Legislative Models of Protection of Cultural Property

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ARTISTIC and cultural objects began to take on national identities during the Enlightenment, with the rise of nationalism and the creation of modern nations. We can observe during that period the "increase in importance of the monument—the main interest shifted away from the person of the artist to the work of art as such."1 After the French Revolution monuments were praised for their artistic, historical, and scientific features. People began to conceive of monuments as the "cultural heritage of a nation, an evidence of historical traditions, a historical identity card."2 This new function of works of art influenced a nation's attitude toward its heritage; the protection of cultural property became a goal shared by various societies. As art became closely associated with particular nations, government efforts to protect cultural property were directed primarily toward keeping monuments within the state boundaries.3 Legislative efforts of this nature were supported by the realization that "those objects of art constitute evidence of things other than themselves; they are documents informing us about a certain state of affairs, in particular about social relationships, being at the same time objects of price, exchange value, property, goods which arose from the economic life of a given epoch."4

Works of art and archeological monuments became valuable not only for their esthetic and artistic values but also because of their value

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3. Legal protection of monuments was undertaken in remote times; however, its main aim was preservation and conservation of monuments, not protection against their export. See generally F. Taylor, The Taste of Angels (1948).
as capital investments. Auction firms came into existence for the sole purpose of selling works of art. A man named Christie founded the first such firm in London in 1766. Art museums appeared in the 19th century; even before then, in 1793, the Louvre was proclaimed the "Museum of the Republic." In 1803, the Musée Napoleon opened, and the Victoria and Albert Museum followed in 1857. Since the 19th century, prices of pictures and historical monuments have risen steadily, even though such prices depend on various fluctuating factors, including fashion. To demonstrate the rise in prices, even accounting for inflation, let us consider one of Renoir's pictures, which the artist sold in the 1870's for 425 francs (the equivalent then of eighty-five dollars) and which was sold in 1915 for 200,000 dollars. The unbelievable rise in prices of the works of masters, ancient and modern, of impressionists, and of contemporary artists continues, leading to the astronomical sums paid mainly by American collectors. According to Geraldine Keen, the price of a Gauguin painting in 1957 reached 100,000 pounds, which sum the author called a "psychological barrier" crossed by growing numbers of works of art, and it is impossible to imagine a price below 100,000 pounds for a painting by da Vinci, Raphael, Rembrandt, or Titian. One of the most notorious sales occurred in 1970, when Velasquez's portrait of Juan de Parreja sold for 2,310,000 pounds. The painting was purchased by Alec Wildenstein, a representative for the largest art auctioning firm, with its headquarters in New York and branches in Paris, London, and Buenos Aires. An English journalist comments that "[t]he Velasquez portrait sold at Christie's brought so incredible a sum, not because it was Velasquez's finest work but because it was the finest left in private hands and thus available to the art market." As a result of the tension between the increasing demand for the limited supply of art works on the world market and the decreasing amount of art in private hands, newspapers all over the world have reported a growing number of art thefts. Italian churches have suffered the most

5. A. Mesnard, L'ACTION CULTURELLE DES POUVOIRS PUBLICS 75-76 (1969) [hereinafter cited as Mesnard].
from those robberies. According to police data, 290 objects of high artistic value were stolen in 1971 alone.\textsuperscript{11}

The long-established and ever-developing black market in archeological finds, through its encouragement of clandestine excavations, has caused a double loss, both impoverishing the heritage of plundered nations and depriving humanity as a whole of the scientific data on which our knowledge of ancient cultures is based. Mexico and Guatemala have become notable victims of large-scale archeological robberies. Mayan relics have been systematically flown from the Mexican and Guatemalan jungles, and, according to an English journalist, "[t]he larger monuments—'documents in stone' weighing many tons—are being shorn of their inscriptions with electric saws to make them lighter."\textsuperscript{12} The destination of these relics is well known. Peter Hopkirk writes, "Among the many United States museums known to have illicitly-exported Mayan antiquities in their collections are three world-famous ones—the Museum of Primitive Art in New York, the Brooklyn Museum, and Dumbarton Oaks Museum in Washington."\textsuperscript{13} According to the same author, however, the United States is not the only resting place for these illegally exported archeological monuments. According to Professor Eric Thompson, a specialist in Mayan culture, the objects illegally taken from Mexican territory can also be seen in German, Dutch, and Swiss museums.\textsuperscript{14}

Among the Mediterranean countries, special attention should be focused on Turkey, which has recently lost huge numbers of archeological monuments. Innumerable treasures have disappeared from the royal tombs in West Turkey; according to Turkish sources, some reside in the Boston Museum of Fine Arts, and others are housed in the Metropolitan Museum of Art in New York. The Turkish authorities have announced that they are preparing a list of illegally exported monuments which are now in foreign museums. The Turkish government is going to ask those museums to return the Turkish cultural property. According to British journalists, about one thousand objects have been illegally exported from Turkey during the last ten or fifteen years.\textsuperscript{15}

\begin{footnotes}
\item[11.] The Times (London), Mar. 3, 1972, at 5, col. 7.
\item[13.] Id.
\item[14.] Id.
\end{footnotes}
It is clear that even in the past, when art thefts were not performed on such a large scale, states imposed legal sanctions in an effort to protect the objects of their cultural heritage from the dangers of the illicit export of such property.

Typical of those attempts is papal legislation going back to 1464, in which Pius the Second forbade exportation of works of art from the papal state.\(^{16}\) Only at the turn of the century, however, can one notice significant progress in the national protection of monuments. At that time, many states enacted laws prohibiting the export of cultural property. The first of these laws were introduced in Europe in the countries rich in art treasures; these states faced the greatest danger from unrestricted trade.\(^{17}\)

**Contemporary National Legislation on the Protection of Cultural Property**

My primary purpose is to make a survey of national legislative schemes to protect cultural property, focusing in particular on the variety of subjects of legal protection and the kinds of legal tools aimed at protecting monuments within state boundaries. I will leave it to the reader to note the obvious relationships between the legal provisions in question and the social systems in which they operate.

Anticipating the possible charge that an incomplete presentation of the material indicates a biased choice of examples, I should state that by using the examples I have chosen I am attempting simply to make the point that international legal protection of cultural property must, as much as possible, reflect the considerable variation among the legal constructions used by different countries.

The legislative programs of various nations for the protection of artistic, archeological, and historical monuments and other cultural properties are characterized by a great number of differences. Those differences reflect the variety of opinions on the appropriate objects and legal means of protection and are the result of the national policies which prevailed when each legal system for the protection of cultural property was created. Because of the variations in the scope and methods chosen by countries for the protection of cultural property, I have decided to present the different national legislative schemes on a region-by-region basis.

\(^{16}\) De Visscher, *La Protection des patrimoines artistiques et historiques nationaux: Nécessité d'une réglementation internationale, Art et Archéologie, Recueil de législation comparée et de droit international*, Nov. 1, 1939, at 20 n.2.

\(^{17}\) *See id.* at 21-22.
European Legislation

European legislation concerning the protection of cultural property is characterized by three distinct approaches. The first one is the French approach, elements of which can be found in the legal systems of Italy, Spain, Austria, Belgium, and Switzerland (though with regard to the last two countries mentioned one should note that their systems of regulation are much narrower, as they lack export restrictions). The second approach is the one taken by the British legislative system and the similar systems of Finland, the Netherlands, and Sweden. The British scheme is distinguished from others by its complicated system of export control. The third approach is that taken in socialist countries. Polish legislation will be used to describe this general model of regulation.

France

France was one of the first countries to introduce legal regulation of cultural property. As early as 1887 France adopted a law which classified cultural properties belonging to the state, the departments, and the communes. This classification completed the legal protection of public cultural property granted by the civil code. The decree passed by the National Assembly on May 26, 1791, is usually included among the provisions introducing legal regulation of cultural property. On the strength of this decree, the Louvre, which until then had only been the Royal Palace, became the National Palace, and the National Assembly acquired the right to decide both the ways in which it would be used and the means which would be employed “to make this group of monuments worthy of its destination.” The basic French regulation, though only one of several, is the Law of 1913 on historic monuments, which has been amended several times.

The subjects of French legal protection are all movable and immovable properties whose “preservation represents the public interest from the point of view of history, art, and science.” Once an object is classified under the act it enjoys the legal protections created by the

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18. Id. at 22.
19. MESNARD, supra note 5, at 75.
measure. The Minister of Cultural Affairs has the responsibility for classifying the cultural properties belonging to the state, departments, communes, legal persons of public law, corporate bodies, and individuals. Besides making possible state participation in a technical procedure of preservation of protected cultural property, the act of classification causes some strictly legal consequences. Once an object is registered as cultural property, no one else can acquire title by adverse possession, no matter how long he has possessed the object. This provision is an exception to Article 2279 of the French Civil Code, providing that possession of movable property gives title, and the registration provision allows the owner of a classified object to bring an action to recover possession at any time and against anyone, even a bona fide purchaser. A second provision, possibly the most effective for the protection of cultural property, is that certain public properties are inalienable. This measure is narrower in scope than the provision preventing the acquisition of title through adverse possession because it does not apply to private property.

Cultural properties in France enjoy legal protection beyond the scope of the provisions protecting historical monuments and movable works of art. This additional sphere of legal protection of cultural property is known as la protection domaniale and is accorded only to public cultural property. According to A. H. Mesnard, when cultural properties are also public properties, they first of all come under the rules de la domaniaalité publique. There are many works of art in France which are under legal protection only because they are public property. One must agree with Professor Brichet that "[u]ndoubtedly our reader will be astonished to learn that the works of art in the Louvre are not classified."

In France, the analytical discussion of the legal meaning of the notion of domaine public also concerns what is called "the group of objects belonging within the scope of public cultural property." The lack of complete agreement on the meaning of this formulation jeopardizes the legal status of some cultural objects. Nonetheless, the institu-

22. Id.
26. MESNARD, supra note 5, at 98.
27. R. BRICHET, LE RÉGIME DES MONUMENTS HISTORIQUES EN FRANCE 163 (1952) [hereinafter cited as BRICHET].
28. See MESNARD, supra note 5, at 401-07.
tion of *domaine public* unquestionably has its value in the protection of cultural property. Professor Brichet writes,

In reality classification of historical monuments concerns only those objects which are worth protection from a point of view of the public interest. The character of public interest can differ in different epochs. It is good that some objects not fully appreciated in a given epoch can be handed down to the following generations, which may value them in a different way. What is more, the classification of objects representing the public interest is not performed immediately. It is a long-lasting undertaking, a long time ahead its completion. So works truly representing the public interest could have disappeared even before the act of classification if the protection arising from the law on historical monuments had not overlapped with the other protection [of the *domanialité publique*].

The preemptive right of the government to purchase all cultural properties put up to auction is a legal instrument of the state control over unclassified objects. Execution of this right is guaranteed by a special procedure which prescribes methods for informing the Minister of Cultural Affairs of objects put up for auction and ways for the proper administrative organs to take part in auctions.

Regarding the export of cultural property, the French legal system has undergone certain changes. At one time the provisions prohibiting export of cultural property were based on the idea of preserving the integrity of cultural heritage; at a later time those provisions were loosened for fear of losing France’s important role on the world art market. Now the export of cultural property is regulated by the Decree of November 30, 1944, supplemented by lists of cultural property requiring an export license. Those lists are enclosed in notices to exporters (*l'avis aux exporteurs relatif au régime des objects d'art et de collection*) published in the *Journal Officiel*. A customs office issues the export license only after considering the opinion of the Central Administration of National Museums in France. All the objects listed as exempt from the requirement of an export license must have a certificate of exemption issued by the Professional Committee of Art Galleries.

Upon these provisions France has imposed quite a flexible legal construction which illustrates the export policy in practice. French

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29. BRICHET, supra note 27, at 162.
31. BRICHET, supra note 27, at 160.
officials do not have to await changes in the statutes before changing their priorities in the protection of cultural property.

**Great Britain**

Cecil Harcourt Smith argues that the legislation of Great Britain concerning protection of cultural property differs from the French system only to a degree. This argument, however, does not seem valid in light of the fundamental differences between the laws of France and those of Britain regarding movable cultural property.

Since 1882, when the legal protection of cultural property in Britain began with the passage of the “Ancient Monuments Protection Act,” British legislation has focused on the preservation of immovable cultural property entrusted to the Ministry of Works, now the Ministry of Public Buildings and Works. The powers of the Ministry are based on three successive acts of Parliament: The Ancient Monuments Consolidation and Amendment Act of 1913, the Ancient Monuments Act of 1931, and the Historic Buildings and Ancient Monuments Act of 1953.

The British define ancient monuments as

1. any monuments specified in the Schedule to the Ancient Monuments Protection Act of 1882;
2. monuments reported by an Ancient Monuments Board as being “monuments the preservation of which is of national importance”;
3. any other monument or group of monuments and any part or remains of a monument or group of monuments which the Minister considers to be of a like character or of which in the opinion of the Minister the preservation is a matter of public interest by reason of the historic, architectural, traditional, artistic or archeological interest attaching thereto.

One of the most important measures for legal protection of British monuments is known as scheduling, which is the compilation and publication of lists containing those monuments the preservation of which is of national importance. When a monument appears on the list, it acquires a legal identity, and ownership of a protected monument is encumbered with restrictions specified in the ministerial notification to an owner. The legislation on ancient monuments excludes from its provisions occupied dwellings and ecclesiastical buildings which are still in use. The business of scheduling is carried out by the Minister of

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34. Ancient Monuments Protection Act of 1882, 45 & 46 Vict., c. 73.
Public Buildings and Works, who acts on the advice of the Ancient Monuments Boards, of which there are three, one for England, one for Wales, and one for Scotland. Because of the inventory of protected properties, the state has a legal instrument enabling it to supervise the manner in which the owners of scheduled monuments treat their property.

The main protection of movable cultural property in Britain is the prohibition placed on the export of works of art having special importance to the British national heritage. Export controls apply to works of art valued at 2,000 pounds or more if they are over 100 years old and have been in Britain for at least 50 years. A person seeking to export such a work of art must acquire a special export license from the Board of Trade. Before the board grants a license, the work of art is examined by an independent expert adviser. If the expert is of the opinion that a license should be refused because of the national importance of the work of art, the case is sent to the Reviewing Committee on the Export of Works of Art, which consists of both permanent and ad hoc members who are specialists on the particular type of object in question. When deciding whether or not an export license is to be granted, the committee considers three criteria: "[1] Is the object so closely connected with our history and national life that its departure would be a misfortune? [2] Is it of outstanding aesthetic importance? [3] Is it of outstanding significance for the study of some particular branch of art, learning or history?" When the committee decides that the work of art should not be exported, an export license will not be granted if an offer to buy the work of art is forthcoming from any public institution in the United Kingdom during a stated period at a stipulated price. If no such offer is made, the export license will be granted, despite the committee's recommendation.

The British procedure for granting export licenses is much less effective than the French system in preserving the integrity of the British cultural heritage. The British system depends totally on the financial resources of public museums, which often suffer from a lack of money.

39. Id. at 5.
The government's financial support of the policy of retaining works of art in the country is inadequate.

The system of exceptions from the estate tax based on the provisions of the Finance Acts of 1936 and 1956 also promotes the protection of Britain's cultural heritage. Pursuant to those acts, cultural property of national, scientific, historic, or artistic interest is excluded from the estate duty as long as the property is not sold or exported or is sold to the National Gallery, British Museum or any other similar national institution, any university, county council or municipal corporation in Great Britain, the National Art Collections Fund, or the Friends of National Libraries.

Poland

There was no legislation concerning the protection of cultural property in Poland before the country's independence because Prussia, Austria, and Russia, the three countries which divided Polish territory among themselves, had no legislative systems of protection of their own. The first act providing protection of cultural property in Poland was the Decree of the Regency Council of 1918. Article 19 of the decree prohibited the export of movable monuments or of their components, and in case of violations, penalties and possible confiscation in favor of national museums were provided for in Article 34. Consecutive legal acts protecting cultural property were enacted in the Ordinance of the President of the Republic of March 6, 1928, which carried the legal force of a law, and in the Decree of March 1, 1946, on Registration and Prohibition of Export of Works of Art and Objects of Artistic, Historical, or Cultural Value. Those two acts were in force

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40. Finance Act of 1956, 4 & 5 Eliz. 2, c. 54, § 34(2); Finance Act of 1936, 26 Geo. 5 & 1 Edw. 8, c. 34, § 26.
42. The first legal act on protection of monuments in Austria was passed in 1918. See Ambros, La Législation des monuments historiques en Autriche, 31-32 MOUSEION 183 (1935). In Germany such provisions were set up in the Constitution of 1919. In Russia there was no legal act. See S. Żaryn, DLACZEGO CHRONIMY ZABYTKI [Why We Protect Monuments] 58 (1966).
43. Dekret o opiece nad zabytkami sztuki i kultury [Decree on the Protection of Artistic and Cultural Monuments], [1918] Dziennik praw państwa polskiego [Journal of Laws of the Polish State], No. 16, item 36 (Pol.).
45. Dekret o rejestracji i zakazie wywozu dzieł sztuki plastycznej oraz przedmiotów o wartości artystycznej, historycznej lub kulturalnej [Concerning the Registration and Prohibition of Export of Works of Art and Objects of Artistic, Historical, or Cultural Value] [1946] Dziennik Ustaw [D.U.] 181 (Pol.).
until 1962, when the Law on Protection of Cultural Property and on Museums was passed.\textsuperscript{46}

Because the constitution of the Polish People's Republic recognizes the great social and political importance of the protection of cultural property, the law of 1962 and the administrative acts which followed do not constitute the entire system of legal protection of such property. Socialist legislation establishes in Article 3 of the constitution the duty of the state to "ensure the overall development of national culture" and connects it with the constitutional guarantees of the people's right to their culture.\textsuperscript{47} Nor should one forget the civil law measures, especially those which define the character of state property and provide for its protection.\textsuperscript{48}

The customs administration also plays an important role because the customs law, together with the administrative regulations, constitutes an integral part of the Polish legal system for the protection of cultural property.

The Law of 1962 introduced a modern notion of cultural property; nevertheless, the Polish act does not disregard a traditional concept of the monument, which it defines as "cultural property: 1) listed in the register of monuments; 2) embodied in museums, libraries or public archives; 3) of another character, if its nature as a monument is evident."\textsuperscript{49} The Polish act extends legal protection only to cultural properties thus conceived.

With regard to the means by which Poland protects monuments, one must begin with the country's system of registration. Registration of movable and immovable monuments is one of the most important duties of the national service for the protection of cultural property, because it is agreed that registration of cultural property worthy of protection guarantees the effectiveness of other administrative and legal means of protection. The Minister of Culture and Art and the conservators are in charge of registration. Within the register are included all movable and immovable objects belonging to the state as well as certain private properties. Inclusion of a given object or its exclusion from the list is announced in the official gazette of each province. The Board of Museums and Protection of Monuments keeps an indexed inventory of

\textsuperscript{47} Id. arts. 62, 64, at 59.
\textsuperscript{48} Konstytucja [Constitution] arts. 3, 62, 64 (Pol. 1952).
\textsuperscript{49} Law of Feb. 15, 1962, \textit{supra} note 46.
protected monuments. The Law of 1962 created incentives for private owners to register their cultural properties. Article 26, paragraph 1 provides: "When the registration of a monument is the result of an owner's proposal, then he and his legal successors have the following rights: 1) the monument can be preserved at the State's expense; 2) transfer of ownership of such a monument through inheritance, donation, or legacy is free from the tax on the acquisition of property rights; and 3) such a monument does not come under Article 33, concerning expropriation of monuments."

At the same time, the Law of 1962 formulates certain obligations on the part of the owners of monuments or collections; these restrictions on ownership are called, in the theory of civil law, "impoverishment of owner's rights."

One of the means of protection is a system of control over the export of cultural property combined with freedom of internal trade. The legal bases for this system are Order No. 47 of the Minister of Culture and Art of May 26, 1964, and Order No. 66 of July 6, 1970. Within the system of control are included all the socialized or private enterprises dealing with art and objects of historic, scientific, or artistic value, as well as books published before May 9, 1945. All these enterprises are obliged to report to a conservator concerning any objects the export of which is prohibited. Moreover, with respect to a registered object or book, an enterprise is obliged to offer it for sale to national museums or national libraries. If the prohibition against export applies to an object put up for sale, the object must carry a warning informing buyers about the prohibition.

Article 41 of the Law of 1962 announces the principle that the exportation of cultural property is prohibited, but the Minister of Culture and Art has the power to grant permission for the permanent or temporary export of cultural property. Export restrictions do not apply to objects enumerated in Article 42 of the law, which includes works of living artists, works of handicraft and of artistic industry created after May 9, 1945, books and prints published after May 9, 1945, cultural property imported from abroad by persons enjoying diplomatic privileges and immunities, cultural property imported from abroad for decoration of foreign diplomatic mission premises as well as official consular premises, and cultural property brought into the coun-

try under the condition of re-exportation.\textsuperscript{53} Export of any of the abovementioned properties requires an export certificate indicating that the items to be exported belong to one of the categories of objects indicated in Article 42. The Order of the Minister of Culture and Art of June 30, 1967 describes the procedures and conditions on which export licenses are granted. According to the provisions of this act, customs officials are not to permit the exportation of any cultural properties without the proper documents.

Article 13 of the Customs Law,\textsuperscript{54} which provides the grounds for international cooperation in the protection of cultural property against illegal export, is especially significant to the operation of the Polish system of cultural protection. Article 13 specifies that "[i]n the cases and on the conditions formulated by international agreement, customs administrative organs can sequester imported goods if the customs authorities of the country from which those goods come were not notified of the export and send them back according to the procedure described in international agreement."\textsuperscript{55}

The legal basis of this type of international cooperation is the "Agreement on Cooperation and Mutual Assistance in Customs Matters," signed in Berlin on July 5, 1962 by Bulgaria, the German Democratic Republic, Mongolia, Poland, Romania, the Soviet Union, Czechoslovakia, and Hungary.\textsuperscript{56} Article 8 of the agreement states that the customs authorities of the parties to the agreement shall return to each other those objects in their possession which are objects of special historical or artistic value, if they were exported over the border of another party to the agreement, in violation of the customs, currency, or other regulations of that party.\textsuperscript{57} The parties to the agreement have cooperated in formulating procedures to guarantee themselves immediate aid at the most important points in the exporting process, the states' borders. While the agreement speaks of the return of objects only on the demand of the state concerned, in practice states generally inform a despoiled state about the illegal export of its cultural property or return the property without a formal demand. Two examples show the effec-
tiveness of this cooperative system, which provides participating nations with a second barrier of control over the exportation of their cultural properties.

In the first case, Poland was the state giving help. On February 6, 1971, the customs office at the Warsaw airport sequestered six icons from a Polish citizen on his return from a short visit to the Soviet Union. The Russians had not noticed the icons, and the objects did not bear documents permitting export. According to the opinion of official experts, all six icons were monuments. On the demand of the Soviet authorities, all the icons were returned to the central customs office of the Soviet Union.58 In the other case, Poland recovered a lost work of art which had been illegally taken abroad by a foreigner. On January 16, 1970, the Polish customs office learned from the customs office of the German Democratic Republic that the customs office in Frankfurt an der Oder, on October 13, 1969, had seized two icons from a Norwegian citizen who was a professional collector of monuments. The icons had been sequestered because the description in the export certificate issued by a Warsaw conservator did not match the actual appearance of the objects. A German conservator stated that the objects were masterpieces from the 18th century, purchased in one of the branches of “Desa,” the official enterprise which operates all the state-owned antiquities shops in Poland. The German authorities returned the icons without waiting for an official demand.59

The case illustrates several different situations in which an illegal export is possible. It can be assumed that the Norwegian citizen obtained the export permission by showing some other objects of less value to the Polish conservator. The scene on the Polish border could have included any of the following circumstances: the Norwegian conservator was not controlled at all; he was not controlled properly; a Polish customs officer read the export permission without checking the identity of the objects described. Whatever the actual situation on the border may be, one must emphasize that the return of illegally exported cultural property is possible only because of the complementary character of the import control undertaken in favor of the other country.

**Legislation in the Middle East**

The Middle East is rich in archeological, historical, and artistic monuments, but at the same time those monuments have been exploited

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59. See id. Doc. No. CUC-L-506/70.
because most of the countries in this region are economically poor. Nearly all of them depended for a long time on Western European powers, and during periods of popular interest in archeological excavations, the archeological masterpieces of these countries have been acquired by museums in Western Europe. Characteristically, provisions for the protection of cultural property in dependent territories were more restrictive than provisions concerning the property in Western European countries. Micacchi, when writing about new legal means of protection introduced in the Italian colonies, stressed that the main principle of colonial archeology was "the principle of State ownership of archeological ground." The apparent progressiveness of this principle should be recognized as a legal means of plunder, for the states which profit by such widely understood prerogatives are, after all, the colonial powers.

It is worth noticing that one can observe similarities in certain provisions governing the protection of cultural property in the Middle Eastern countries even though their protection systems were shaped in different periods of time and under the influence of various legal systems.

In some Middle Eastern countries the laws enacted during the 1930's are still in force. In the others some new provisions have been introduced, often prepared by the UNESCO experts. An example of a country receiving UNESCO help in the creation of internal regulations on protection of cultural property is Algeria, where the Polish scientist Professor K. Michałowski worked as a UNESCO expert. UNESCO has performed similar services in Qatar, the Republic of South Yemen, the Yemen Arab Republic, and Saudi Arabia.

The most striking similarities among the legislative systems of the Middle Eastern countries appear in the definitions of objects of protection. Almost all the countries of this region assume that the date of creation of a given object should be the main criterion for deciding

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60. Micacchi, La Législation coloniale italienne sur les monuments historiques, 17 MouséION, 64 (1932).
whether an object should be protected. The year 1700 constitutes the dividing line between protected and nonprotected cultural property in Iraq, Israel, Jordan, and Lebanon. In Egypt the year 1879, the end of Ismail’s rule, was chosen.

**Syrian Arab Republic**

The Syrian legislation on the protection of cultural property was chosen as the Middle Eastern model for the present discussion because, even though it belongs to the category of modern regulations, it preserves characteristics of other Middle Eastern systems. In conformity with Arabic tradition, Syria has chosen the age of the object as the main criterion in the definition of cultural properties, which are called antiquities. Historical and artistic value are additional criteria in the designation of protected objects.

Decree Number 222 offers the following definition:

[T]he term “antiquities” shall denote movable or immovable property, constructed, fabricated, fashioned, written or drawn by man more than two hundred years ago. Authorities responsible for antiquities shall have the right to regard as antiquities other movable or immovable articles of a more recent date if these are thought to be of historical, artistic or national interest. Each case shall be dealt with separately by a ministerial order.

Under the Decree of 1963, all cultural property belongs to the state with the exception of immovable property to which the owners can prove their title by deeds issued by a competent authority and of movable property registered by its owners with the authorities responsible for cultural property. Classified movable and immovable antiquities which belong to the state may not be sold. Compulsory classification brings about several restrictions on the individual ownership of protected antiquities. With regard to registered movable and immovable antiquities, the law prohibits the destruction or modification of one’s own cultural property and its removal to another place within the country. An owner has no right to oppose any official act affecting his own cultural property when the act results from an order from the authorities responsible for antiquities.

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66. *Id.* art. 4.
67. *Id.* arts. 21, 30.
68. *Id.* art. 22.
The Syrian decree gives powers to the General Directorate of Antiquities and Museums to expropriate any movable or immovable cultural property if it is in the interest of the state to do so.\textsuperscript{69}

In the hope of giving cultural property the highest degree of protection, the Act of 1963 imposes a system of protective measures on the trade in art. Chapter five of the decree contains provisions setting forth the obligation of each art dealer to obtain a license in order to be able to deal in antiquities. The license is granted subject to several conditions, the most important of which are as follows: 1) all objects offered for sale are to be kept in shop rooms only; 2) there is to be a reference register listing each item’s characteristics, its place of origin, the name and exact address of the supplier, and the name of the purchaser; 3) all information mentioned above is to be sent to the competent authority in the form of a written declaration signed by the supplier or the purchaser of a given object within three days after the sale.

Export of cultural property is regulated by Articles 66 to 74 of Decree Number 222. In accordance with those provisions, movable cultural property can be exported only if accompanied by the appropriate certificate.

It is worth mentioning that

\begin{quote}
[a]fter examining the cultural property intended for export, the authorities responsible for such property may grant or withhold authorization for such export, or may purchase the property in question at the price quoted by the exporter. Where such price is markedly different from the real value, the relevant commissions may alter the price to a figure which shall then become definitive.\textsuperscript{70}
\end{quote}

Those who violate the prohibition against exporting cultural property are punished by the payment of a fine of from 100 to 1,000 Syrian pounds and by imprisonment for a period of from one month to two years. In addition to those penalties, the object may be confiscated.\textsuperscript{71}

When examining the legislation of various countries on the protection of cultural property, one should point out the Syrian provisions controlling the importation of cultural property. These controls have two purposes. The first is to keep watch over the imported objects in order to subject the items of outstanding value to the provisions of Decree Number 222 by immediate classification. The second purpose, described in Article 22, is to help other countries to regain cultural

\begin{footnotesize}
\begin{enumerate}
\item Id. arts. 20, 31.
\item Id. art. 69.
\item Id. art. 86.
\end{enumerate}
\end{footnotesize}
property which has been illicitly brought into Syria, provided that the other countries reciprocate.

Legislation in the Far East

Asia's rich array of cultural properties reflects the variety of cultures inhabiting that continent. At the same time, these properties illustrate the characteristic cohesive elements of Asian art, which have developed from the shared experience of influences which have prevailed in large cultural centers and which have combined to create the fundamental structure of the Asiatic culture.

The cultural heritage of Asia is, to a great degree, endangered, both by nature and by man. Aware of the necessity for various forms of regional cooperation in order to protect cultural property, the Asian states have undertaken several practical steps toward the realization of this idea. One such step is cooperation within the framework of the Asian and Pacific Council which acts on the principle that "[t]he Asian and Pacific region represents a composite of heterogeneous cultural and social elements..." Nonetheless, international regional cooperation is still marginal, and the main emphasis is on protection at the national level.

Japan

Japanese legislation was chosen as a model for the region of Asia for several reasons. It should be noted that "[t]he Law for the Protection of Cultural Properties of 1950 is the only law in Japan which was drafted exclusively for the purpose of governing the administrative system for the protection of cultural properties." The breadth of legal protection, which is the unusual feature of Japanese law, was the principal reason for choosing the Japanese system as a model. Also important was the fact that the Japanese law on the protection of cultural property is one of the most recent legal acts of its type and may indicate the influence of international achievements in the protection of cultural property. For example, Japan introduced into its legislation the term "cultural property," which was coined during the preparatory works of the Hague Conference of 1954. Another important factor


was that the provisions of the other Asiatic countries were strongly influenced by the systems of European colonial countries or were directly introduced by colonizers. The provisions of Cambodia and Thailand, for example, were introduced by the French authorities, and the British influence is noticeable in the laws of Burma and India. In Japan, however, the provisions on protection were not forced upon the country by some other state; as a result, Japanese law contains elements which are unique to Asia.

One should mention at the outset that the system of legal protection of cultural property in Japan has its own history. The first acts were introduced at the beginning of the Meiji Era, about 1868. The next important legislative act was the Law for the Preservation of Ancient Shrines and Temples, issued in 1897. The acts of 1929 and 1933 widened the protection of cultural property. The Law for the Protection of Cultural Properties was introduced in 1950 to replace all earlier legal regulations.

It has been mentioned that the Japanese law uses the term "cultural property" to define the objects which the law protects. The notion of cultural properties is defined as follows:

1) Buildings, pictures, sculptures, applied arts, calligraphic works, classical books, ancient documents, and other tangible cultural products, which possess a high historical or artistic value in and for this country, and archeological specimens (hereinafter referred to as "tangible cultural properties");

2) Art and skill employed in drama, music and applied arts, and other intangible cultural products, which possess a high-historical or artistic value in and for this country (hereinafter referred to as "intangible cultural properties");

3) Manners and customs related to food, clothing and housing, to occupations, religious faiths, festivals, etc., and clothes, implements, houses and other objects used therefore, which are indispensable for the understanding of changes in our people's modes of life (hereinafter referred to as "folk-culture");

4) Shell mounds, ancient tombs, sites of palaces with towns developed around them, sites of castles, old dwelling houses, and other sites, which possess a high historical or scientific value in and for this country; gardens, bridges, gorges, seashores, mountains, and other places of scenic beauty, which possess a high value from the point of view of art or visual appreciation in and for this country; and animals (including their habitats, breeding places and summer and winter resorts), plants (including their habitats), and geological features and minerals (including the grounds where peculiar

74. Id. at 3.
natural phenomena are seen), which possess a high scientific value
in and for this country (hereinafter referred to as "monuments").

Only classified cultural properties receive legal protection. A spe-
cial organ of the Ministry of Education, the National Commission for
Protection of Cultural Properties, is responsible for classification. This
organ informs the public and the authorities about newly classified
property in the Official Gazette. After he receives the official an-
nouncement, an owner is bound by the legal consequences of classifica-
tion.

There are four categories of classified objects, each of which
contains important properties designated from among the items in one
of the four groups of cultural properties mentioned above. With regard
to the category of important intangible cultural properties, which in-
clude art and skill employed in theatrical arts and in applied arts, it
should be noted that the persons who attain great skill in these crafts are
recognized as holders of cultural property.

The tangible cultural properties which are particularly important
are designated as national treasures. National treasures are "those
properties which are of especially high value from the viewpoint of
world culture and which are the matchless treasures of the nation."
The properties of the "monuments" category which are especially valua-
able are further designated as special historic sites, special places of scenic
beauty, or special natural monuments. Items within the categories of
important folk-culture and important intangible cultural properties ap-
parently receive no special protection. In the case of an object classified
as a "national treasure" or as an "important cultural property," the state
gives the owner a subsidy in order to help him if he is unable to keep the
cultural property in a proper state because of financial difficulties.
Some specially appointed officials take care of privately owned classi-
fied objects if the owners are unable to do so. The preemptive right
of the state, its right to purchase before others are offered the chance to
buy, is executed without regard to the difference between "national
treasures" and "important cultural properties." The provisions regulat-
ing export treat all classified cultural properties the same. Export of any

76. Id. art. 2.
77. Id. art. 5, at 61.
78. Id. art. 28, at 65.
79. Id. art. 56, at 76.
80. Id. art. 27, at 64, 65.
81. Id. art. 69, at 80.
82. Id. art. 38, at 69.
83. Id. art. 32-2, at 66.
cultural property of high value is forbidden. It is, however, possible to obtain an export license issued by the commission, which may grant such licenses for purposes of international cultural exchange.\textsuperscript{84} It should be understood that the second level of classification described above plays an important role in the process of export licensing because the usual reason for a refusal to grant a license is that the object in question is a "national treasure."

**Legislation in the Americas**

**Mexico**

The Federal Law Concerning Monuments and Archeological, Artistic and Historic Zones, passed by the Mexican Congress on May 6, 1972,\textsuperscript{85} is of the class of legislation which imposes very restrictive regulations accompanied by strict state control over the ownership and circulation of cultural property and the exportation of protected objects.

The purpose of the Mexican legislation can be found in an earlier measure enacted in 1934.\textsuperscript{86} The Law of 1934 was not the only act of its type in Latin America. One can tell from the Colombian protective law of 1959\textsuperscript{87} that the countries of Latin America generally agreed upon the meaning of the term "monument" at the Seventh Pan-American Conference in Montevideo in 1933.

The Mexican Law illustrates one more important phenomenon: that the effectiveness of a law depends on the circumstances of the people of the area in which it is to be enforced. R. Reinhold asked, in the *New York Times*, why it is so difficult to stop the illegal export of cultural properties from Latin countries. Among the possible reasons, he considered poverty as the most important, followed by the geography of the area.\textsuperscript{88} One should also take into account the people's lack of cultural awareness. If the national educational policy emphasized the importance of protecting cultural property, perhaps

\textsuperscript{84} Id. art. 44, at 61.

\textsuperscript{85} Ley federal sobre monumentos y zonas arqueológicos, artísticos e históricos, May 6, 1972, 312 Diario Official [D.O.] 16 (Mex.). [Editorial note: The Law of May 6, 1972, has been reprinted along with an excellent translation as an appendix to an American case, Appendix A to Brief of Amicus Curiae American Association of Dealers in Ancient, Oriental & Primitive Art, at A-48 to -58, McClain v. United States, No. 75-3368 (5th Cir., filed Sept. 4, 1975).]

\textsuperscript{86} Ley sobre protección y conservación de monumentos arqueológicos e históricos, poblaciones típicas y lugares de belleza natural, Jan. 19, 1934, 82 D.O. 152 (Mex.).

\textsuperscript{87} Law of Dec. 30, 1959, No. 163 (Colom.).

fewer individuals would decide to take part in illegal trade. Of course, education would not solve the problem of the rich international gangs of smugglers, but a reduction in the number of individual thefts of archeological objects would undoubtedly improve the situation generally, since Mexico presently can provide some form of protection for only one hundred of the eleven thousand known archeological sites within its borders.89

The Mexican Law of 1972 divides protected objects into three categories: archeological monuments, artistic monuments, and historical monuments. The term “archeological monuments” means “movable and immovable objects products of the cultures prior to the establishment of the Spanish culture in the National Territory, as well as human remains, and fauna, related to these cultures. . . .”90 The notion of artistic monuments embraces “works of outstanding aesthetic value.” The law provides that “with the exception of Mexican murals, the works of living artists are not to be declared monuments.”91 To the category of historical monuments belong: “properties relating to the history of the nation from the time of the establishment of Spanish culture in the country if they are declared to have such character” by the president or by the Ministry of Public Education.92

Mexican law gives a special status to archeological monuments, proclaims that they are the property of the nation, and provides that ownership may not be acquired either by sale or by prescription.93

To insure strict supervision over archeological diggings, the new law requires anybody finding archeological objects immediately to inform the nearest civil authority, which must pass such information on to the National Institute of Anthropology and History within twenty-four hours.94 For any archeological projects to be undertaken by national or foreign scientific institutions, permission must be obtained from the National Institute of Anthropology and History.95

Among the measures aimed at the identification and conservation of cultural properties are the provisions requiring inclusion of protected objects in national inventories and notification of the competent authorities concerning the pending sale of protected monuments.

89. Id.
90. Ley federal sobre monumentos y zonas arqueológicos, artísticos e históricos, May 6, 1972, art. 28, 312 D.O. 16 (Mex.).
91. Id. art. 33.
92. Id. arts. 5, 32.
93. Id. art. 27.
94. Id. art. 29.
95. Id. art. 31.
State control over circulation of cultural property is secured by provisions which require art dealers to register their businesses and to accept the conditions specified in the relevant administrative regulations.

Under Article 16, paragraph 2 of the Law of 1972, the ban on export extends to all archeological monuments except those which are donated to foreign governments or scientific institutions by the president of the Republic.96 One who wishes to export artistic or historical monuments must obtain permission from competent authorities. Apart from strict export controls, Mexico has introduced measures providing for the recovery of illegally exported archeological monuments. On the basis of Article 16, paragraph 3, the National Institute of Anthropology and History is responsible for carrying out actions seeking the return to Mexico of illegally exported archeological monuments.97

As a final step in reviewing the Mexican law on protection, it is interesting to note that Article 19 provides that international agreements, as well as other federal regulations, are to be applied to all problems not covered by the provisions of the Law of 1972.98 Owing to this legal construction, the provisions of the Convention of the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted by the General Conference of UNESCO at its sixteenth session on November 14, 1970 and ratified by Mexico, are part of the national law of Mexico.

The United States

From observing the United States in the first phase of the UNESCO proceedings concerning the development of international means for protecting cultural property against illegal operations, one would assume that the United States has no organized system for the legal protection of cultural property. This assumption, however, is wrong, for one can construct a model of American legal protection from various statutes. The American system of protection is the result of the unique cultural developments of the United States combined with the unusual features of American land ownership.

The cultural situation in the first period of independence of the United States can be illustrated by the saying of President Ulysses S. Grant, quoted by Charles C. Mark: "I only know two tunes. One is

96. _Id._ art. 16, para. 2.
97. _Id._ art. 16, para. 3.
98. _Id._ art. 19.
'Yankee Doodle' and the other one isn't. Mark agrees that the French Revolution and the German insurrection of 1848 influenced, to some extent, the development of American culture, particularly because political immigrants brought with them new political views and new culture. Mark states, however, that American civilization up to the 20th century did not regard art highly.

In comparison with European legal systems, the American way of protecting monuments is unusual and reflects the fact that when the first legislation protecting cultural property was adopted, vast territories were owned by the federal government, especially in the West and South, where most of the protected monuments were located. The lack of great works of art explains why only historical monuments received protection under national law. Because most lands belonged to federal and state authorities, interest focused only on the monuments situated in those territories.

The original United States statutes protecting cultural property in the United States are "An Act for the Preservation of American Antiquities," enacted in 1906, and "An Act to Provide for the Preservation of Historic American Sites, Buildings, Objects, and Antiquities of National Significance and for Other Purposes," passed in 1935. There is no definition of protected objects in these acts, though criteria for protection can be stated. The important factor distinguishing an object as a national monument is its historical value. Such an object may be an estate, some architectural construction, or a movable object. The Act of 1906 was devoted to the protection of monuments situated on lands owned or controlled by the government of the United States; later the law authorized the president to declare as national monuments objects belonging solely to states. The Act of 1935 enlarged the range of protected objects. Its introduction declared: "It is a national policy to preserve for public use historic sites, buildings and objects of national significance for the inspiration and benefit of the people of the United States."

100. R. Lee, United States: Historical and Archaeological Monuments 19 (1951).
104. Id. § 461.
Interior with wide authority in the area of cultural protection. The secretary acts through the National Park Service, an independent office of the Department of the Interior which was created for the administration of national parks and monuments.105

Among the secretary’s duties is the responsibility for making “a survey of historic and archaeological sites, buildings, and objects for the purpose of determining which possess exceptional value as commemorating or illustrating the history of the United States.”106 According to the Act of 1935, character of ownership is irrelevant to the act of classification. Thus, the act enlarged the notion of national monuments because it provided that property could be declared a monument and thus recognized as worthy of protection regardless of its legal status. Ronald F. Lee, however, stresses the fact that “[t]he act of classification in the United States carries no legal implication, and does not diminish the right of the owner of an historic monument to do as he pleases with it.”107 Nevertheless, the federal authorities can secure wide surveillance over monuments through a system of agreements concluded by the Secretary of the Interior with states, municipal subdivisions, corporations, associations, or individuals. These agreements may contain provisions regarding various problems involving the protection, maintenance, or preservation of monuments.108 Furthermore, the secretary has the power to “acquire in the name of the United States by gift, purchase, or otherwise any property, personal or real, or any interest or estate therein, title to any real property”109 if it is done to implement a national policy of protection of historical monuments.

The increasing concern at the federal level with the protection of cultural property is well illustrated by a set of statutes passed by the 89th Congress, sometimes called “The Preservation Congress.” Of special significance among acts approved by the 89th Congress is the “act to establish a program for the preservation of additional historic properties throughout the Nation and for other purposes.”110 The statute empowers the Secretary of the Interior “to expand and maintain a national register of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, and culture . . . and to

109. Id. § 462(d).
grant funds to States for the purpose of preparing comprehensive statewide historic surveys and plans . . . for the preservation, acquisition, and development of such properties . . . .”111 The Advisory Council on Historic Preservation was created for the purpose of preparing recommendations for the president and the Congress on all matters relating to the protection of cultural property.112

Under the federal legislation there is no body having the right to control or supervise export of American cultural property. Some inquiries conducted in connection with the Metropolitan Museum of Art's policy regarding the sale of its holdings indicate that on the basis of general rules not necessarily established to protect cultural property, authorities can intervene to meet the demands of the public interest. Such an action took place when the attorney general of New York started an inquiry regarding paintings sold by the Metropolitan Museum of Art to foreign collectors, most of whom were from Japan. The museum is a private institution, and this fact was stressed by the director, Thomas Hoving, who replied to reporters' inquiries about the sale, "That's none of your business."113 The attorney general's inquiry undercuts Hoving's words and shows that the United States is indeed aware of the need to protect cultural property situated within its territory. Furthermore, the United States is one of a rather small group of countries which forbid the importation of cultural property illegally exported from the country of its origin. On October 27, 1972, President Nixon signed legislation prohibiting the importation into the United States of pre-Colombian monumental and architectural sculpture and murals illegally removed from the country of origin.114 Introduction of these provisions is one of the means of implementing a treaty concluded with Mexico on July 31, 1970.115 The treaty definition of protected objects is broader than the definition established by the United States for purposes of internal regulation. The latter concerns only pre-Columbian monumental and architectural sculpture and murals, while the treaty definition includes also "art objects and religious artifacts of the colonial periods of the United States of America and the United Mexican States

112. Id. §§ 470i-j.
of outstanding importance to the national patrimony . . .” as well as “documents from official archives for the period up to 1920 that are of outstanding historical importance . . .”116 Also worth mentioning is a recent bill which prohibits the importation of illegally exported objects not only of Mexican origin but also coming from Central America, South America, and the Caribbean Islands.117 This act may suggest that the United States is ready to conclude a series of agreements to resolve problems flowing from the illicit exportation of cultural properties within the American continents.

The act provides that the Secretary of the Treasury, in consultation with the Secretary of State, will prepare a list of objects of pre-Columbian monumental or architectural sculpture and murals which cannot be imported into the United States unless an importer can produce either a certificate issued by the competent authorities of the country of origin stating that the exportation was authorized or any other evidence that the import prohibition does not apply to objects imported by him.118 Any import of protected objects unaccompanied by the appropriate documents is regarded as illicit, and the customs service is obliged to seize such objects.119 Any sculpture or mural which is forfeited shall be returned to the country of origin under the conditions described in the act.120

The provisions presented above put the United States in the forefront in international efforts concerning the protection of cultural property against illegal exportation. It is possible to suggest some reasons for the decision made by the United States to change its import policy, at least on the American continent. Without diminishing the influence of the efforts of American individuals, especially those connected with art and archeology,121 one should note that the new policy is in large part the victory of the countries which have been the victims of illegal export,

118. Id. § 2092(a).
119. Id. § 2093(a).
120. Id. § 2093(b).
121. Even before any official action was taken by the government of the United States, some American museums implemented a policy generally restricting the purchase of cultural property and specifically prohibiting the purchase or exhibition of any objects of unknown origin. See Reinhold, Traffic in Looted Maya Art is Diverse and Profitable, N.Y. Times, Mar. 27, 1973, at 28, col. 3. The International Council of Museums passed a resolution demanding that its members refuse to buy any art object or antiquity which lacked a “pedigree” or record of its provenance. See Nafziger, Regulation by the International Council of Museums: An Example of the Rule of Non-governmental Organizations in the International Legal Process, 2 Denver J. Int’l L. & Policy 231 (1972).
as they found at last a way of pressuring officials in the United States. Their method was to threaten the expulsion from their lands of all American archeological missions engaged in legal operations. The realization of the threat would have been a great disaster for American scholarship, and the threat has had a decisive influence on changing the attitude of the United States toward international cooperation in the protection of cultural property.

**African Legislation**

With respect to legislation for the protection of cultural property, the non-Arabic nations in Africa can be divided into two groups. In the first group belong all the countries where the protection provisions originally introduced by colonial powers are still in force. In the second group belong the countries with protective systems of their own. It is rather difficult, however, to determine the precise number of African states having new provisions on protection. The index of national legislation prepared by UNESCO in 1969 lists only eight African states as having regulations introduced after their independence. They are: Kenya, Malawi, Mali, Nigeria, the Central African Republic, the Sudan, Tanzania, and Uganda.

**Malawi**

The Act of 1965 passed by the Parliament of Malawi is an example of efforts on the African continent to work out a legal system of protection. In the case of Malawi, the legal system of protection is the result of the adoption of the British colonial legislation, and in several respects Malawian regulations sound similar to those used in Sierra Leone, where old colonial statutes are still in force.

Malawian law defines two separate groups of protected objects, monuments and relics:

- **Monument** means any area of land which has distinctive or beautiful scenery or which contains rare or distinctive or beautiful vegetation or any area of land, structure, building, erection, ruin, stone

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122. One of the first countries to use this form of pressure was Peru, which in 1971 refused a Harvard University archeological expedition permission to perform archeological excavations in Chan Chan, the pre-Inca capital. See Friendly, *Archeologists, in Belgrade, Ask Nations to Curb Antiquities Thefts*, N.Y. Times, Sept. 18, 1971, at 5, col. 1.


124. An Ordinance to Provide for the Preservation of Ancient, Historical, and Natural Monuments, Relics and other Objects of Archaeological, Ethnographical, Historical or other Scientific Interest, June 18, 1946, 1 Laws ch. 59 (1960) (Sierra Leone).
circle, monolith, altar, pillar, statute, memorial, grave, tumulus, cairn, place of interment, pit dwelling, trench, fortification, excavation, working, kiln, rock, shelter, midden, mound, cave, grotto, rock sculpture, rock painting, wall painting, or inscription or any other site or article of a similar kind or associated therewith which is of archaeological, geological, anthropological, ethnological, prehistorical, historical, artistic or scientific value or interest or any remains thereof and includes:

   a) the site on which any monument or group of monuments was discovered or exists; and

   b) such portion of land adjoining such site as may be required for the maintenance of or otherwise for the preservation of such monument or group of monuments.

Relic means any fossil of any kind and any implement, ornament or article (not being a monument) which is of archaeological, geological, anthropological, ethnological, prehistorical, historical, artistic or scientific value or interest.  

One might assume that this minutely detailed definition, which apparently attempts to provide a complete list of protected objects, is the result of the draftsmen's inability to formulate a general definition, but the quoted definition follows the pattern of British laws, and such a suspicion would be out of place with respect to British lawyers. Therefore, one must conclude that the definition serves a special purpose: primarily, it provides certain knowledge of the statute's scope to the organs responsible for the protection of monuments, to owners of protected objects, and to all others dealing with cultural property.

The minister of the interior is responsible for the enforcement of the statute, and he acts according to the recommendations of the Monument Advisory Council. The minister is empowered to expropriate any monument when such action is in the public interest and to grant export licenses.

A portion of the law which is uniquely Malawian is the part dealing with agreements between the minister and owners of protected objects. The initiative for such an agreement may lie with either an administrative organ or the owner. Such an agreement may concern limitation of the owner's rights, renovation of the protected object, admission of the public to view the object, the necessity of informing the authorities about a transfer of ownership, the state's preemptive right to purchase the monument, and so on. A series of such agreements, if

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125. 4 Laws ch. 29:01 § 2 (1970) (Malawi).
126. Id. ch. 29:01 § 23.
127. Id. § 9.
put into practice, could be an effective instrument for the legal protec-
tion of cultural property.

Conclusion

In view of the facts that ninety-three governments have informed
UNESCO about their legislation protecting cultural property and that
other countries are in the process of enacting such legislation, one can
state that there are very few countries not interested in protection of
cultural property. Despite the variety of definitions of cultural property
in the examples presented, the concepts used in most of the models do
not differ greatly. Even the unusual Japanese definition of cultural
property, which includes natural objects not created by man, has a
parallel provision in the law of Poland. In Article 5 of the Polish
legislation, which defines the objects to be protected, we may read about
"rare specimens of an animate and inanimate nature. . . ." Some
other similarities can be noted in the legal means by which nations deal
with the conservation of cultural property and the prohibition of its
export. Those similarities in national practice create a world-wide
standard of state activity with regard to the protection of cultural
property. At the same time, however, it is the simultaneous existence of
these similar national systems which, at least currently, fails to provide a
framework within which nations could devise legal means for the recov-
ery of a protected object taken far beyond the borders of the country of
its origin. Many of the provisions regulating trade in cultural prop-
erties and granting them special status have an administrative character.
Provisions of this kind, for the most part, are not enforced by foreign
courts; it is not easy to formulate a claim for recovery of property illic-
tly exported when the claim is based on an administrative order. The
words of E. Mezgar have been valid since 1937: "It is a well estab-
lished principle in international English and American private law, as
well as international continental private law, especially that of France,
that a conflict of laws may occur only among civil laws and that in the
case of foreign criminal or administrative laws a judge has no
concern . . . ."128 In 1955 F. A. Mann took a similar stand:

[A] foreign State cannot enforce in England such rights as are
founded upon its peculiar powers of prerogative. Claims for the
payment or penalties for the recovery of customs duties or the satis-
faction of tax liabilities are, of course, the most firmly established
examples of this principle. It is also free from doubt that if works
of art cannot be exported from Italy without a special licence, the

128. E. Mezgar, Les Mesures du contrôle des changes et les principes du conflit
des lois, Premiers congrès d'études internationales 163 (1937).
State of Italy cannot come to English Courts to recover a painting wrongfully exported from Italy.\footnote{128}

In the case of a civil lawsuit, however, the significant provisions, from the point of view of international relations, are those national laws that forbid alienation or export of protected objects which are the property of states, museums, other legal persons of public or private law, and natural persons. The question arises whether these provisions offer a means to recovery when an object which is state property and which that country’s provisions describe as inalienable is nonetheless alienated within the country and is then exported. A further question concerns whether an identical legal situation is present when the order of activities is reversed and the illegal export precedes the alienation. In this second situation, the object is alienated outside the borders of the country to which it belongs. If, in some circumstances, restitution will not be granted on the mere force of the assertion that the object is public property, it would nonetheless seem that recovery should still be possible in the first instance on the ground that all countries should consider the alienation within the country of ownership invalid, according to the generally accepted principle of property law that lex rei sitae—the validity of a transfer depends upon the law of the country in which the subject matter is situated at the time of the legal transaction. Contrary to expectation, however, in such cases the country which owns the property does not necessarily recover. The reason for this anomalous result is that courts in this situation apply a competing principle of private international law, according to which the legal status of movable property is evaluated in accordance with the law of the state where the property happens to be at the moment that an action in detinue is brought. Thus, the law to be applied in this case will be the law of the state to which the cultural property, recognized as inalienable in the country of its origin, has been imported. If in this foreign country the object is not recognized as inalienable, the country of original ownership will not regain the object.

If the second situation above occurs, and an object is sold abroad despite the fact that its alienation is prohibited in the country of origin, the basis for the denial of restitution is application of the principle “\textit{en fait de meubles possession vaut titre}” (possession in title), according to which it is possible to acquire rights to movable property even from a person who has no title to it.

\footnote{129. Mann, \textit{Prerogative Rights of Foreign States and the Conflict of Laws}, 40 \textit{The Grotius Transactions} 25, 34 (1955).}
Examples of how courts of various countries have put these principles into practice can be found in the works of Professors De Visscher and Nahlik. While there have been some cases which involve the return of illegally exported articles, the process is time-consuming, costly, and quite inefficient. As a result, states have chosen other ways of regaining objects, relying on diplomacy or on direct negotiations with the museums which are in possession of the illegally exported property. Italy is a country which has put these alternative methods into practice. Rodolfo Siviero, a police investigator, revealed that Italy has regained some precious works of art through diplomatic means. The public, however, has been informed neither of the negotiations nor of their results. The only widely known case of a return is that of "Boston's Raphael," which Italy was able to regain from the United States.

On February 19, 1973, the New York Times announced that the Metropolitan Museum had acquired an Etruscan vase which was alleged to have been secretly dug up and illegally exported from Italy. After much painstaking investigation by the New York police, the FBI, the Italian government, and the New York Times reporters, it was concluded that the acquisition of the Calyx Krater was legitimate. While it appears that this vase was legally acquired, the event does point out

136. Id.
how sensitive art-rich countries are to the loss of important pieces of cultural property and how quick they are to act through diplomatic channels to reclaim them. Mexico and Turkey have followed the Italian practice.

Despite all the difficulties involved in recovering cultural property, there are examples of nations pressuring other nations to remove the export restrictions placed on cultural property. An illustration is the case of the Italian export charges, the subject of a judgment issued by the Court of Justice of the European Economic Community. The Italian Law of June 1, 1939, on the protection of objects of artistic or historic value, provided that a person exporting an object of such value should pay an extra charge of from 8 percent to 30 percent of the object's value. Litigation concerning the validity of the export charges commenced in January of 1962, when Article 16 of the Rome Treaty, establishing the European Economic Community (EEC), came into force. This article provides that “Member States shall abolish as between themselves, not later than at the end of the first stage, customs duties on exportation and charges with equivalent effect.”

Two years earlier, on February 18, 1960, the Council of Ministers had set up a common tariff of customs, Section 21 of which contains regulations regarding works of art, collections, and monuments. All such properties were exempted from customs duties. The EEC commission applied to Italy for abolition of charges imposed by Article 37 of the 1939 Law because, according to the commission, they violated the Rome Treaty. During negotiations with the commission, Italy continually sought delays, citing in justification the long and complicated parliamentary procedure in Italy for changing a law. On March 11, 1968, the Italian Parliament rejected the possibility of changing the law, and the commission submitted the dispute to the Court of Justice of the European Economic Community. The court declared that “The Republic of Italy did not adhere to obligations which were incumbent on it according to Article 16 of the treaty establishing the E.E.C., still collecting after January 1, 1962, in relation to the other Member States, progressive charges stipulated by the Law No. 1089 of June 1,

140. Id. § 37.
142. Id.
143. C. Pasetti & A. Trabucchi, Code des Communautés Européennes, 961, 1208.
144. See generally 14 Recueil de la Jurisprudence de la Cour 620-21 (Cour de Justice des Communautés Européennes 1968).
The court did not accept Italy's argument that it had broken no international obligations, but was instead acting within the framework of common regulations included in the provisions of the same treaty which Italy was accused of violating. Italy based its argument on Article 36 of the Rome Treaty, which states: "The provisions of Articles 30 to 34 inclusive shall not be an obstacle to prohibitions or restrictions in respect of importation, exportation or transit which are justified on grounds of . . . the protection of national treasures of artistic, historical or archeological value. . . ." In refuting the accusation lodged against it, Italy tried to convince the court that Article 36 was applicable to its special charges on export because the aim of the charges was not of a fiscal character, since the payment fixed in Article 37 of the Law of 1939 was intended to be a means of protecting and preserving artistic, historic, and archeological objects in its territory. The court disagreed with the Italian point of view, choosing to examine the situation from an economic perspective. In the opinion of the court, the prohibitions and restrictions permitted by Article 36 relate to import, export, and transit only. The court distinguished the aim of restrictions allowed by Article 36 of the Rome Treaty from the aims of customs duties and other taxes of that kind. The court found that customs duties only change economic conditions of export; they do not influence the decision of export itself. The export charges, the court concluded, made the export of cultural property more complicated and onerous without fulfilling the main purpose of protecting a cultural heritage.

In conclusion, it should be noted that it has long been known that legal action of individual nations for the protection of cultural property is no match for the clever methods applied by some professional thieves, especially when prices of works of art are growing all the time. An example of criminal techniques used in smuggling works of art may be taken from Peter Hopkirk in an article entitled "When Stealing Is a Work of Art."

The method he discusses involves painting a new picture on the surface of the original picture before crossing the border and then, after crossing, removing the temporary coat of paint with the help of chemical agents in a manner which causes no damage to the original picture. After this procedure is completed, the illegally exported work of art appears on the market, and recovery of it by the despoiled state is possible only through close international cooperation.

145. *Id.* at 621-22.