation¹²⁵ and the 1970 UNESCO Convention, but did not ratify the latter until 1977 and 1978 respectively, while Mexico passed enabling legislation under the Federal Act on Monuments, Archaeological, Artistic and Historic Zones 1972, which was brought into force in 1973.¹²⁶

The USA and the UK are typical of States where public

¹²³ Regional governments; associations of art, antique and antiquities dealers; museum associations etc. See Paul Guggenheim, Survey on the Ways in Which States Interpret Their International Obligations, Symposium Proceedings, Munich, July 23-27 1954, (Paris: UNESCO, 1955)12.

¹²⁴ Negotiation with such power groups may be necessary before signature, ratification or accession to an international Convention. For example, the Hague Convention 1954 was not signed by Canada due to an inability of the federal and some provincial governments to resolve issues of jurisdiction. Williams op.cit.80 cites an example involving Quebec.

¹²⁵ Recommendation on the means to prohibit and prevent the illicit import, export and transfer of ownership of cultural property 1964, (Doc.13C/PRG/17) Annex I.

¹²⁶ UNESCO, The Protection of Movable Cultural Property II, (Paris: 1984)331-2, dates of ratification: Canada, 28/6/78; India, 24/4/77; Mexico 4/1/73.

support and endorsement of the UNESCO Convention by significant non-governmental organizations, such as associations of museum professionals, archaeologists or lawyers has not overcome the organized resistance (noted by ICOM) from powerful blocks¹²⁷ such as dealers' associations, and perhaps more importantly, their influential clients.¹²⁸ In 1980, the Director General of ICOM reported:

the reluctance of States which are major markets for cultural trade to ratify the UNESCO Convention of 1970, in most cases because of the legal blockade obtained in those countries by the antique and art dealers' lobby.¹²⁹

As of 1989, the UK had not ratified the UNESCO Convention, although there is domestic legislation in place

¹²⁷ James Nafziger, "Regulation" op.cit. 234, cites early support in 1972 for ratification of the 1970 UNESCO Convention by the American Society of International Law, College Art Association of America, Society of American Archaeology, and to a lesser degree, the American Association of Museums. For the UK, see The Standing Commission on Museums and Galleries, Tenth Report 1973-77, (London: H.M.S.O. 1978)85 "notwithstanding the fact that the UNESCO Convention has not yet been ratified by the UK, each museum should comply with the terms and ethical principles of the Convention ... "

¹²⁸ Paul Bator, "Trade" op.cit.356 notes some U.S. dealer groups "fought with virulent zeal" against any restriction or regulation of their trade, and the propriety of secrecy ... which allows persons...to become accomplices in the acquisition of looted masterpieces.

¹²⁹ Twelfth General Conference of ICOM, Mexico City, Oct. 24-Nov.4 1980, Secretary General's Report for the Period 1977-1980, (2.DOC.80/CG.24)1.

to regulate exports,¹³⁰ and the USA has only accepted limited elements as demonstrated in the "toothless" U.S. Convention on Cultural Property Implementation Act 1982.¹³¹

In several cases, domestic ratification of this Convention is "buried" in a legislative package which has its primary emphasis elsewhere. In Mexico, a major component of the 1972 legislation which implemented the UNESCO Convention was the nationalization of pre-Columbian cultural objects:

All movable and immovable archaeological monuments are the inalienable and imprescriptible property of the Nation.¹³²

A major thrust of the Canadian legislation¹³³ is retentive, that is, to regulate exports of cultural objects, but its most widely known and applied provisions are the tax benefits available to donors of cultural objects to

¹³⁰ Export of Goods Control Orders, amended 1972. Originally the Import, Export and Customs Powers (Defence) Act 1939.

¹³¹ Merryman, "Elgin", op.cit. 1892 at note 34. (19 USC 2601-2613(1982) Public Law 97-466). See also Maria Papageorge Kouroupas and Ann J. Guthrie, "The Cultural Property Act: What It Means for Museums," Museum News, 63:5(June 1985)50.

¹³² Federal Act on Monuments, Archaeological, Artistic and Historic Zones Act, 1972, Bonnie Burnham, The Protection of Cultural Property: Handbook of National Legislations, (Paris: ICOM, 1974)113 and Prott & O'Keefe, Law and the Cultural Heritage op.cit. 1:191.

¹³³ Cultural Property Import and Export Act 1978, S.C.1974-5, c.50.

public institutions;¹³⁴ it seems almost incidental that the Act also enabled Canada to implement many of the obligations of the UNESCO Convention. Even when States do ratify this Convention, certain aspects are ignored.¹³⁵ For example, a provision which has great potential to remedy numerous problems - the registration and regulation of dealers - has not been seriously undertaken by any State to date.¹³⁶

B. Definitions of Cultural Objects

In an oblique approach, philosopher Susan Sontag queried "what is not a cultural object?" and suggested that plentiful and readily available items do not qualify.¹³⁷

¹³⁴ Annual Report 1984-5, Cultural Property Export and Import Act, op.cit. 36 notes the certification of cultural objects as "the major activity of the Cultural Property Review Board"; at page 12, notes 787 applications for certification eligible for tax benefits and at page 48, a total of 220 permits for export issued, with only 8 appeals detailed at page 21.

¹³⁵ UNESCO Convention, op.cit. Art.10. The States Parties to the Convention undertake . . . as appropriate for each country, (to) oblige antique dealers, subject to penal or administrative sanctions, to maintain a register recording the origin . . . names and addresses the the supplier, description and price of each item and to inform the purchaser of the cultural property of the export prohibition to which such property may be subject.

¹³⁶ See Burnham, op.cit. 36 for an account of a dealer registration project in Arizona, which was not enforced by the State, but undertaken voluntarily in 1973 to combat a high theft rate of Indian silver and turquoise jewellery.

¹³⁷ Susan Sontag, "One Culture and the New Sensibility" in Against, op.cit. 298 notes that mass culture, such as books, films, magazines etc. do not qualify because they are easily available, thereby reinforcing the scarcity theory. See also Horne, op.cit. 249.

Historical definitions focussed on specific situations; they were not comprehensive and in retrospect, can now be seen to have contributed to the perpetration of outdated legal principles.¹³⁸ Modern definitions found in international and domestic legislation are no less confusing:

It is high time . . . UNESCO standardized the various definitions that are of frequent use in their documents instead of attempting new ones every time a new Convention or Recommendation is introduced.¹³⁹

Apart from semantic difficulties,¹⁴⁰ there are more serious problems of substance and philosophy. It is more practical to examine the underlying rationale for modern definitions of cultural objects, rather than details of inclusion and exclusion. Lawyers who specialize in the new subdiscipline of "art law"¹⁴¹ often conclude that cultural objects are not specifically defined in the large body of indirect legislation which applies to movable property of the goods and chattels variety: "cultural property is for

¹³⁸ Prott & O'Keefe, Law and the Cultural Heritage, op.cit. 1:321 on "treasure trove," also supra, Chapter Three, The Middle Ages.

¹³⁹ H. Sarkar, Museums and Protection of Monuments and Antiquities in India, (Delhi: Sundeep Prakashan, 1981) 17.

¹⁴⁰ Use of synonyms such as: object, item, article, property, material, work, piece, art, objet d'art, art treasure, antique, antiquity, archaeological specimen, etc.

¹⁴¹ Herrera, Cultural Development, op.cit. 169 on "Cultural Legislation: a new legal discipline" and Stephen E. Weil, "Some Thoughts on Art Law", in Beauty and the Beasts, op.cit. 199-207 for a summary of the development of this area.

most legal purposes like other property,"¹⁴² particularly with reference to commercial transactions.

Another viewpoint finds considerable historical evidence for the special treatment and definition of cultural objects:

cultural property has been recognized as no ordinary property for¹⁴³ well over a century in international legislation.

This approach, supported by the growing body of international and domestic legislation specific to cultural objects causes Sharon Williams to suggest that perhaps conventional property concepts necessarily do not apply.¹⁴⁴

The 1970 UNESCO Convention (and most post-1970 domestic legislation which incorporates or ratifies it) formalizes the idea that it is the primary responsibility of each State to protect its own cultural heritage,¹⁴⁵ and requires cultural objects to be designated specifically by that State. This may include all objects of a certain age or

¹⁴² Merryman, "Elgin", op.cit. 1889, and "American Law and the International Trade in Art" in International Sales, op.cit. 425-35, and Otto Sandrock, "Foreign Laws Regulating the Export of Cultural Property and the Respect Due to Them by the Judge of the Lex Fori", ibid. 457-481, D. Peter Carter, "The Art Trade and English Private International Law" ibid. 317.

¹⁴³ Geoffrey Lewis, "Museums, International and National Self Regulation," ibid. 557.

¹⁴⁴ Williams, op.cit. 52.

¹⁴⁵ Ian Christie Clark, "Illicit Traffic In Cultural Property: Canada Seeks a Bilateral Agreement with the U.S.," Museum 38(1986)185, "each State has the right to define its own cultural property ..."

type, or only those of great importance or significance, to be determined by the application of specific criteria as the situation arises.¹⁴⁶ Some legislation nationalizes all or some cultural objects on an immediate or eventual basis,¹⁴⁷ or gives the State the right of expropriation or preemption, with or without compensation. These measures may apply both to public collections and to privately owned material.¹⁴⁸

Whatever the specific technique, the designation is conferred by State authorities. Christian Dickie, discussing the Conventions of the European Community regarding the protection of cultural objects, argues that "national" should be eliminated from the definition since this concept is incompatible with a view of a international Community and heightens the issue of national sovereignty.¹⁴⁹ Nevertheless, nationalistic definitions are clearly a necessary precursor to any form of international codification. x

However, another force is playing an important part in

¹⁴⁶ The designation may be achieved by means of: national inventories ; registration or certification by state authorities; registration by private and public owners; declaration by owners without resort to national registers. See Burnham, Protection, op.cit. 17-18.

¹⁴⁷ A number of Latin American states, including Mexico, have enacted legislation declaring State ownership.

¹⁴⁸ Quebec Cultural Property Act, (S.Q.1972,c.19) applies to cultural objects in private ownership.

¹⁴⁹ Christian D. Dickie, "Commerce International de L'Art entre Commerce Libre et Protection des Biens Culturels," in International Sales, op.cit. 533.

enlarging the definition of cultural objects from one of national public assets to a more global viewpoint. Official State recognition invariably relies upon the expertise of a relatively small number of professionals who are used by governments as policy advisors, expert witnesses, examiners or adjudicators in the drafting and enforcement of cultural object related legislation.¹⁵⁰ These influential individuals are usually academics, curators or administrators connected with cultural, educational or regulatory government agencies - with museums or "museum-like" custodial organizations¹⁵¹ rather than with the commercial or even political milieux.

As part of an international, collegial, professional association - ICOM - some individuals are not always supportive of nationalistic positions, and press for change,¹⁵² emphasizing the view that:

the museum community must . . . determine what constitutes an important element of a country's or peoples' cultural heritage.¹⁵³

¹⁵⁰ The Canadian Cultural Property Export & Import Act "Expert Examiners" are almost invariably museum curators.

¹⁵¹ For example, the Archaeological Survey of India is responsible for historical and archaeological sites as well as museums. See S. Roy, The Story of Indian Archaeology 1784-1947, (New Delhi: The Archaeological Survey of India, 1961)111-113.

¹⁵² See Thurston Shaw, "Whose Heritage?" 149 Museum (1986)45.

¹⁵³ Gansylmayr, H. et. al., "Study on the Principles, Conditions and Means for the Restitution or Return of Cultural Property in View of Reconstituting Dispersed Heritages," Museum 31(1979)63. Author's emphasis.

In a more theoretical approach, Edwina Taborsky suggests that the museum has created a kind of sociological "patent" on cultural objects, because it identifies, names and displays them, and thereby exercises a element of control over both the physical and intellectual property.¹⁵⁴ Clearly, it is ultimately the museum community that must reflect an international perspective and work towards both the codification of acceptable definitions of cultural objects as well as an appropriate philosophical framework in which to use that definition.

III Summary of the Current Situation

As a theory of long-term global stewardship, the principle of the common heritage of all mankind is not simply one extreme of the continuum that began with private inheritance and evolved into public assets. Nevertheless, in the twentieth century, it has struck a sympathetic chord in a number of other scientific, social and political themes dealing with interdependence, integration, conservation and egalitarianism at both the academic and popular level.¹⁵⁵

The concept has been formulated, named, aired internationally, and accepted "in principle" in some quarters

¹⁵⁴ Edwina Taborsky, "The Sociostructural Role of the Museum," International Journal of Museum Management and Curatorship 1(1982)344; see also Horne, op.cit.34.

¹⁵⁵ The environmentalist, anti-nuclear, civil rights and human rights movements, the Gaia theory of James Lovelock, the "North-South" Conferences and so on. See Prott & O'Keefe, Law and the Cultural Heritage, op.cit. 15 on the relationship of the West German "Green" movement.

as a worthy but somewhat idealistic goal,¹⁵⁶ but does the political will exist to bring it into practice and to include cultural objects as part of it? Is it possible to reconcile the inherent contradiction between this ideal and the practice of national sovereignty, which has been so avidly promoted by the very Organization that to date, has also been the most prominent in advancing the principle of the common heritage of all mankind?

An indication of the present level of acceptance of the common heritage of all mankind can be seen in the approach taken to basic human necessities - air, water and food. On neither a domestic nor an international scale does a clear communal right to these commodities yet exist¹⁵⁷. Foodstuffs are an integral element of the international market system; even with significant domestic legislation in place, pollution of the world's supply of air and fresh water is rampant.¹⁵⁸ Clearly, a common right to cultural objects is a much more distant goal; at best, there is slow, begrudging acceptance of the idea that modern States have an

¹⁵⁶ Williams, "Restitution" op.cit.119 and Prott and O'Keefe, National Legal Control, op.cit.128.

¹⁵⁷ Occasionally, in emergency situations, special action is taken to provide, distribute, subsidize or control food products for victims of natural disasters, famine, war, etc.

¹⁵⁸ Rosalie Bertell, No Immediate Danger? Prognosis for a Radioactive Earth, (Toronto: Women's Educational Press, 1984).

obligation to acknowledge if not a common right, then at least a common interest.¹⁵⁹

A solution urged by some interested parties¹⁶⁰ is State acceptance of the Hague and UNESCO Conventions, and support for the activities of the UNESCO Committee for Promoting the Return of Cultural Property or Its Restitution in Cases of Illicit Appropriation. However, the control and/or eventual recovery of cultural objects achieved by means of these international instruments or Committees must be understood as the recognition, by a "holding" State, of a claim or right which is extended (in most cases) to only one other State, and not to the community at large. These small steps towards the acceptance of the idea of global stewardship of cultural objects are still dominated by the issue of national sovereignty.

Another possibility calls for the elimination of inconsistencies in legal approach and the codification of national legislation. An international Convention adopting these new rules has been proposed. In turn, it requires additional implementing legislation at the national

¹⁵⁹Supra, Modern Era, New Legal and Political Theories, on the rights of future generations.

¹⁶⁰Notably by the International Council of Museums, which represents museum professionals in many countries; see Stetie, op.cit.116-118 and Williams, "Restitution" op.cit.128.

level.¹⁶¹

Ultimately, the effective integration of the common heritage of all mankind into the modern world requires both a philosophical foundation and a practical framework. The acceptance of the principle of accountability as the basis of obligation at an international level, and the integration of mechanisms for the protection of cultural objects into the economic fabric are the focus of Chapter Five.

¹⁶¹Prott & O'Keefe, National Legal Control op.cit. 137-142, Final Recommendations of a study commissioned by UNESCO.

CHAPTER FIVE - TOWARDS A SOLUTION

If the common heritage of (all) mankind is to survive, mankind itself must take steps . . . It is not a question of encroaching on the sovereignty of an individual State - as cultural property cannot be regarded as the exclusive patrimony of any one State.¹

The global stewardship of resources for the benefit of all is a relatively new aspect in natural law (or natural rights) theory; if it is to thrive rather than merely to survive, it must be successfully integrated into national policies and legal systems. This requires an acceptable legal/philosophical foundation capable of reconciling the issue of national sovereignty vis-à-vis an international regulatory regime, but more importantly, practical approaches which recognize the realities of our present international and interdependent economic framework.

Using the model described in Chapter Two as a guideline, the "outcomes" of some cultural policies based upon the prevailing legal approach will be reviewed.

I A Philosophical Foundation

The concept of the common heritage of all mankind is inherently international;² in its present global form, international law³ is a discipline still at a relatively

¹Williams, Protection, op.cit. 47/8. Brackets are the author's addition, and the order of sentences in the quotation is reversed.

²Lewis, "Return" op.cit. 439, illustrates this aspect vis-à-vis cultural objects when discussing difficulties in the designation of "country of origin."

³The Roman ius gentium - the law of all peoples -
(Footnote Continued)

rudimentary stage of evolution. The principle of precedent, for example, is deliberately avoided,⁴ although it is central to common law applications and is increasingly accepted and practised in civil law States.⁵ However, international law trails behind domestic legislation in another, more critical area.

A fundamental inquiry of natural law theorists of all periods concerned the basis of obligation for the legal system of the day. As noted earlier, the Greeks favoured human reason, medieval scholars evoked a divine, revealed law, and writers of the Enlightenment identified the sanction of reciprocity - which is still the basis of obligation in modern international law.⁶ However, the approach taken by most modern States has moved considerably beyond a simplistic, "might is right" retaliation to the

(Footnote Continued)

developed to settle disputes with peregrines - foreigners not entitled to the Roman Civil law; later, this code became confused with the Greek idea of natural law; supra Chapter Three, Ancient World. However, the ius gentium only ever applied to a relatively small portion of the world. International law today must cater to States with a variety of religious and/or legal traditions, (e.g. States with an Islamic tradition develop legal systems quite different from those with a Christian or Hindu tradition).

⁴ Statute of the International Court of Justice, Art. 59. See also Higgins, op.cit. 381, "The decision of the Court has no binding force except between the parties and in respect of that particular case."

⁵ Merryman, Civil Law op.cit. 25, "civil law recognizes only statutes, regulations and custom in that order - although this dogmatic conception is now eroded."

⁶ Brierly, op.cit. 59.

concept of accountability.⁷

A. Accountability as the Basis of Obligation

The accountability of the ruling authority for public property and activities was an attractive idea - even in antiquity.⁸ However, the modern manifestation of this approach allows a more effective scrutiny of government action by a significant proportion of the population.⁹

During the last quarter of the twentieth century, there has been some progress towards the acceptance of accountability as a valid basis of obligation for international law,¹⁰ but accountability to the global community presupposes both a loss of national sovereignty

⁷At the national level, perhaps the US "Watergate" incident was the most dramatic indication of the domestic acceptance of this principle. For an application specific to museums, see John Blaine, "Accountability to the Hand that Feeds You," Museum News 57:5(1979)34-6 and Marie Malero, "Museums are Accountable to Whom?" in A Legal Primer, op.cit. 19-42.

⁸The Roman (and later Medieval) principles of utilitas publicae, tutor regni, and patria parens all incorporated this ideal; supra Chapter Three, The Ancient World, and the Middle Ages.

⁹Factors affecting the modern version of accountability are: increased literacy and educational levels; participation in the political process and an universal franchise; the role of the media combined with improved communication, transportation and travel facilities; and perhaps most significantly, the use of computerization to provide efficient documentation and analysis of data.

¹⁰Williams and de Mestral op.cit 52, discuss the origins of the doctrine of positivism using the example of a newly formed State which agrees to be bound by international law as "external public law", and then go on to question if specific consent is withdrawn, can this obligation be considered to have ceased.

and the need for new political entities and/or international régimes to mediate and manage the burgeoning competition for resources.¹¹ Such issues have been explored theoretically¹² and, to a lesser degree, in practical terms.¹³ Originally associated with the economic/financial milieu, the notion first lent itself to a review of the inequalities in the distribution of natural and man-made resources.¹⁴ In the "conservation mentality" of the 1970's¹⁵, accountability transcended its former strongholds and came to include environmental and anti-nuclear concerns, and finally, heritage issues.

B. Accountability and Cultural Objects.

Many of the repatriation claims made since 1970 relate

¹¹C. M. Eichelberger, New Dimensions for the U.N. - Seventeenth Report of the Commission to Study the Organization of Peace, (Dobbs Ferry: Oceana, 1966)38, in discussing marine resources, long before the 1982 UN Convention on the Law of the Sea, recommended that resources should be brought "under unified management."

¹²Richard A. Falk, op.cit. on the the World Order Models Project (WOMP) which proposes a variety of new political formats.

¹³The European Economic Community, for example, has moved from trade agreements to a consideration of legal codification and monetary uniformity. "A Central Bank for Europe," Economist 307:7556(June 25,1988)11-12.

¹⁴U.N. involvement in the economic issues surrounding the deep sea bed and outer space, and the activities of the "Group of 77," supra Chapter Three, Modern Era; also the formation of regional groups for economic benefit, such as the European Economic Communities, and most recently, the US/Canada Free Trade Agreement concluded in January 1988.

¹⁵Sabine de Valence, "Natural Heritage and Museums: A Future for Tomorrow," ICOM News 40:1(1987)5-12.

to historic misappropriations that are generally beyond the relevant international Conventions and enabling domestic legislation;¹⁶ they occupy that problematic grey area where the basis of obligation is unclear. Under the guise of concern for: adequate facilities, professional staff or potential audience, holding States often take a "might is right" position, while requesting States cite ethical accountability as the overriding consideration.¹⁷ The Intergovernmental Committee charged with negotiating international requests for cultural objects operates in a conciliatory and advisory fashion to promote co-operation, but has little power beyond good offices.¹⁸

Nevertheless, at a popular level it is perceived that the protection of cultural objects is improving and the 1970 UNESCO Convention which expressly addresses the issue of illicit activities, is seen to:

symbolize a big change. . . and the ensuing
bi-lateral treaties (and domestic enabling legislation)

¹⁶ Articles 7(a) and (b) of the UNESCO Convention specifically state that the Convention only applies to cultural objects which have been illegally exported after the entry into force of this Convention in the States concerned.

¹⁷ Merryman, Elgin, op.cit. 1895-1903, contrasts these two positions and discusses "the morality of the removal" in relation to the Elgin Marbles; see also Shaw op.cit. 46-48.

¹⁸ Alma Robinson, "The Art Repatriation Dilemma," Museum News 58:4(March/April 1980)56 on the Intergovernmental Committee for Promoting the Return of Cultural Property or its Restitution in Cases of Illicit Appropriation.

have helped to tighten up security at customs.¹⁹

Since 1970 a heightened consciousness has generated a significant body of academic and popular literature, increased activity by the professional associations,²⁰ and a considerable volume of domestic and international legislation, with both direct and indirect²¹ application to cultural objects. Most significantly, the old adage that "the end justifies the means" has been found wanting.²² The secrecy which veiled both legal²³ and illegal transactions involving cultural objects has been pierced, and the

¹⁹"Arts - Collectors or Looters?" Economist 305:7520 (October 17/1987)117/8. In actual fact, it is painfully apparent that customs security is totally inadequate.

²⁰Patricia Ullberg, "What Happened in Greenville: The Need for Museum Codes of Ethics," Museum News 60:2 (November/December 1981)26-29.

²¹Prott and O'Keefe, Heritage, op.cit. 108, on indirect legislation "with important and not always intended side effects."

²²Stephen E. Weil, "Toward Greater Museums Integrity, The Snodgrass Sermon," 56-68, and "No Museum is an Island" 103-113, in Beauty and the Beast, op.cit. In these cases, "the end" was the acquisition of cultural objects by private or public collectors.

²³Beginning in 1985, the catalogues of major U.S. auction houses identified cultural objects consigned by public institutions for deaccession by sale. Although this represents the disclosure of a legitimate activity, it had not been practiced earlier. Christies' Special Services for Museums and Other Non Profit Institutions, (Toronto: undated leaflet.) On the other hand, the British Antique Dealers Association, in an undated 1988 brochure, Buying antiques with confidence, note "Clients wishing to buy or sell major collections and important antiques are able to do this discreetly and in complete confidence."

participation of "establishment" parties - prominent collectors, diplomats, dealers or museums - in questionable transactions is no longer safe from investigation, publicity and increasingly-prosecution.²⁴ Marie Malero notes:

objects that once passed silently in and out of museums are now the subject of national and international debate.²⁵

While international transactions will always be the thorniest problem, the issue of illicit activity at a domestic level must be approached as the first step towards the control of illicit international transactions.

1. Museum Abuse

One aspect of illicit traffic²⁶ is museum abuse. Not infrequently, public custodial institutions become the end recipients in a "food chain" of illegal suppliers - occasionally by accident,²⁷ but more often by design.²⁸ In

²⁴ Generally, diplomats have remained immune from prosecution, but there are an increasing number of cases involving dealers and museums.

²⁵ Malero, op.cit. xii. For a more popular perception, see "Arts - Unsold for \$1.3M" Economist 299:7450 (June 14, 1986)87, "the rules are changing . . . the mystique is going, going, gone."

²⁶ Another often forgotten aspect of illicit traffic is "official vandalism", see Sarkar, op.cit. 50-3 and 59-61, on both historical and contemporary examples; also Roger D. Stone, "Stop the Smugglers" Connoisseur 209:841(1982)14-18 on urbanization in Mexico.

²⁷ For example, the purchase by the Royal British Columbia Provincial Museum, Victoria, Canada (formerly the British Columbia Provincial Museum) of three objects stolen from the Carnegie Museum of Natural History, Pittsburgh, (Footnote Continued)

view of the heightened expectations about the performance of the public sector, such museums abuse their privileged position²⁹ by repeatedly soliciting as gifts, (loans, or purchases), cultural objects of known illicit provenance through known traffickers,³⁰ often in connection with fraudulent tax benefits.³¹ The volume of such "scandals" regularly reported during the past decade indicate little

(Footnote Continued)

USA, in 1980, through New York dealers, "In this issue.." Stolen Art Alert, 2:9(1981)1.

²⁸ Geraldine Norman and Thomas Hoving, "It was Bigger Than They Knew," Connoisseur 217:907(1987)78 note "the largest tax fraud scheme in U.S.history" involving cultural objects and fakes was described by the J.P.Getty Museum merely as a "serious violation of museum policy on donations," and Ted Gupp, "The King of Gems," in four parts, The Washington Post, March 27,28,29,30/1983 at page A1 on the tax fraud scheme at the Smithsonian Institution.

²⁹ As registered charities, even privately endowed custodial institutions in Canada, the UK and the USA may receive both State and private support, and are eligible to assist donors to secure substantial tax benefits. They sponsor exhibitions which often enhance the values of the loaned material, and may purchase or accept as gifts, cultural objects for which no other market exists.

³⁰ Geraldine Norman and Thomas Hoving, "The Getty Scandals," Connoisseur 217:904(May 1978)99-109, identified a museum curator, Jiri Frel, who recommended major acquisitions of suspect material from dealers and donors for over a decade.

³¹ Noted as early as 1974 by Pegden, op.cit.54. For more contemporary concerns, see Kevin Krajick, "Caveat Donor, the IRS is catching up with artful tax dodgers," Connoisseur 215:877(1985)58-64, and Sonja Tanner-Kaplash, "Museums Be Wary - how to avoid donations that bring the tax man and bad publicity," Museum Quarterly 16:2(1987)5-7,29-30.

evidence of serious measures to combat museum abuse.³²

It seems clear that such situations are less frequently reported in the UK, and given the voracity of the press, it might be concluded that there is less museum abuse of this nature in that country.

Official museum publications often deal coyly with the provenance of major acquisitions. Apart from a passing reference to a German dealer, the history of an important Hellenistic bronze acquired by a major US institution in 1977 was glossed over in typical "museumese":

the statue speaks for itself .. it must have been in the sea . . and spent a long time there.³³

Yet, shortly after its acquisition, the popular press revealed exactly when, where and how the piece was found, and identified the international dealers who organized the complex illicit transaction, which culminated in the highest price paid for a comparable piece to date.³⁴ One of them

³²The few exceptions are ambivalent: see Thomas Hoving, The Chase, the Capture: Collecting at the Metropolitan, (New York: Metropolitan Museum of Art, 1975)22-5 & 99 on the Metropolitan Museum's "Recommended Purchase Blank" as an example of an internal museum document intended to elicit relevant information from museum curators, and a model form letter inquiring "whether your ministry or service has any information concerning the provenance or previous ownership" of intended acquisitions, which requires a reply within 45 days - an almost impossible feat for many bureaucracies, especially those in art rich Third World countries.

³³Jiri Frel, The Getty Bronze, (Malibu: J. P. Getty Museum, 1982)3. The work is possibly by the 4th century BC Greek sculptor, Lysippos.

³⁴Bryan Royston, "Smuggled," Saturday Review of the
(Footnote Continued)

described his expertise and involvement:

Look, if I wanted to legally export the Pope and his diadem out of Italy tomorrow - two telephone calls . . would do the trick. . . If this statue hadn't been found by some people who wanted to make pennies and some other people came along . . who wanted to be rich . . . it would³⁵ still be lying in some cellar in Italy - rotting away.

Despite such public admission, this particular dealer³⁶ was courted by major museums for the next decade; parts of his large private collection³⁷ were given for tax benefits, sold, or loaned for special exhibitions to museums in Europe, North America and the Middle East.³⁸ A biographer

(Footnote Continued)

Arts 62:12 (March 31, 1979)25-30. The piece was found by Italian fishermen in the Adriatic in June 1964, and smuggled from Italy to South America to England to Germany, before purchase by the J. P. Getty Museum for US\$3.9M. Royston links the dealer Borowski to curator Jiri Frel.

³⁵ ibid.29/30. This interview was never contested or disclaimed by Borowski.

³⁶ Dr. Elie Borowski, now over 75 years old, was employed at a major Canadian institution 1948-58 following his emigration from post war Poland. During the next two decades, he became the leading dealer of near eastern antiquities in Basel, Switzerland, listed in Helmut Rauschenbush ed., International Directory of Arts, Vol.II. (Berlin: Deutch Zentralducherei Ag. 10th ed. 1969-70)67.

³⁷ Hershell Shanks, "Treasures from the Lands of the Bible," Biblical Archaeology Review, 11:2 (1985)26-38.

³⁸ Ladders to Heaven - Art Treasures from the Lands of the Bible, June 23 - October 28 1979, (Toronto: Lands of the Bible Archaeology Foundation, 1979) catalogue of an exhibition of near eastern cultural objects owned by Elie Borowski circulated to museums in Toronto, Calgary, Ottawa, Cologne, Tel Aviv and Jerusalem; sales were made to museums in Germany, and tax benefits were received from Canadian museums. Also, Cynthia Gavner, "Jerusalem Biblical Museum Approaches Completion Date," The Canadian Jewish News, September 29, 1988, page 3.

notes: "He knows that many modern curators regard the contents of his collection as plunder."³⁹

This is not an isolated example; unfortunately, many museum professionals focus attention on the issue of repatriation claims, (which often represent historic misappropriations) instead of the contemporary necessity of investigating sources - to help eliminate future claims.⁴⁰ Despite the "big change" symbolized by the UNESCO Convention, the incentive of financial gain for individuals and the acquisitive, "brilliant connoisseurship" mentality of major museums⁴¹ are still major blocks to the effective protection and control of cultural objects. The self-regulation called for by ICOM has not proven effective - as yet.

2. The Law - a Blunt and Expensive Instrument

Knowledgeable authorities are skeptical about the positive impact of the current international and national legislation, noting "the poor record of substantive

³⁹ Hershell Shanks, "Elie Borowski Seeks a Home for His Collection," Biblical Archaeology Review, 11:2 (1985)25.

⁴⁰ Ellis G. Burcaw, "A Museological View of the Repatriation of Museum Objects," Museum Studies Journal 1:1(Spring 1983)8-11.

⁴¹ Thomas Hoving, The Chase, op.cit. 40-56, on the (now infamous) acquisition of the Euphronios crater in 1972; the notoriety of this transaction led to the coining of the phrase "Hovingism" as a museum parallel to the French-coined "Elginisme." See also, "Getty's Aphrodite Purchase Raises Provenance Questions," Stolen Art Alert 9:7&8(July/August 1988)6-7.

accomplishment using a legalistic approach"⁴² and the "lamentable lack of any real progress towards checking such illicit traffic".⁴³ Clearly, the present approach⁴⁴ is inefficient; prosecution is expensive and far from timely, oftentimes sanctions are not applied,⁴⁵ and surveillance and documentation costs are prohibitive. Further difficulties stem from international transactions involving different legal systems and jurisdictions.⁴⁶

National cultural policies as reflected in legislation

⁴²Ellen Herscher, "International Council of Museums Adopts Code of Ethics," Journal of Field Archaeology 14(1987)213.

⁴³Keith Nicklin, "Rape and Restitution: The Cross River Region Considered," Museum 33:4(1981)259, Finlay, op.cit. 29, "the situation is far from reassuring to anyone who knows what is really happening," and Merryman, "Retention," op.cit. 478, "there is ample empirical evidence that retentive laws have not effectively limited the trade in cultural property, but have merely determined the form that traffic takes and the routes it follows."

⁴⁴For an excellent review of various legal and other control mechanisms (e.g. public education, involvement and recognition, incentives and rewards etc.) see Prott and O'Keefe, Heritage, op.cit. 330-343.

⁴⁵The 1983 export by Sotheby's (Canada) Ltd. of a suite of Charles Rennie MacIntosh furniture from Canada to Monaco for sale at auction without the required export permit was never prosecuted; the objects were later purchased by a Canadian museum with federal "repatriation" funds for approximately Can.\$600,000. Cultural Property Export and Import Act, Annual Report 1983/4, (Ottawa: Ministry of Supply and Services, 1985)13. A similar transaction was the official gift for the wedding of Prince Charles and Lady Diana Spencer, exported from Canada without the necessary permits. "Wedding Present Bed Finally Made Legal," Toronto Star, July 20, 1981 at A4.

⁴⁶Duboff op.cit. 37, and Chapter Three on lex situs and bona fide purchases.

often echo aspects of the "symbolic" 1970 UNESCO Convention. Its shortcomings were noted earlier;⁴⁷ however, the documentation of (State-owned) collections is particularly pertinent to the legal process and aptly illustrates the disadvantages of the present approach. Almost two decades after the introduction of the UNESCO Convention, bodies such as ICOM, UNESCO and the Intergovernmental Committee⁴⁸ must still urge the improved documentation of cultural objects to what is surely a "converted" audience - namely, the museum community.⁴⁹

Even with the demonstration of significant political will, (i.e. the existence of cultural policy and the allocation of resources), adequate documentation poses problems. In an affluent State, such as Canada, which supports a computerized facility for registering museum collections free of charge to users, less than 10% of the

⁴⁷ Supra Chapter Three, Modern Era.

⁴⁸ The Intergovernmental Committee for Promoting the Return of Cultural Property or its Resitution in Cases of Illicit Appropriation.

⁴⁹ ICOM 15th General Assembly, resolution #7, urges the improved documentation of museum collections, "Resolutions of the XVthe General Assembly of ICOM," ICOM News 39:4(1986)14; at the 5th Meeting of the Intergovernmental Committee, April 1987 . . . museums were requested to provide improved documentation, including photographs for objects at the time of registration; the Committee urged the speedy preparation of inventories for cultural objects held by museums and religious bodies. "Protecting the Heritage," ICOM News 40:2(1987)17.

total public collections⁵⁰ are entered into this inventory, after more than a decade of operation at a cost of approximately Can.\$3M per annum.⁵¹

Numerous writers have reiterated the doubts expressed by Norman Pegden over a decade ago, on the costs of implementing this aspect of the UNESCO Convention and the efficacy of the result.⁵² Yet in an interesting reversal, a major insurer announced in 1988 its intention to establish an international computerized register of stolen cultural objects, which will be available to certain selected

⁵⁰Price Waterhouse Associates, National Museums of Canada: Report on the Survey of Collections, Management Practices and the Uses of Technology in Canadian Museums. (Ottawa: National Museums of Canada, October 1985)5 estimates the total volume of public collections at 37,000,000.

⁵¹Jane Sledge and Betsy Comstock, "The Canadian Heritage Information Network," 7-16 in Museum Documentation Systems: Developments and Applications, R. B. Light, D.A.Roberts, J.D. Stewart eds., (London: Butterworths, 1986) and Challenges and Choices: Federal Policy and Program Proposals for Canadian Museums, (Ottawa: Ministry of Supply and Services, Cata.#CO 22-81/1988 1988)37, gives the 1987-88 operating costs for CHIN as Can.\$3.37M. The total number of entries in CHIN are reported at under 2,000,000, Guy Mathias, "Paris User's Training Seminar," Museum Quarterly, 17:1(1989)47, "the National Databases are woefully short of establishing a truly national inventory of collections."

⁵²Peter Gathercole, "Recording Ethnographic Collections: The Debate on the Return of Cultural Property," Museum 151(1986)197 and Pegden, op.cit.59. Also Theft of Cultural Property in Canada, (Ottawa: Interpol/Royal Canadian Mounted Police, 1986)2, "the often incomplete descriptions and the lack or poor quality of reproductions are a reflection of the type of documentation now available."

groups.⁵³ One might conclude that while the costs of documenting cultural objects in the most basic manner are prohibitive - even for wealthy States, when the possibility of revenue generation exists, these enormous expenses represent an attractive proposition for commercial organizations.⁵⁴ Clearly, an important consideration is how to defray the enormous costs of documentation as a stepping stone to better control of cultural objects.

3 Economic "Considerations"

Economic factors act as an incentive for illicit trade and as a disincentive for adequate controls; they now include a new facet - for transactions involving cultural objects have moved beyond the point where an advantage accrues only to individuals. There is increasing evidence of official exchanges between States which involve economic benefits at a national level.⁵⁵

⁵³ Deborah Shalowitz, "High Prices and Popularity Increase Fine Arts Risk," Business Insurance (October 10, 1988)30 describes a joint venture between the International Foundation for Art Research Inc., based in New York and a Lloyds of London broker, Hogg, Robinson and Gardiner Mountain PLC, for an international computerized art loss data base, "to stem the worldwide flow of stolen art."

⁵⁴ In 1988, the British Antique Dealers' Association initiated a "Consumer Information Service" as part of a new marketing strategy. It is not clear at the time of writing how much documentary activity is involved, but clearly profit-making organizations are entering into this field.

⁵⁵ Robinson, op.cit.55,58 & 59 cites the 1978 return of St. Stephen's Crown to Poland after 33 years in the U.S. since W.W.II was for "the stated purpose of goodwill and the
(Footnote Continued)

This may well represent the principle of the common heritage of all mankind at work, in that a larger public body secures a benefit. However, the intention here is merely to illustrate that economic considerations have long been a significant factor in negotiating official, legitimate transactions involving cultural objects, and to consider more innovative uses of that same factor to combat illicit activities.

A case in point was the 1970 bilateral agreement between Belgium and its former colony Zaire, which resulted in the return of more than 1000 ethnographic and anthropological objects from the Belgian Royal Museum of Central Africa to the National Museums of Zaire.⁵⁶ The agreement included the provision of certain conservation facilities, and training for African staff in Belgium. However, accounts of the return overlooked an important economic ingredient - while hardly of a museological nature - it helps to explain Belgium's interest in "maintaining good foreign relations with its ex-colony."⁵⁷

In 1975, Zaire was the world's largest producer of raw diamonds, and supplied 75% of the global requirement for

(Footnote Continued)
 apparent intention of enhancing trade relations." Author's emphasis.

⁵⁶ Huguette van Geluwe, "Belgium's Contribution to the Zairian National Heritage", Museum, 31:1(1979)32-37.

⁵⁷ Robinson, op.cit. 59, in reference to returns made by Holland to Indonesia at about the same time, as well as the arrangement between Belgium and Zaire.

metallurgical abrasives.⁵⁸ By the mid 70's Antwerp, long a major diamond trading and cutting centre, was also the hub of the fastest growing sector of the Belgian economy - mineral processing. Shortly after the 1979 return, Zaire broke away from the De Beers' South African diamond cartel to set up a new State agency, Sozacom, which then entered into marketing arrangements with two Belgian firms.⁵⁹

The 1971 Treaty of Co-operation between the US and Mexico⁶⁰ also illustrates economic incentive coupled with the protection of cultural objects. In return for greater vigilance by US authorities for illegal imports of pre-Columbian artifacts, Mexico's unspoken reciprocal responsibilities included co-operation in retrieving stolen US automobiles and especially, control of narcotic trafficking.

At the 12th General Conference of ICOM in 1980, a sophisticated computerized cartographic system designed for archaeological surveys was demonstrated to some delegates.

⁵⁸ In 1975, Zaire produced 12M carats (to South Africa's 7.5M carats), increasing to 17M carats in 1979. Most of the production was of industrial quality crushing bort; since then, synthetic substitutes have been developed to replace the natural product. Encyclopaedia Britannica, 15th ed.(1975) Vol.III:520.

⁵⁹ Johnathon Friedland, "All Eyes on Zaire's Game of Solitaire", South, 24(October 1982)58-63, identified the Belgian firms of Caddi and Glasnol, both of Antwerp.

⁶⁰ Treaty of Co-operation Between the United States of America and the United States of Mexico for the Recovery and Return of Stolen Archaeological, Historical and Cultural Objects, 1971.

Donated by the US to Mexico in 1978, and maintained at a military airport near Mexico City, the system used specially adapted photographic equipment mounted in an high altitude, recent model jet aircraft to generate maps of terrain and vegetation variations for areas as small as a few hundred square meters. The accuracy of foliage identification made this system an ideal tool for surveillance of illegal narcotic farms located in remote areas, inaccessible by road.⁶¹

Yet another variation on the theme was a significant commitment by the Canadian government to finance an (unsuccessful) four year legal battle to prosecute two US art dealers between 1980-84. Under the 1977 Cultural Property Import and Export Act, they were accused of illegally importing into Canada an ancient mother goddess figurine,⁶² missing from Nigeria since approximately 1960.⁶³

⁶¹Personal visit by the author on October 29/1980 as part of the ICOM International Committee for Documentation to the DETANAL Project (Direccion de Estudios de Territorio Nacional). The espionage usage was never officially confirmed, (neither was it denied, verbally, at the time) but the location of this "archaeological survey" equipment at a military installation instead of a civil airport, seems unusual.

⁶²The 13" terra cotta sculpture, dubbed "the Nigerian Nok" may date to B.C.900. It is from the earliest known Nigerian culture, named after a village in northern Nigeria, where it was first discovered.

⁶³The Canadian Act implements the UNESCO Convention. "Canada Seizes Nigerian Statue," Stolen Art Alert, 3:1(February, 1982)2, identifies this prosecution as "the first in the Western world to use the UNESCO Convention as
(Footnote Continued)

Nigerian authorities had monitored the piece since it was offered for sale in 1979 for approximately US\$500,000, anticipating its importation into a State party to the Convention.⁶⁴ At the outset, it was apparent that the evidence was probably insufficient for conviction;⁶⁵ however, the persistence and tenacity of the Crown (in its first prosecution under the Act) extended to three criminal charges and a civil suit for possession.⁶⁶

When counsel for the accused dealers protested that their clients were deliberately lured into Canada and entrapped because "Canada just loved Third World countries"⁶⁷ their allusion was not only to Canadian

(Footnote Continued)

an instrument in the return of important smuggled cultural property;" however, it was at least the second application of the Convention. Williams, "Recent Developments" op.cit. 119.

⁶⁴ ibid. 1, the Nigerian Director General of Antiquities had declined an offer to purchase the piece from the dealers.

⁶⁵ A. Caravella, "Canada Drops Civil Suit in Nok Statuette Case, International Foundation for Art Research Reports, (formerly, Stolen Art Alert) 6:7 (August/September 1985) 4, the Crown consulted a prominent Canadian lawyer specializing in art law in advance of the criminal cases, who advised against prosecution on the basis of insufficient evidence. See also Williams, "Recent Developments" op.cit. 120-1 for a detailed account.

⁶⁶ June 16/83, Alberta Provincial Court; March 1984, Appeal to the Alberta Court of Queen's Bench; October 1984, Alberta Court of Appeal.

⁶⁷ Linda A. Ketchum, "Canadian Cultural Property Case Judged," Stolen Art Alert 4:7 (October 1983) 2.

sympathy for a similar, art exporting "loser" State. In the early 1980's, revenues from its oil industry had enabled Nigeria to purchase cultural objects for repatriation;⁶⁸ naturally, other trading relationships escalated as a result of this newly available income. In 1980-1, Canadian exports to Nigeria had jumped by almost 250% over the previous year; while this represented a minor proportion of the total export trade, for a short time at least, Nigeria was perceived to be a growing market for Canadian raw materials and manufactured goods.⁶⁹

II Economic Measures in Domestic Legislation

What are some of the existing outcomes of cultural policy - as defined in Chapter Two - with economic overtones? Apart from sales and purchases, there are but a handful of economic measures defined in legislation that are associated with cultural objects; generally, these represent isolated and unintegrated attempts to control

⁶⁸ Lewis, Return, op.cit. 440 noted "Nigeria has recently been buying material on the open market."

⁶⁹ Statistics Canada, Exports by Countries, January - September 1981, (Ottawa: Ministry of Supply and Services, 1981) 8 & 145. Exports were primarily food products, minerals, steel and industrial equipment. By 1983-4, exports were reduced to less than half the 1980-1 volume.

and/or protect such objects.⁷⁰

Within the mandate of their acts of incorporation, 'some custodial institutions have attempted to generate funds by means of admission fees,⁷¹ disposals from the collections and even travelling exhibitions to generate foreign exchange.⁷² Such income is generally applied to acquisitions and exhibitions⁷³ rather than documentary activities.⁷⁴

Certain States - often those with a long history of plundered archaeological land or marine sites, provide some

⁷⁰ Prott & O'Keefe, op.cit. 110 "Rarely is there time and seldom the inclination to survey the whole of the law affecting this subject matter and to assess its internal consistency and also its compatibility with other laws in force."

⁷¹ Pierre Francois Oulette, "Admission Fees In Museums - A Discussion Paper," Muse 5:2(Summer 1987)44-5 which surveys a number of reports, including F.G. Burnett, The Raynor Scrutiny of the Department Museums: Science Museum and Victoria and Albert Museum. (London: Office of the Arts and Libraries, HMSO, 1982)28-31.

⁷² Geoffrey Wall and Chris Knapper, Tutankhamun in Toronto, (Waterloo: Faculty of Environmental Studies, University of Waterloo, 1981) on the direct and indirect economic impact of this exhibition circulated by the government of Egypt.

⁷³ Charles D. Webb, "Museums in Search of Income," in The American Museum Experience - In Search of Excellence, (Edinburgh: Scottish Museums Council, 1985)78.

⁷⁴ John Richardson and Eric Zafran, Master Paintings from the Hermitage and the State Russian Museum, (New York, M.K.Knoedler & Co., 1975) catalogue of an exhibition circulated to four US and one Canadian venue to raise foreign exchange to pay for US computer equipment for USSR museums, as reported in Ross Rogers, "A CHIN Above the Rest," Ottawa Magazine (March 1984)11-13. This USSR exhibition was clearly an exception to this trend.

compensation to finders,⁷⁵ and/or rewards to informers and government officials, as part of their antiquities legislation.⁷⁶ These rewards may be monetary, relative to the value or importance of the find, or based upon a standard formula or at the discretion of a government official. Non-monetary rewards may take the form of: a civil decoration or other award; some preference in the granting of excavation permits⁷⁷ and even ownership of objects not required by State custodial institutions.

A more usual economic response found in the legislation is the imposition of fines for prohibited activities, which may range from possession to failure to report an archaeological find promptly. However:

there appears to be no instance of criminal fines ... being specifically allocated by the State .. for the

⁷⁵ M.L.Nash "The Law of Treasure Trove and Treasure Hunters," New Law Journal 128(1978)1164, notes that in UK practice, "the authorities will return an item not required for national or other institutions and pay the full antiquarian value for those items retained" in spite of the fact that strict interpretation of UK law makes designated items of treasure trove the property of the Crown without compensation.

⁷⁶ U.S. Archaeological Resources Protection Act, 1979 [Sec.470 gg(a)] provides for rewards to informers equal to half the penalty or fine assessed. See also, Prott & O'Keefe, op.cit.216 on Turkey, Syria, Lebanon, Chile, and Equador with legislation providing rewards to police, customs and antiquities officers, and 341, on the the need for prompt payment of rewards.

⁷⁷ Prott and O'Keefe op.cit.214 on the granting of permits under the U.K. Protection of Wrecks Act 1973, to persons who find and report a wreck for designation; however, these excavations must be properly conducted under the requirments of the Act, by qualified persons.

improvement of public education, increased security measures or general administrative expenses.⁷⁸

A basic shortcoming of such approaches is that rewards represent an expenditure to the State; and fines rarely generate any surplus after surveillance, apprehension and court costs are considered. x

Although most cultural objects are now exempt from one of the oldest taxation measures - import duties⁷⁹ - taxation is still the major economic measure used by governments in connection with cultural objects.

A. Taxation

Minor examples include the tourist taxes or airport taxes levied in some States,⁸⁰ exemptions for custodial institutions from property or income taxes on generated revenue⁸¹ and some new, innovative examples, such as the purchase of university libraries by financial organizations as a corporate tax avoidance device.⁸²

⁷⁸ ibid. 351.

⁷⁹ Many classes of cultural objects are duty and excise tax exempt under tariffs designated for antiques or antiquities over a certain age, or as original works of (contemporary) art.

⁸⁰ Egyptian tourist taxes are directed to the Department of Antiquities, which administers museums.

⁸¹ Malero op.cit. 29

⁸² Steve Cameron, "Cash Short Universities Ponder Sale of Libraries." Toronto Globe & Mail, April 30, 1988, page A1-2, the universities retain possession and use of the cultural objects, which become depreciating assets for the "owner", usually a holding company which can write off a percentage
(Footnote Continued)

Sales taxes are not specific to cultural objects, and vary from State to State and even over time. In federal States, such as Canada, the USA, and India, this may be a provincial or state jurisdiction and vary internally. Within the EEC States, Value Added Tax is 15%, sales taxes tend to be lower in the other States surveyed. Nevertheless, the total volume of sales of cultural objects - in 1984/5, as high as £M750 in the UK alone⁸³, represents a substantial amount of tax; only a very small proportion of the total is purchased by public institutions.⁸⁴ It has been suggested that a surtax be applied to sales of cultural objects originating in the Third World,⁸⁵ but it is clear a discriminatory tax of this kind would be almost impossible to administer.

B. Tax Benefits

However, tax benefits for donors of cultural objects to public institutions - a scheme originally introduced by

(Footnote Continued)

loss at year end. This practice has since been banned in Canada.

⁸³ John Myerscough, The Economic Importance of the Arts in Britain, (London: Policy Studies Institute, 1988) 217, breaks down the total as: dealers associations - £484M, auction houses and re-exports - £220M, contemporary artists and crafts - £43M and overseas remittances - £7M.

⁸⁴ The U.K. National Heritage Memorial Fund disbursed only £M8.7 to public institutions for purchases in 1987/8.

⁸⁵ Shaw op.cit. 48.

governments to encourage philanthropy in general,⁸⁶ is now a major vehicle to assist the limited purchasing power of museums in their efforts to augment the public heritage.⁸⁷ It has also become a significant public cost, in the form of funds not collected by a State Treasury. The "enlightened tax concessions"⁸⁸ available in North America, which generally favour benefits for living donors, are in contrast to the British system, which by and large, provides benefits in the form of conditional exemptions to legatees.⁸⁹

Some results of such tax measures have been noted in Chapter Four. The huge volume of cultural objects acquired by custodial institutions through these "passive" collecting methods is frequently at odds with "the

⁸⁶ Geoffrey Lewis, "Heritage Giving Through Taxation," paper given at Legal Aspects of the International Art Trade, 2nd Symposium, Geneva, 14-16 April, 1988. Unpublished ms., notes that tax benefits were first introduced in U.K. in 1894, and later in North America.

⁸⁷ Pegden op.cit. 54.

⁸⁸ Finlay, op.cit. 45.

⁸⁹ For details on Canada: Gifts in Kind, Income Tax Financial Seriesu, (Ottawa: Revenue Canada Taxation, 1985); for USA: Gifts of Property: A Guide for Donors and Museums (Washington: American Association of Museums & the Association of Art Museum Directors. 1985); for UK: Charles King-Farlow, "Capital Taxation and Heritage Reliefs," International Journal of Museum Management and Curatorship, 5(1986)81-83 and Peter Longman & Heather Wilson, "Tax Incentives - Can Museums Benefit?" A paper given at the British Museums Association Annual Conference, Birmingham, July 16/85. (London: Museums and Galleries Commission, 1985).

purposeful selection"⁹⁰ mandate of such organizations.

Instead of receiving choice or even desirable items, public bodies are obliged to store, insure, conserve and document acquisitions which could be unsuitable for display or study - often in an effort to avoid offending existing or prospective donors.⁹¹

It is notable that States without such tax benefits (i.e. Mexico and India) do not lack significant public collections of indigenous cultural objects.⁹²

C. The Benefits of Tax Benefits?

The total value of cultural objects donated to public institutions for tax benefits is difficult to calculate, because government reporting procedures amalgamate charitable donations of all types.⁹³ However, the Canadian

⁹⁰ Burcaw op.cit.8.

⁹¹ Lee Rosenbaum, "The Care and Feeding of Donors," ARTnews 78:9(November 1978)97-105. Montias, op.cit.30 on cultural objects which "end up in places which have no need for them" and Sarah Jane Checkland, "Are Galleries Too Gullible?" The Times, October 3, 1988, page 12, on the British Rail Pension Fund collection on 20 year, long-term loan to a number of public insitutions for over a decade, which was suddenly withdrawn and sold in 1988.

⁹² Admittedly, there may be shortages of specific types of museum quality material, see K. C. Aryan, Folk Bronzes of North Eastern India, (Delhi: Rekha Prakashan, 1973)10 on folk bronzes, which had been somewhat ignored by Indian museums in the past, and their present scarcity due to "junk sellers who either damaged them or melted and sold them to the coppersmiths".

⁹³ Richard M. Bird and Meyer Bucovetsky, Private Support for Universities, (Toronto: The Commission on the Future Development of the Universities of Ontario, 1984)6 on the

Cultural Property Review Board Annual Reports break out some figures; in 1984/5, donations totalling Canadian \$21M were certified under the Cultural Property Export and Import Act 1978, a figure which escalated to over \$35M just three years later.⁹⁴

In the USA, with ten times the population of Canada, a pattern of serious abuse related to such donations has been documented. In 1984, 94% of the valuations reviewed by the U.S. Internal Revenue Service Art Advisory Panel were judged fraudulent: 70% were overvalued items donated to public institutions and 24% were undervalued for probate purposes.⁹⁵ In that same year, the US Tax Reform Act was introduced to counteract this trend. With an expanded membership, and stronger penalties and regulations, the Panel more than doubled its previous case load to police the

(Footnote Continued)

difficulty of reconciling official government statistics with information from other sources, such as the Canadian Center for Philanthropy. While it is possible to separate contributions made to the various types of charitable organizations (i.e. religious, educational, medical, cultural etc.) gifts in kind, and gifts of cash or securities, are not distinguished.

⁹⁴ Annual Report, 1984/5, Cultural Property Export and Import Act, (Ottawa: Department of Communications, 1985)36 and Annual Report, 1986/7, Cultural Property Export and Import Act, (Ottawa: Department of Communications, 1987)34. These figures do not include cultural objects that were not eligible for certification, and were donated directly to custodial institutions for a lesser tax benefit.

⁹⁵ Lee Rosenbaum, "Can the Art World Live with the Tax Reform Act?" ARTnews 86:1(January 1986)96-102.

problem - at no small cost to the State.⁹⁶ There have been similar experiences in Canada,⁹⁷ where an official report notes "an independent review suggests that overevaluation is a problem."⁹⁸

Clearly, tax benefits for donors are a poorly regulated venture into the economic milieu, largely because public custodial institutions have not taken their responsibilities very seriously.⁹⁹ In fact, such measures are now considered "regressive", for when one individual artificially lowers his tax contribution, someone else's must be higher."¹⁰⁰

Tax reform has been called for repeatedly in those States with the most experience in this area. The UK

⁹⁶ In 1983, the Panel reviewed 905 donations in excess of US.\$20.000; in 1984, this jumped to over 2000 reviews and included lower valued objects. See also, Determining the Value of Donated Property, (Washington: Department of the Treasury, Internal Revenue Service Publication 561, revised December 1987)9-13.

⁹⁷ Arnott and Tanner, op.cit.118 on the 1975 "Doctors Trial" and Tanner-Kaplash, "Museums be Wary," op.cit. 5-8 on the 1985 Conn case. Both Canadian cases involved unsupportably high valuations for donations of cultural objects to public institutions; in the interim, a large number of cases have been settled out of court. Also, Bird & Bucovetsky, op.cit.31 on abuses in the Canadian Cultural Property Review Board process which allows "considerable room for collusion between donor and donee."

⁹⁸ Summary and Evaluation Report - Movable Cultural Property Program, (Ottawa: Department of Communications, Program Evaluation Branch, September 1988)6.

⁹⁹ Malero op.cit.247-50 on "The Museum's Position Regarding Donor Deductions" and Lee Seldes, "Museums and Corruption," Saturday Review of the Arts, (July 1981)10-14.

¹⁰⁰ Rosenbaum, "Tax Reform Act," op.cit. 102 cites Lawrence White, of the New York State University Graduate School in Business Administration.

Wealth Tax, proposed in 1974, would have affected only about 1% of the population in respect of cultural objects;¹⁰¹ but it was soundly defeated. There have been demands for tax reform more recently in the USA.¹⁰² and some reforms have been implemented recently in Canada and the USA,¹⁰³ but in both instances, this applies to the manner in which benefits are calculated, rather than to any radical reconsideration of such tax shelters. The museum community has been reticent to comment on the issue, largely because acquisition via tax benefits is the only alternative to dwindling purchase funds.¹⁰⁴

Ironically, it is the affluent States¹⁰⁵ that prefer to

¹⁰¹ Hugh Jenkins, "Ministerial Address at the 81st Museums Association Annual Meeting, Museums Journal 75:3(December 1975)106-7 also suggested that some of the proceeds of the Wealth Tax might go to museums.

¹⁰² Alan Feld, Michael O'Hare and J. Mark Schuster, Patrons Despite Themselves - Tax Payers and Arts Policy, (New York: New York University Press, 1983)43 recommended that tax deductions be replaced by a tax credit system; earlier publications called for similar reforms: Presidential Task Force on the Arts and Humanities, (Washington: U.S. Government Printing Office, 1981)19 and Advancing the Arts in America (Washington: National Council on the Arts, 1981)18.

¹⁰³ Canadian Tax Reform 1987, (Ottawa: Department of Finance, 1987)33 implements a system of tax credits instead of deductions from taxable income, for donations of cultural objects.

¹⁰⁴ Ashton Hawkins, "The Collapsing Safety Net", Apollo 128:32(November 1988)342 describes tax reform as "eroding tax incentives for charitable giving."

¹⁰⁵ Tax benefits for donations in kind of cultural objects to public institutions exist only in Canada, the U.K. and the U.S.A.

have custodial institutions acquire collections in this indirect manner, rather than providing adequate acquisitions funds.

In summary, it is evident that while tax benefits to donors have encouraged the movement of a significant volume of cultural objects from the private to the public sphere, it has also encouraged another version of the illicit market, one that often operates with museum compliance.¹⁰⁶ This system, which represents significant costs to States in terms of lost revenue and generates absolutely no funds to finance the large influx of museum acquisitions⁷ or to set up documentary or regulatory machinery. Clearly, more innovative alternatives are needed, for which models have long existed.¹⁰⁷

III A Practical Framework

The large legal market for cultural objects has long been part of the international economic fabric, and the apparently irreversible monetization of cultural objects in

¹⁰⁶ David Federman, "Tax Shelters - Who Gets Burned," Jewellers' Circular-Keystone, (May 1980) 49-56 "investigators frequently depend on museum curators as key advisors on the . . . value. . . but curators too have a vested interest."

¹⁰⁷ For example, Akreba-Abaza, op.cit. 17, notes the usual, although not obligatory, condition which accompanies donations (including gifts of cultural objects) made "to please Allah and to serve the people" under the Islamic legal tradition of al waqf, "in order to accomplish the purpose for which they are donated, it is necessary to generate some sort of income to maintain and assure their good condition. Therefore, these donations are often accompanied by houses, land or shops that generate income . . . "

the twentieth century has motivated a possibly larger, illicit market,¹⁰⁸ which is both growing and interfacing to an increasing degree with the legal milieu.¹⁰⁹

As noted in Chapter Two, the "protection" of cultural objects really means control - which requires a combination of documentation¹¹⁰ and regulation; in turn, this entails substantial administrative costs, and often the strenuous political opposition of groups with vested interests.

Leonard Duboff notes:

The art market is largely unregulated. Unlike more traditional forms of investment, which are regulated by statute and policed by administrative agencies, there is no comprehensive body of statutes specifically designed to prohibit manipulation or deceptive practices in the art market.¹¹¹

Even with the presence of considerable political will, States find it difficult to assign priority to a relatively

¹⁰⁸ Martin Bailey, "Register Considered as Deterrent to Art Theft," Toronto Globe and Mail, April 9, 1988 page C15, estimates the current worldwide total value of stolen art over US \$400M annually, and notes that British collectors and museums are particularly affected.

¹⁰⁹ Museums are often the ultimate destination of this interface.

¹¹⁰ Malcolm H. Weiner, "Implementing the Convention on Illicit Traffic in Antiquities, Proposals Past and Prospect," Art Research News 2:1(1983)3-7 discusses difficulties in settling international claims, (such as Mexico's claim in the McClain case, see McAlee op.cit.) and questions whether an art exporting nation can claim title to objects which were previously unknown to it, emphasizing the need for efficient documentation of both state and privately owned cultural objects.

¹¹¹ Duboff, Art Law, op.cit. 45, writing on art as investment.

non-essential area¹¹² that does not generate revenue for the State, for:

the cost of protecting cultural property .¹¹³
is so great that few nations can afford it.

Economic factors are a truly pervasive force and should be recognized, accepted and used in innovative and creative ways, to generate revenue for protective measures for both public and private collections. These measures should include public education,¹¹⁴ (for example, incentive and reward programs as appropriate) as well as the enforcement of legislation, surveillance costs for unprotected sites and the inevitable expenses of documentation.

The most effective controls for existing abuses may very well be to integrate the present legal foundation with a much more economic approach.¹¹⁵ For example, where legal

¹¹²The protection of cultural objects is hardly an election issue for governments, and tends to be championed by non elected officials in the appropriate ministries. Sandra Gotlieb, "The Bleeding of Canada - and how a most unusual civil servant applied a tourniquet," The Canadian, (November 4, 1978) 25-27.

¹¹³Duboff, Art Law, op.cit. 11, presumably in reference to public collections only.

¹¹⁴Public education is considered by most experts as the most essential and far reaching control mechanism. "with enough education, it may some day become socially unacceptable to own a prehistoric artifact." Carol Ann Basset, "The Culture Thieves," Science 86:4(1986)29.

¹¹⁵Montias, op.cit. on an economic approach, (using an auction system), to establish values for donations of cultural objects to museums and galleries in the U.S. for tax benefits, to replace the current abuses in the appraisal process.

prosecution is necessary, it should entail minimal costs to the the State; illegal ownership, import or export transactions are often difficult and expensive to prosecute, but non-compliance with a simple regulatory measure, such as licensing, is a more straightforward matter. An economic cultural policy of this nature will be explored in Chapter Six.

CHAPTER SIX - CONCLUSIONS

The preservation of the cultural heritage should be responsive to new situations, tendencies and needs.¹

The questions concerning both the existence and propriety of the philosophy of "the common heritage of all mankind" have been addressed to a large extent, by history. For this ideal, with certain roots in antiquity, has survived and blossomed - in a theoretical sense - in the twentieth century, but at almost every turn, it is defeated in practice.²

The international concern for the cultural heritage is part of this trend; after warfare and natural disasters, illicit traffic has been identified as the most serious risk relative to the protection of cultural objects today.³ The issue of historic misappropriation, while not unrelated, is not featured in the following proposals - although, as noted earlier, economic considerations often play a part in international repatriation negotiations. To further the application of the philosophy, a successful resolution of theory and practice must not only incorporate - but perhaps

¹Final Report of the Intergovernmental Conference on Cultural Policies in Asia, Yogyakarta 1973, (Paris: UNESCO, 1974)16, Conclusion #2.

²Supra Chapter Three, Modern Era, Management of Natural Resources, on the 1982 United Nations Conference on the Law of the Sea for a general application of the philosophy.

³R. Wallace Stuart, "Missing Links," Art Research News 2:4(1983)9-11; also Williams, The International and National Protection, op.cit. for a full discussion.

be based upon - acceptable economic solutions,⁴ which in turn must function at a domestic level.⁵ As noted in Chapter Four, it would be ideal if cultural property were somehow exempt from the influences of monetization, but it clearly is not.

I. An Economic and Domestic Focus

An economic approach requires that benefits be made available to the most numerous and/or the most powerful of the interested parties.⁶ In common law States, for example, the purchaser or donee who in good faith acquires stolen cultural objects enjoys little or no protection under the law - and may be subject to an economic loss. Admittedly, this affects only a relatively small number of often wealthy and powerful private, public or corporate collectors, (including dealers), who could benefit directly from protective measures.⁷ But, the taxpaying public - a much

⁴Calabresi and Melamed, op.cit.31. "For, unless the redistribution of property is accompanied by a major shift in political ideology, westernized legal systems have treated disequilibrium in the established order of property distribution as a situation deserving of compensation in one form or another."

⁵While "domestic" is normally limited to a single State, the EEC countries which are moving towards certain harmonized operations, will likely soon qualify under this definition. See "Risks for Movable Cultural Heritage in Open European Market," ICOM News 41:3(1988)17.

⁶Prott and O'Keefe, op.cit.15-27 on their assessment of a wide variety of interest holders, although the insurance industry, a major stake holder, vis-à-vis the illicit market has been omitted.

⁷Burnham, Art Theft, op.cit.53 on the concerns of
(Footnote Continued)

larger group - would become the indirect beneficiary of protective measures for cultural objects if, for example, costly and time-consuming legal actions could be avoided.⁸ Since State governments are instrumental in providing measures to regulate transactions in a general sense, economic considerations vis-à-vis cultural objects specifically must include the generation of sufficient revenue to cover any associated costs.⁹

While one key to the problem is economic, another is the assumption of responsibility at a domestic level.¹⁰ Historically, culture has been divisive - setting peoples and States apart from one another by emphasizing their

(Footnote Continued)

professional dealers about receiving stolen cultural objects; and Merryman, "Retention" op.cit. 483-4, notes 16 & 17, on good faith purchases and the "imposing power of ownership" in U.S. decisions; see also Crewdson, op.cit. 47-59.

⁸ In some cases, the State that assumes the court costs for legal actions may not even have nationals as parties to the case. See "Indian Givers, Art and Auction (April 1988) 44 on the Bumper Development Corp. of Alberta, Canada, which acquired an illegally excavated and exported Indian sculpture in 1981. When the Government of India et al. sued for the return, the case, heard in London, England, took 44 working days spread over 5 months.

⁹ Roy Strong, "Scholar or Salesman - The Curator of the Future," Muse 6:2(1988)16, on future directions for European museums, (as the traditional custodians of cultural objects), notes "the irrevokable shift towards revenue generation" and Merryman, "Retention" op.cit. 510 on the support of a professionally operated cultural property management program.

¹⁰ The (first) Intergovernmental Conference on the Institutional, Administrative and Financial Aspects of Cultural Policy, Venice 1970, op.cit. focussed on the roles and responsibilities of the State.

differences; only very recently has culture, including material culture, been viewed as a unifying force for internationalism. This occurred precisely because culture was perceived as an apolitical, non-commercial activity that posed few risks to existing international arrangements. However, as noted in Chapter Four, the greatly increased economic value and politicization of cultural objects, as well as the gradual criminalization of offences connected with them, make international experiments in the protection of cultural objects more difficult. This heightens the need for economic action at a domestic level.

Admittedly, an economic and domestic emphasis in seeking a solution appears to slip into the conceptual cul de sac of nationalist heritage, vis-à-vis a more internationalist - common heritage of all mankind - view. This issue was discussed in detail in Chapter Five; nevertheless, the inherent risk may be worthwhile if cultural objects could be efficiently protected at a domestic level as a first step towards an international goal¹¹ - reflecting the slogan of the environmentalist movement, "think globally act locally." As John Henry Merryman has noted, "the international rhetoric, by pointing the finger abroad,

¹¹ Merryman, "Retention" op.cit. 501, on an evaluation of reasons for a nationalist stance, including "opportunity preservation" i.e. the retention of cultural property within state boundaries in the hope that it will move from the private to the public sphere.

diverts attention from failures at home."¹² What specific measures might best encourage the idea of a public heritage - both domestic and international?

A. Disclosure

It is reasonable to assume that the trend towards greater accountability which gained great momentum around 1970 - within the custodial¹³ and dealer communities, (often, but not always at the instigation of governments¹⁴) will continue as a domestic response to the protection of cultural objects particularly from illicit transactions. In fact, this is increasingly evident in the private sector.¹⁵

¹²ibid. 510.

¹³ Jack Foss, "Let's Kill all the Lawyers - Registrars, Law and Ethics," in Mary Case ed., Registrars on Record: Essays on Museum Collections Management, (Washington: American Association of Museums, 1988)130-142 for a summary the development of accountability in U.S. museums.

¹⁴ In the U.K. this call for the accountability of museums began as early as 1912, The Second Report of the Parliamentary Public Accounts Committee, (London: HMSO, 1912)539 sec.5) recommended "store audits" for the National Museums and Galleries. A recent document is Management of the Collections of the English National Museums and Galleries, Report by the Comptroller and Auditor General, (London: HMSO 1988) and its sequel, Management of the Collections of the English National Museums and Galleries, House of Commons Committee of Public Accounts, First Report, London: HMSO, 1988.

¹⁵ See "Code of Practice of UK Fine Art and Antiques Trade Members" in International Sales, op.cit. 667-8, and Michael Fritz, "Heads They Win, Tails You Lose," Forbes, 142:13 (December 12, 1988)260-2 on numismatics - "the fastest growing speculative investment area" and the U.S. based grading services which rate the condition and rarity of coins independently of the dealer community.

Cultural objects - as heritage - can only be public if they are openly and notoriously known.¹⁶ Reference was made earlier to the "mystique" that traditionally surrounds transactions associated with cultural objects. The principle of disclosure is applied to personal inheritances, in that probated wills become public information, registered and documented by the State for the purpose of taxation, with associated costs largely assumed by beneficiaries, in a "user pay" manner.¹⁷ If they are truly to be part of the public heritage, cultural objects require a similar or parallel status,¹⁸ so that documentary and regulatory machinery can be funded by a predictable source of revenue and will be considered necessary, rather than as an optional "frill".

An improved regulatory net at the domestic level

¹⁶ This concept is featured in legal principles; for example, Anglo-American statute of limitation legislation requires possession to be "open and adverse"; that is, actual, visible, exclusive and continuous. See Malero, op.cit. 66.

¹⁷ Probate taxes and registration fees generate revenue to offset administrative costs to government; the beneficiary often assumes additional legal fees.

¹⁸ Certain data about cultural objects held by public custodial institutions is still not available to the general public. Under the Canadian Access to Information Act, 1987 and U.K. Data Protection Act, 1984 (both on computerized information held by organizations, including museums), the disclosure of data about an individual to third parties, (e.g. donor and vendor data requested by a member of the public or press) is restricted. See also, S. G. Jones and D. A. Roberts, The Data Protection Act and Museums, Cambridge: Museum Documentation Association Occasional Paper #8, 1985)

will not catch all wilful (or unintentional) abuse, neither will it generate a great deal of revenue in the short term, but this approach will provide funds and mechanisms for the creation of adequate records of not only public, but also corporate and private collections of cultural objects.¹⁹

Regulatory measures would offer governments an opportunity to control cultural objects, and have the costs shared by those who presently benefit most from illicit trafficking. In turn, this would help to identify and regulate dealers, especially those repeatedly involved in illicit transactions,²⁰ and thereby achieve one of the aims of the 1970 UNESCO Convention.²¹

¹⁹The groundwork has been laid by computer programs pioneered in the UK, USA, Canada, and Mexico after 1964 to document large volumes of cultural objects held by public institutions. Recent contributions include Frederick Granger and Stephen Alsford, The Canadian Museum of Civilization Optical Disc Project - A Report, (Ottawa: National Museums of Canada, 1988) on a technique which links a textual record to an image. There are also the stolen art data banks managed by police, commercial and private organizations, such as the International Foundation for Art Research Inc.

²⁰Stolen Art Reports published by the International Foundation for Art Research Inc. since 1980 very clearly indicate dealer collaboration as a major problem. Linda E. Ketchum, "Galleries Victim of Fraudulent Consignment Scheme," Stolen Art Alert 4:8(November 1983)2-5 reports the more unusual case of a dealer preying on other dealers rather than the public.

²¹"A World Decade for Cultural Development," UNESCO News, 167(December 2, 1985)3 advocates "the promotion of standard setting actions with a view to the application in member States of the international instruments adopted by UNESCO . . ." First proposed in 1982 at the World Conference for Cultural Policies in Mexico City, organized
(Footnote Continued)

B. Regulation and Revenue Generation

Appropriate levels of legitimate trade in a controlled environment are the best deterrent for a "black market".²² However, it is rarely recognized or admitted that many cultural objects, "having been divested of their intrinsic, primary purpose"²³ have become scarce resources, luxury goods, and investment commodities - for which regulation and substantial taxation has been the rule, rather than the exception - throughout history.

Today, governments require certain manufactured items (usually those of some value) to be uniquely identified by registered descriptions, serial numbering,²⁴ the authorization of registered sales under license and a continuing record of ownership, perhaps by means of an annual licensing procedure or the required registration of changes of ownership. Automobiles are the most obvious

(Footnote Continued)

by UNESCO, the "Decade" was not proclaimed until 1986 in U.N. Resolution 41/187.

²² Mexico is an example of a State with repressive legislation which has encouraged illicit activity; see Gillett Griffen, "Collecting Pre Columbian Art," Art Research News 1:2(1981)9 "with the presidency of Luis Eschevarria, the lid was clamped down . . . it was a time of confiscation, seizure and intimidation. . . during which great quantities of art left Mexico." See also, Merryman, "Retention," *op.cit.* 509 on the black market.

²³ de Varine, op.cit. 152.

²⁴ More sophisticated measures are available today, e.g. machine readable magnetically encoded identification, now used for international credit cards.

example, but many more exist.²⁵ Often, a processing fee, surtax or luxury tax is applied, which covers administrative costs and may generate substantial revenue.²⁶ Often a "fee for services" relationship exists, in that the State is perceived to provide a service either to the owners of such commodities, or to the public at large.

But where could the registration of cultural objects start? At what point do cultural objects "surface"? Where is control both necessary and possible? And where can States with limited resources most easily prevent illicit transactions in the making, and better control legitimate trade?

To date, the primary focus of control is still the import/export interface,²⁷ (and to a much lesser extent,

²⁵ Air, land and sea vehicles of all types; firearms and offensive weapons; toxic chemicals, alcoholic and tobacco products, medical and non medical drugs; communications devices; computerized data; gold, other precious metals, currency and investment securities are all examples of commodities that most States register in some form. In emergencies, even everyday commodities such as food, fuel and clothing may be regulated or rationed. Most States also require that transfers of land be registered, and records of untransferred land are maintained by means of property taxation.

²⁶ For a precedent to this approach, see George J. Church et al., "Thinking the Unthinkable," Time 13:22 (May 30/1988) 14-20 on the generation of revenue to control drug abuse in the U.S.

²⁷ Legislation may require export permits for certain classes of cultural objects; exports are usually designated under a tariff-free classification for "antiques", i.e. cultural objects over a certain age. Generally, customs officials are not well trained in cultural object

(Footnote Continued)

site control and acquisitions by public institutions), but many other areas are more easily monitored. The commercial relationships between dealers, appraisers, shippers, conservators, insurers and collectors (private, corporate and public) and possibly their tax accountants and lawyers, provide a starting point. By involving the various participants in the present economic system with specific reporting responsibilities, it would be possible to establish an "audit trail"²⁸ of important cultural objects, in much the same way as the transfer of real estate is public information which involves, (depending upon the jurisdiction), real estate agents and appraisers, lawyers, municipal registry officers, land transfer tax officials, and possibly financial institutions.

Clearly, there is wealth of experience in the regulation and thereby, the "protection" of other types of property and - incidentally - its owners, which could be adapted and applied to cultural objects, especially to high value items.²⁹ Regulation of such cultural objects

(Footnote Continued)

identification, and while the permit application procedure may provide certain safeguards, actual enforcement at State borders tends to be erratic at best.

²⁸ This North American accounting term refers to an up-to-date record of funds and locations; in the context of museum collections management, it refers to the identity and location of cultural objects. See Sonja Tanner-Kaplash, "The Royal Ontario Museum, Toronto," in Museum Documentation Systems, op.cit. 26.

²⁹ "High value" need not necessarily be limited to cultural objects of great monetary value, although these
(Footnote Continued)

would provide some protection for the private collector, who is often forgotten as the ultimate source of most public collections.³⁰

II Opportunities for Museums

Public education - as an aspect of disclosure - is a long-range strategy which requires significant time for any demonstrable results, yet it is clearly the most basic building block in the defence against illicit activities. Many government sponsored publications, while well intentioned, are somewhat inadequate, (Fig. III).³¹ Clearly, there is a logical role for museums to assist governments to improve such material, as well as to undertake other initiatives.

A. Public Education as Disclosure

One opportunity is for museum staff to contribute to the popular media on a regular basis, rather ^{than} limiting

(Footnote Continued)

might form the largest proportion. Occasionally, a relatively low value object might have especial importance for a specific State or region. Some States already have mechanisms in place to designate such objects in the event of applications for export permits or tax benefits.

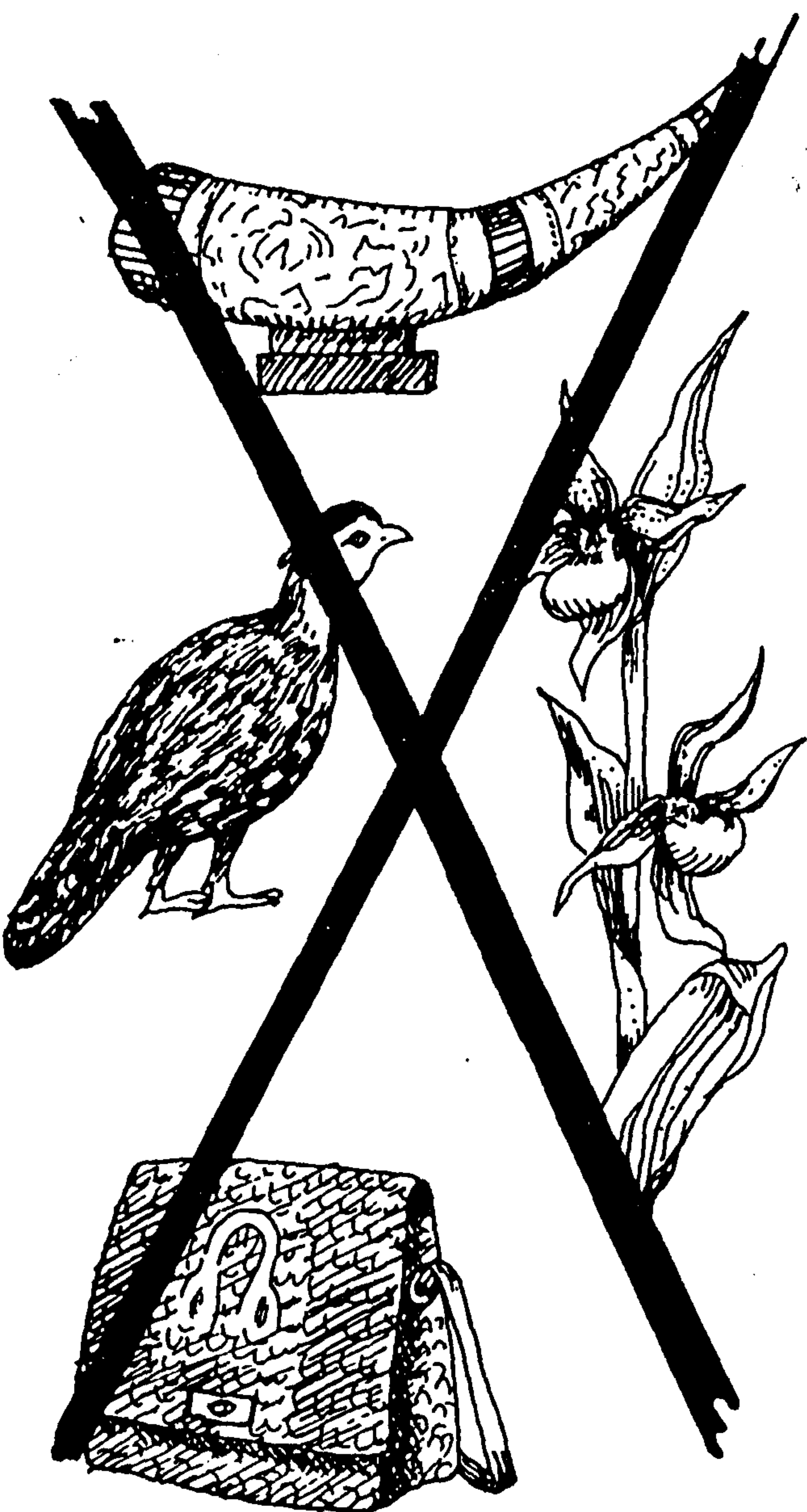
³⁰The Standing Commission on Museums and Galleries, Tenth Report 1973-77, (London: HMSO, 1978)7.

³¹Such publications may be too general, as in the example illustrated (where "birds" are listed as an endangered wildlife species, presumably under the CITES Convention), for which export in whole or in part is banned; other material is too technical for the average tourist or layman.

FIGURE III

An example of government sponsored public education/relations literature.

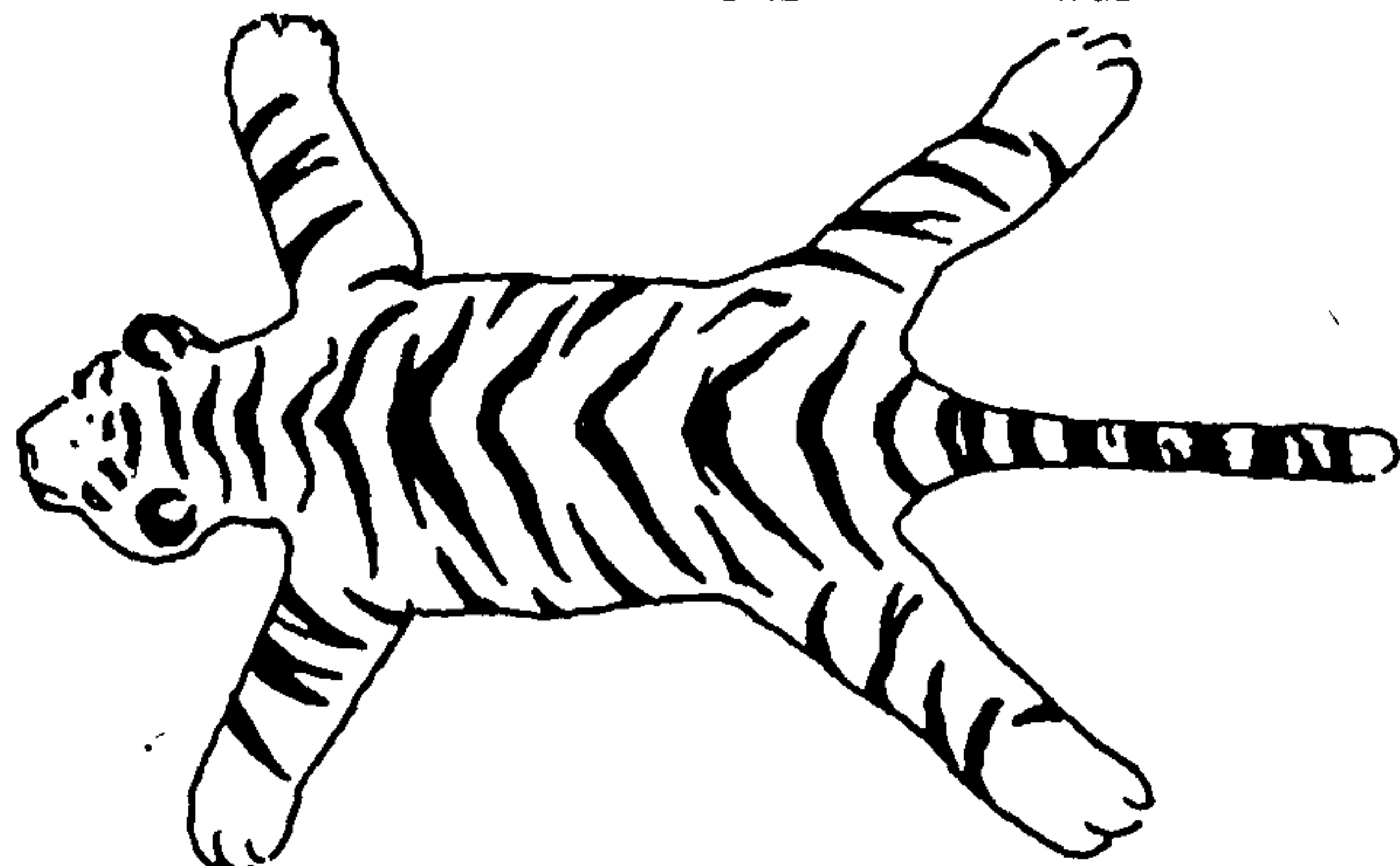
DON'T



BUY TROUBLE

IVORY ● ORCHIDS ● BIRDS ● MUSK ●
TORTOISE SHELLS ● REPTILE SKINS ●
PELTS ●

EXPORT OF WILDLIFE AND PRODUCTS
MADE FROM THEM ARE **BANNED**



FOR WHAT YOU CAN BUY,
PLEASE CONTACT,

The Deputy Director,
Wildlife Preservation, Government of India.

Bikaner House
Shahjahan Road
New Delhi – 110 011.
Phone 384556

97/IB, Hazara Road (2nd Floor)
Calcutta – 700026
Phone 481592

11, Air Cargo Complex
Sahar, Bombay – 400057
Phone 632-8529

77, II Main Road, Gandhi Nagar,
Adyar, Madras – 600020.
Phone 412638

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Printed at New Age Printing Press, Delhi.

themselves to academic publications.³² A single article in Reader's Digest,³³ which claims to be the world's most read magazine,³⁴ probably did more to publicize the need for a review of treasure trove legislation and the dangers of unrestricted metal detector use than any number of scholarly publications in archaeological journals and specialist publications.³⁵ Other disclosure opportunities for museums (and similar organizations) include exhibitions which feature "graphically developed arguments against the illicit market."³⁶

More importantly, public education and disclosure tactics should be aimed at the segment of the public most

³² Prott and O'Keefe, op.cit. 334 on popular level Mexican publications.

³³ George Pollock, "Treasure Trove on Trial," Readers' Digest (October 1987) 160-66 on the Middleham Jewel, found in 1985 in North Yorkshire, "one of the most impressive examples of goldsmithing from Middle ages", judged as "lost" rather than hidden with the intent of recovery under UK Treasure Trove legislation, and sold by the finders at Sothebys for £1.43M in December 1986.

³⁴ With a circulation of 28M world wide in fifteen languages and 1.5M in the U.K. alone.

³⁵ For example, the excellent article by N. Harinarayana, "The Treasure Trove Act and the Government Museum, Madras" in Museums and Museology - New Horizons: Essays in Honour of Dr. Grace Morley. (Delhi: Agam Kala Prakashan, 1980) 275-280 on Indian treasure trove legislation, which includes bronzes and ceramics in addition to precious metals and could well serve as a model for the UK.

³⁶ Stuart op.cit. 10 on "Peru's Artistic Heritage," an exhibition held at the National Geographic Society in Washington, D.C., January 1984, composed of pieces seized during 1981 by the US Customs Service.

likely to be involved in illicit transactions - the affluent who travel. Tourism is a major factor in stimulating both the demand and the supply of cultural objects for both the licit and the illicit markets. For example, point of entry declaration forms required by most States for returning residents and tourists usually inquire about restricted goods (alcohol, tobacco, firearms etc.) in some detail. Recently, such forms have included inquiries about endangered species of animals and plants.³⁷ To date, cultural objects - also the subject of an international Convention for over a decade - are conspicuous by their absence on such documents.³⁸

Museums could take the lead, working through their international organization, ICOM, to develop an appropriate wording to caution travellers about exporting and importing cultural objects. Through ICOM publications and national committees, States parties to the UNESCO Convention could then be invited to incorporate such cautionary material into their national declaration forms.

B. Gifts, Exchanges and Reproductions

Another way for museums to contribute involves official State gifts made to elected politicians or hereditary rulers to commemorate specific occasions. Such

³⁷ Convention on International Trade in Endangered Species.

³⁸ e.g. Revenue Canada Customs and Excise form "Welcome to Canada - Information for Travellers" (no number).

gifts would be more appropriately made to national or regional museums, with the credit line indicating the identity of the individual to be honoured. This does occur now in some situations³⁹, but museums need to promote this behaviour, perhaps by liaising with the cultural attachés of foreign embassies, and providing suitable publicity for officials when such presentations are made. Official or diplomatic gifts might enable museums, particularly those in Third World countries, to acquire or augment collections of foreign cultural objects without cost.

Another opportunity to encourage a legal and global recirculation of cultural objects could be by way of exchanges between individual museums; this approach has been suggested⁴⁰ and even attempted before.⁴¹ Such a program would not be directed at repatriation requests, but rather, focus on gifts of indigenous cultural objects. Some

³⁹The Napier Museum, Trivandrum, India, displays several examples of official gifts made to Shri E.K. Nayanar, the Honorable Chief Minister of Kerala during 1980, including gifts from the Chinese Ambassador to India, East German Cultural Delegations etc. Personal visit by author January 1989.

⁴⁰Pegden, op.cit 59.

⁴¹The ICOM sponsored MUSEP program begun in 1978 quickly fell into abeyance and has not been revived. "Museum Exchange Program," ICOM News, 32:1-4(1979)54 and Ad Hoc Committee on the Implementation of the Museum Exchange Program Minutes, Paris, 28 November 1978, ICOM Doc.78/MUSEP.8.

States might not be able to participate in such a program,⁴² but many Third World countries, (e.g. India and Mexico) have a legitimate surplus of high quality cultural objects and could easily "afford" such exchanges. Too often, developing countries appear only as recipients of foreign aid - such a program would stimulate endogenous development and intercultural studies.⁴³

To bring about an exchange program in a more successful manner than has been achieved to date, political pressure needs to be brought to bear, which ideally, might result in an international Convention sponsored by UNESCO (probably preceded by a Declaration and a Recommendation) in which signatory States might agree to a minimum number of exchange gifts each year. In practice, this presents considerable difficulties; however, such a program might be a suitable project for ICOM during the World Decade for Cultural Development.⁴⁴

Another proactive role for museums is the marketing of high quality, but clearly identifiable (possibly numbered) reproductions of suitable cultural objects. This

⁴² For example, those States that have been so denuded of cultural objects, (possibly as a result of revolution, natural disasters etc.) that they have little indigenous material left.

⁴³ World Conference on Cultural Policies, Final Report, op.cit. 68, Recommendation No. 14 on cultural diversity and intercultural exchanges.

⁴⁴ "A World Decade for Cultural Development" UNESCO News, No.167(2 December 1985)1-3 on this initiative.

too would allow Third World countries - as well as developed States - to acquire representative collections from other cultures, which are too expensive on the open market, or which may be no longer available. Reproductions would also satisfy some portion of the demand for cultural objects created by tourism, and thereby begin to regulate illicit suppliers in an indirect fashion. In addition to a mass produced product for the tourist industry, museums might commission major, one of a kind, pieces for display.

Such ventures have been very successful in the USA, often generating considerable revenue. Museums are in a particularly fortunate position to sponsor this type of undertaking. It requires some venture capital (possibly available through connections with wealthy donors and members of the community), a certain amount of start-up expertise (through professional staff such as conservators), and an overall monitoring of the operation (through their association with national and international organizations). Advantageous side effects would be the encouragement of craft revivals and local and cottage industries⁴⁵ as well as the provision of legal, controlled work for many presently

⁴⁵ World Conference on Cultural Policies, Final Report, op.cit. 67, Recommendation No.13 on intercultural communication "to promote more balanced exchanges among cultures by supporting national programs for the development of national industries in countries in which such industries are least developed." See also A. T. Jayanti, "Khadi, a Symbol of Individual Freedom," Discovering India 1:1 (November 1988)26-36. on handloomed textiles as a cottage industry in India.

involved in illicit excavations, transactions, and the fabrication of copies and fakes which are sold as originals.⁴⁶

In 1989, ICOM launched as an international marketing project, the ICOM Engagement Calendar, illustrated with photographs of cultural objects contributed by various member institutions.⁴⁷ Apparently, this was visualized as the first in a line of quality products; it would be logical for this initiative to be expanded into a full fledged reproduction program as part of ICOM's contribution to the World Decade for Cultural Development.

III. Opportunities for Government

Law in the twentieth century . . . is used to encourage commitment to certain social goals by offering a clear statement of these goals and standards.⁴⁸

Ideally, each State might empower its Law Reform Commission⁴⁹ or equivalent body, to review in an integrated

⁴⁶M. C. Joshi and K. S. Ramachadran, "The Problems of Imitations of Antiquities," Museums and Museology: New Horizons - Essays in Honor of Dr. Grace Morley. (Delhi: Agram Kala Prakashan, 1980)293-298.

⁴⁷ICOM News 41:3(1988)3.

⁴⁸Prott and O'Keefe, op.cit.331.

⁴⁹Pioneered by Province of Ontario in 1964, and now copied widely, (ie.the Law Reform Commission of Canada 1971) this independent body established by statute, consists of qualified experts, which review at government request, the changing social and economic situation relating to a specific issue, and make recommendations regarding new or modified legislation. The Canadian Encyclopaedia, (Edmonton: Hurtig, 2nd ed. 1988)2:1190.

and holistic manner, the entire legal framework surrounding cultural objects, recognizing the accompanying economic and social issues. In practice, where such bodies do exist, there are more pressing issues than heritage law to review. Lyndell Prott and Patrick O'Keefe note:

Rarely is there time and seldom the inclination to survey the whole of the law affecting this subject matter and to assess its internal consistency and also its compatibility with other laws in force.⁵⁰

Despite this fact, it is clearly apparent that policing illicit transactions involving cultural objects has proven both expensive and ineffective; it may be more useful to switch the emphasis from stolen cultural objects to programs of positive reinforcement for legally acquired items, thereby broadening the area of concern and control to include all types of transactions involving cultural objects. One way to do this is by providing benefits (and sanctions) within a legislative framework. Some of these benefits need to be more attractive than the mere absence of penalties!

A successful control measure must be based on known models, accept private ownership, and protect the freedom of the owner to dispose of cultural objects under reasonable circumstances. In short, it should be no more restrictive than already existing legislation in order to find support among the various communities of interest. If such measures

⁵⁰ Prott and O'Keefe, op.cit. 110

also offer a tangible benefit to win over private, corporate and public collectors by providing protective services, as well as generating some revenue to offset administrative costs, then that community of support might be broadened. Finally, the concept must work for poor as well as wealthy States, be capable of phasing-in over a period of time, and accept the fact that those States which have already introduced tax benefits for donations to public institutions are not likely to reverse that decision in the short term.⁵¹

A A Licensing Program

The licensing of dealers in art, antiques and antiquities has often been suggested;⁵² such proposals appear to discriminate against a small group, who are supported by wealthy and powerful clients. It is a more easily identified group than the huge base of the illicit "procurement pyramid" - the often desperately poor, illiterate, local huaqueros, or the layer of well-connected middlemen and jobbers.

However, the licensing of the actual cultural objects - in the same manner as other regulated objects described earlier - would apply equally to all owners and be less

⁵¹Hawkins, op.cit.308, "it is ironical that the United States, which pioneered the concept of charitable support that Britain is beginning to emulate, would now seem to be moving in the opposite direction."

⁵²Report and Recommendations on the Protection of Cultural Property in South East Asia, (Paris: UNESCO, 1972)14 sec.6, and sec.13 on the notification of ICOM about known dealers in illicit cultural objects.

likely to arouse antagonism.

A major factor in the prevention of illicit traffic is the disclosure and documentation of the ownership and location of (significant) cultural objects in public, corporate and private⁵³ collections, as the starting point in an audit trail of transfer transactions. Clearly, administrative machinery will be required to organize and operate a central registry, but with computerization, such a task is considerably less formidable than it would have been even a decade ago.

Initially, cultural objects eligible for licensing would be those already subject to, and defined in, existing legislation,⁵⁴ AND valued in excess of a specified amount. Value ranges must be determined by each State as appropriate, but practicality suggests a reasonably high figure, (i.e. all single objects or related groups valued in excess of US\$500,000). While monetary value would be a major consideration, there might be special provisions made for the identification of cultural objects of particular intrinsic value that fall below the established value. This figure could be gradually reduced at two or three year intervals, as the capacity and efficiency of the licensing

⁵³ Strong op.cit. 19/20 on the logistics of museum acquisition and the erroneous belief "that gradually all major works of art . . . should ultimately pass, by dint of death duties, into the hands of the State. . . ."

⁵⁴ Such as domestic export regulations, archaeological, antiquities, and treasure trove legislation etc.

program grows. Initially, the volume of licensed cultural objects will be quite small, and a modest licence fee would defray most costs.

There will always be the "99 cent syndrome", as owners attempt to undervalue cultural objects to escape regulation; but over time, this may result in keeping items in lower value ranges! There is considerable merit in the suggestion made by Hugh Jenkins, U.K. Minister for the Arts at the time of the Wealth Tax proposal in 1974, that property could be valued by owners (for taxation purposes) with the proviso that the State might purchase it at the owner's value if offered for sale.⁵⁵

The arbitrary choice of a high figure such as U.S.\$500,000 may appear at odds with the much lower limits already in place for export permits in States such as Canada and the UK. However, the intent of licensing is quite different; it is intended to bring cultural objects of significant importance under closer scrutiny regardless of their location or owner and - whether or not - they are proposed for export. It would be logistically impossible to attempt such a program with low value limits; it would be equally inappropriate to call for a change in export regulations.

The licensing program would be based on an annual

⁵⁵ Hugh Jenkins, The Culture Gap: An Experience of Government and the Arts. (London: Marion Boyars, 1979)65.

registration, accompanied by a modest licence fee payable by private and corporate collectors. Public institutions, while exempted from the fee, would still be required to report regularly. The amount of the fee will be of concern to collectors; considerations will be based upon the cost of operating a licensing system - which will vary from State to State, as will the amount the "market will bear". Automobile licences might be used as an indication as to how high a fee can be tolerated,⁵⁶ although it could be argued that there are very few automobiles in existence valued at U.S.\$500,000. Cultural objects of this category are essentially luxury goods, that often provide significant profits for owners; realistically, it is not likely that the amount of the fee will raise as much opposition as the idea of "being regulated." However, to ease the financial burden, it might be wise to reduce the fee for owners that license more than one item at a time.

The reporting mechanism must place the onus on the owner to provide, perhaps in conjunction with other information required by the State,⁵⁷ a photograph and a

⁵⁶ Automobile licences in the UK in 1988 were four times the fee charged in Canada.

⁵⁷ An example of unrelated obligations that are linked for administrative convenience occurs in Greece, where voter registration is required before a driver's license can be renewed. The annual income tax return might be a possible relationship.

brief, standardized description in a predetermined format,⁵⁸ as well as information about transfers of ownership by sale or gift during the period covered by the licence.

Logistical problems concerning foreign residents or nationals who own cultural objects presently located in a foreign country will arise, but models exist to bring these owners and their property into a licensing system. Generally, an owner is subject to the regulations of the State of residency.

B. Encouraging Compliance

What incentives could be built into such a program to encourage compliance? Licences should be required for a specified minimum time period - perhaps one or two years - prior to applications for export permits and most especially, for tax benefits for donations or loans⁵⁹ or sales made to public institutions. If the cultural object was licensed immediately upon acquisition, (perhaps within one or two months) by an owner, then this time requirement could be waived.

⁵⁸ This format must be conducive to rapid computerization; many models are now available from the museum community. See R. B. Light, D. A. Roberts and J. D. Stewart, Museum Documentation Systems: Development and Applications. (London: Butterworths, 1986) and D. Andrew Roberts, ed. Collections Management for Museums: Proceedings of the First Annual Conference of the Museum Documentation Association, (Cambridge: Museum Documentation Association, 1988).

⁵⁹ U.K. legislation provides conditional tax exemption for owners who make cultural objects available for loan to public institutions.

In any event, this time requirement should be minimal in the first few years of the licensing program, but increase in tandem with the years of operation, in order to discourage the avoidance of licensing in the early years of the program. Nevertheless, an occasional conditional "amnesty" (or pardon) could be provided in order to bring further cultural objects into the licensing program; however, this should be accompanied by a moderate penalty at the time of any future, profit-oriented transaction, (e.g. tax benefit or sale), so that prompt compliance is rewarded.⁶⁰

Eventually, the requirement for licensing cultural objects could be connected to the availability of other services used by the collecting community, such as sales at public auction or sales to the public through dealers on consignment or otherwise, since this would offer an element of protection to purchasers of all kinds. Licensed objects might be eligible for reduced appraisal fees, or fine arts insurance premiums, since the research required of the appraiser, and the risk undertaken by the insurer, decrease as a record is built up about the cultural object. If appraisers, dealers and insurers were required to report unlicensed objects to a central registry, the net could be tightened - but it is extremely unlikely that such

⁶⁰ A strategy similar to the "late registration fee" of many educational institutions.

restrictive legislation would be acceptable in affluent, free trading nations.⁶¹

Licensing would also provide an ideal opportunity to improve the quality of appraisals - a major problem in the existing tax benefits system.⁶² When an item is first licensed and registered, the appraisals upon which the value is based would be necessary documentary evidence, and automatically part of the record. It is extremely unlikely that a private, corporate or public owner of cultural objects valued in excess of U.S.\$500,000 would not have a current appraisal - or even several - available for insurance purposes at least. It is conceivable that an owner might choose to value the cultural object himself, or disregard a professional appraisal. But assuming that the values for the majority of licensed objects would be generated by professional appraisers, and centrally registered (eventually with regular, computerized updates), owners would be better protected from the vagaries of the appraisal industry.

Access to information would be governed by the existing legislation in States that have already developed statute law in this area, so that, barring "leaks", owners would be

⁶¹ Although the U.S. Internal Revenue Service has long rewarded informers with a percentage of the revenue ultimately collected from fraudulent income tax returns.

⁶² The UK Select Committee on a Wealth Tax, Vol.IV, op.cit.1393, on "the wide divergence of opinion even between professional valuers actually engaged in the market."

no more at risk from the criminal community than at present.

After several years of operating a licensing program, unlicensed objects would not be eligible for export permits, tax benefits in connection with gifts or loans to public institutions, or purchases made by them.⁶³ Sales at auction or by consignment, valuations or insurance would become more difficult. Private sales would continue, since it would be fruitless to attempt to prevent the total movement of unlicensed cultural objects. However, the owners of unlicensed material would be at a definite disadvantage, and this might help to reduce the value attached to unlicensed objects.

On the other hand, owners of properly licensed cultural objects, in addition to being eligible for any of the permits, tax benefits or services described above, would have enjoyed years of protection from unscrupulous or incompetent dealers and/or appraisers who neglected to research the provenance of an object at the time of a purchase. And, in the event of a theft, owners of licensed objects would be eligible for prompt assistance from the central registry in notifying local and international authorities. The recovery of well-documented cultural

⁶³ It could be argued that such a penalty would be counter productive for the museum and gallery community. However, after a reasonable introduction to a licensing program, there could be few good reasons for unlicensed material, except illicit acquisition. Museums should not acquire collections for which the source is suspect.

objects tends to be significantly higher than recoveries of unrecorded pieces - another advantage to the owner of licensed objects.

C. Dealing with Opposition

Two major factions will oppose a licensed, revenue generating approach. The aesthetic "art for art's sake" movement has historically fought any monetization of cultural objects. Supported today by some of the discipline-specific associations, notably archaeologists and some museum professionals, this faction seeks to "distance" the corrupting influence of the illicit market by simply ignoring economic factors.⁶⁴

Second, there are the obvious, generalized arguments that increased regulation and/or taxation provide an incentive to black market activities (which are already out of control), and represent an infringement of the "free" trade principle (which no longer really exists in a world of multinationals, cartels and trade boards) as well as an individual's rights to privacy. Of course, those same individuals presently seem to register or licence their real

⁶⁴ Prott and O'Keefe, op.cit. 348 "many experts in the cultural heritage field are opposed to valuing the archaeological heritage. . . they argue this introduces an inappropriate commercial element. See also, Canadian Museums Association Advocacy Alert, August 1985, which endorsed the stand on the non valuation of archaeological objects taken by the Canadian Archaeology Association.

estate, vehicles, investment securities or, (in the UK), televisions, without a quibble!⁶⁵

Setting cultural objects outside the market place, even if only theoretically, means that the mechanisms that have evolved to control and regulate many other classes of property have never been seriously considered for adaptation to the regulation of cultural objects. As noted in a recent US case:

transfers of paintings require no licensing, no assignment or registration.⁶⁶

Clearly, a licensing approach has "user-pay" overtones and would place a financial burden primarily upon those who profit under the present system - the speculator/investor collectors, the dealers and middlemen of all types, even insurers and appraisers. These groups are ably represented by powerful lobbies to protect their vested interests, but the onus must be upon them to present convincing arguments as to why they should not bear the brunt of the costs along with the profits.

⁶⁵ Milrad and Agnew, op.cit. 106 on the opposition of the New York Bar Association to the 1980 New York State bill on the disclosure of museum transactions.

⁶⁶ Amram, op.cit. 51 from the summation of the US O'Keefe vs. Snyder case, tried in the Superior Court of New Jersey, (Mercer County Div. Docket #L-275 17-75).

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