Contents

Issue 71 Autumn 2007

TO FOLLOW

The First Page

Article

The protection of cultural property in armed conflict

by Roger O'Keefe

The protection of cultural property in armed conflict has been a matter of legal concern since the rise of modern international law in the sixteenth and seventeenth centuries. What is meant by "cultural property" depends to an extent on the context, since each of the relevant treaties applies to a greater or lesser range of things. In essence, however, the term refers to buildings and other monuments of historic, artistic or architectural significance, to archaeological sites, to artworks, antiquities, manuscripts, books and collections of the same, to archives, and so on. The terminology distinguishes between "immovable" and "movable" cultural property, the labels being self-explanatory. By "protection" is meant, in the wartime context, protection from damage and destruction and from all forms of misappropriation.

Three basic points can be made about the protection, by means of international law, of cultural property in armed conflict. None is momentous or profound, but each is a useful corrective to seemingly popular and potentially harmful assumptions. First, states and other past parties to armed conflict have placed more, and more sincere, value on sparing and safeguarding immovable and movable cultural property, at least since 1815, than might be assumed. Next, the international legal protection of cultural property in armed conflict is not a pipe-dream. Finally, the criticism that concern for the wartime fate of cultural property displays callousness to the fate of people is misplaced.

VALUE PLACED ON PROTECTION

Since the end of the Napoleonic Wars, states and other parties to armed conflict have placed greater value on protecting cultural property than might be assumed. Perhaps it is not saying much, given the seemingly entrenched view that cultural property has always been deliberately attacked and looted in war, or its protection at best ignored. But it is not less true for that.

For a start, states have expended considerable energies on elaborating a demanding and sophisticated body of international rules specifically directed towards the protection of cultural property in armed conflict.

Some of these rules are to be found in the various general conventions on the laws of armed conflict. The 1899 and 1907 Hague Regulations on the Laws and Customs of War on Land, 1907 Hague Convention IX on naval bombardment, 1977 Additional Protocols I and II to the Geneva Conventions, and the 1980 and 1996 Protocols to the Conventional Weapons Convention on mines, booby-traps and other devices all contain specific provisions on cultural property. Conversely, of the general conventions on the protection of cultural property, the 1970 Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property contains an article relevant to armed conflict.

Alongside these treaties there have also evolved customary international rules of a criminal nature for punishing wartime mistreatment of cultural property. In the wake of World War One, the draft list of war crimes prepared by the 1919 Preliminary Paris Peace Conference recognised the wanton destruction of cultural property as criminal, and France sought the extradition from Germany of 16 individuals implicated in war crimes of a cultural nature. After World War Two, the Nuremberg tribunal convicted several defendants, chief among them Alfred Rosenberg, of war crimes and crimes against humanity for their roles in the Nazi plunder and destruction of cultural property in the occupied territories to the east. At the other end of the scale of gravity, a French military tribunal at Metz held a German soldier responsible for the destruction of a war memorial and a statute of Joan of Arc in a small town in occupied France. In more recent times, the International Criminal Tribunal for the former Yugoslavia has been vested with jurisdiction over war crimes in relation to cultural property, and has developed a body of relevant authority in cases such as Strugar and Jokić (both dealing with the shelling of the Old Town of

Dubrovnik) and Plavšić Blaškić, Kordić, Naletilić and Brđanin (all on the devastation of cultural property in Bosnia-Herzegovina). The International Criminal Court has been granted an analogous jurisdiction by the Rome Statute.

Most tellingly, states have adopted several specific conventions on the protection of cultural property in armed conflict, treaties which trace their origins to a 1919 report of the Netherlands Archaeological Society, as reflected in a provision of the 1923 draft Hague Rules on Aerial Warfare and later in the 1938 Preliminary Draft International Convention for the Protection of Historic Buildings and Works of Art in Times of War. In 1935, the Seventh International Conference of American States concluded the Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, known as the Roerich Pact, applicable to both war and peace. The Pact is still in force among 11 American states, although it is for all intents and purposes a dead letter. Far more significantly, in 1954 states adopted the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, along with its First Protocol. The Convention was updated and added to in 1999 by the adoption of a Second Protocol. The Convention currently has 166 states parties, the First Protocol 93 and the Second Protocol 44. This treaty regime remains the cornerstone of the international legal protection of cultural property in armed conflict.

All these normative efforts can be summed up in the following basic rules, applicable to international armed conflict (including belligerent occupation) and non-international armed conflict alike, consonant with customary international law and non-exhaustive. To begin with, it is prohibited to attack cultural property unless it makes an effective contribution to military action and its destruction offers a definite military advantage. It is also illegal to attack a military objective, such as a tank, a military headquarters or a munitions factory, if this cannot be done without inflicting on nearby cultural property damage out of proportion to the military advantage anticipated. The demolition of cultural property under a party's own control is forbidden too unless military necessity imperatively requires it. It is further prohibited to use cultural property for military purposes unless there is no other feasible way to obtain a similar military advantage. All forms of theft, pillage, misappropriation, confiscation or vandalism of cultural property are similarly unlawful. Parties to an armed conflict are required to prohibit, prevent and, if necessary, put a stop to all such acts. They are also forbidden to seize or requisition cultural property situated in the territory of an opposing party. Individuals responsible for intentional attacks on, other destruction of, or plunder of cultural property may be punished for war crimes, and widespread or systematic destruction or plunder of cultural property can qualify as a crime against humanity. As specifically regards occupied territory, an occupying power must prohibit and prevent any illicit export, other removal or transfer of ownership of cultural property, and must as far as possible support the competent authorities of the territory in safeguarding and preserving cultural property.

Where the 1954 Hague Convention and/or its Protocols apply, additional obligations arise, and special institutions and mechanisms for the enforcement of these obligations come into play. For example, states parties must prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate. Such measures include, as appropriate, the preparation of inventories, the planning of emergency measures for protection against fire or structural collapse, the preparation for the removal of movable cultural property or the provision of adequate *in situ* protection of such property, and the designation of competent authorities responsible for the safeguarding of cultural property. Under the Second Protocol, a state party in occupation of the whole or part of the territory of another must prohibit and prevent any archaeological excavation in the occupied territory, save where this is strictly required to safeguard, record or preserve cultural property. The same applies in respect of any alteration to, or change of use of, cultural property which is intended to conceal or destroy cultural, historical or scientific evidence. Over and above the general rules which apply to all cultural property, the Convention and Second Protocol provide for optional regimes of "special" and "enhanced" protection respectively, providing in theory for a higher standard of protection in respect of a narrower range of property. The Second Protocol embodies a detailed regime of war crimes provisions. The Convention provides for elaborate (and in practice dysfunctional) implementation and compliance mechanisms, and the Second Protocol has created both an intergovernmental Committee for the Protection of Cultural Property in the Event of Armed Conflict and a Fund for the same.

Nor has the wartime protection of cultural property been merely on paper. Since 1815, good will, conscientiousness and a broad consensus that cultural property should, where at all possible, be spared in armed conflict have figured more prominently than might be thought. Where such qualities have been lacking, fear of the consequences, especially in terms of public opinion, has tended to compel compliance. Indeed, the historical record shows that malicious destruction and plunder of cultural property by armed forces and flagrant disregard for its wartime fate have been exceptions over the past 200 years – devastating and not uncommon exceptions, but exceptions all the same, and condemned by other states.

Of course, any argument to this effect runs up hard against World War Two. But the first point to be made is that, leaving aside the Nazis' depredations in the occupied territories to the east, the destruction of cultural property

during the war was mostly not prohibited by international law as it stood at the time, and was rarely premeditated or nonchalant. This includes, for the most part, the Allies' strategic bombing campaign over Germany, in relation to which the UK's secretary of state for air told the Commons in 1942, it would seem sincerely:

> *Monuments of art and antiquity are the common heritage of all mankind. We do not deliberately destroy them, but it is our policy to restore that greater heritage of mankind—freedom—and to do that we must and will destroy the enemy's means of making war – his defences, his factories, his stores and his means of transportation, wherever they may be found.*

This should not be taken to mean that each and every Allied strategic air raid was lawful. In many instances, for example the devastation of Dresden and the US raids on Japan from late 1944, the already-elastic notion of a military objective was stretched very arguably beyond breaking point. But rarely were such acts in wilful defiance of the law. The same goes for other notorious examples of the destruction of cultural property during the war, such as the tactical aerial attack on the Benedictine abbey at Monte Cassino and Field Marshal Kesselring's swingeing demolitions in Florence. The genuine military necessity for either action must be seriously in doubt, but neither was an act of outlawry. One exception to this pattern was the firebombing of Lübeck (although the town was chosen not for its history as such but for its wooden construction), which in turn led by way of retaliation to the Germans' "Baedeker raids" on Exeter, Bath, Norwich, York and Canterbury, undertaken with the perhaps-rhetorical intention of destroying every building in England marked with three stars in the famous guidebook.

Conversely, World War Two witnessed conspicuous acts of cultural solicitousness. Despite being the second capital of the Axis and the focal point of the railway lines from southern to northern Italy, Rome was spared Allied bombing until July 1943 in explicit recognition of its cultural significance; and when it was bombed, special techniques were used and precautions taken to avoid hitting cultural property. It was a similar story with Florence and Siena. As regards Japan, although many of the US raids were of questionable legality, Kyoto and Nara were spared on cultural grounds. In the land war, Monuments, Fine Arts and Archives ("MFA&A") officers accompanied US forces throughout Europe, advising commanders as to the location of and care to be given to cultural property – a practice imitated by the British, for example in Libya. General Eisenhower's General Order No 68 of 29 December 1943, on the preservation of historic monuments in the mainland Italian campaign, emphasised the care to be taken to spare cultural property, and promulgated rules to this end. The order reiterated in more emphatic terms one to the same effect during the Sicilian campaign, and was followed by a directive of 26 May 1944 for western and central Europe, as well as by Title 18 ("Monuments, Fine Arts and Archives") of the Military Government Regulations for the US zone in occupied Germany. For its part, the German *Kunstschutz* or art protection corps took considerable pains to safeguard cultural property in southern and western Europe (although its efforts were undermined by the *Einsatzstab Rosenberg*, a special unit for the plunder of works of art, by the Special Purposes Battalion of the Waffen SS of the Ministry of Foreign Affairs, directed by von Ribbentrop, by the archaeological corps of the Ahnenerbe, the SS's special research division, and by operatives working on the personal behalf of Göring and Bormann respectively). In the same vein, Kesselring insisted on abandoning Rome without a fight, and without engaging in the routine military practice of demolitions to hinder pursuit. (The first Allied soldier to enter Rome the following morning was a US MFA&A officer, in accordance with a plan drawn up six months before.) Similarly, the commander of occupied Paris, General von Choltitz, deliberately delayed carrying out an initial order to destroy all the bridges over the Seine, and eventually ignored Hitler's command to defend the city "stone by stone", choosing instead to surrender without a fight.

In subsequent conflicts too, the international rules on the protection of cultural property in armed conflict have by and large been observed. For example, prior to the air and sea-launched-missile strikes which ushered in the 1991 Gulf War and which accompanied the invasion of Iraq in 2003, and prior to the aerial campaign over Yugoslavia in 1999, US military planners, in consultation with civilian experts, identified and placed on a special "no target" list significant cultural property in the countries in question. During the first of these conflicts, when Iraq positioned two fighter aircraft next to the ancient ziggurat at Ur, Coalition commanders decided not to attack them after weighing the value of their destruction against the risk of damage to the historic site. Similarly, when in 2002 a large number of armed Palestinian militants took up positions inside the Church of the Nativity in Bethlehem, the Israel Defence Forces refrained from an assault on the site, the standoff eventually being resolved through international good offices.

It is best, however, not to overdo the point. Appalling exceptions to the overall historical pattern of compliance and good faith since 1815 are not hard to find: the Nazis' colossal devastation and seizure of the cultural heritage of the occupied territories to the east, Iraq's plunder of Kuwaiti cultural institutions in 1990, the shelling of the Old Town of Dubrovnik in 1991 and 1992, the systematic razing of places of worship, many of them centuries old, and other historic landmarks such as the Old Bridge at Mostar during the war in Bosnia-Herzegovina, and the failure of US forces to guard Iraqi cultural institutions during the 2003 invasion, to name a few. Moreover, it is cold comfort that much of the destruction of cultural property during World War Two was not prohibited by the

laws of war as they then stood. But a frank recognition of these points does nothing to undermine the essential truth of the conclusion that states have made a greater effort since the end of the Napoleonic Wars to spare cultural property in armed conflict than seems to be assumed – and, indeed, that such efforts have in practice been the norm.

UNREALISTIC?

Contrary to common assumption, the protection of cultural property in armed conflict by means of international law is not a hopelessly unrealistic proposition.

The greatest cause of the wartime destruction of cultural property since 1815 has been its incidental damage in the course of bombardment of otherwise lawful targets. Such destruction reached its dreadful apogée in the World War Two Allied strategic bombing campaigns over Germany and Japan. But the signal failure of international law to prevent the devastation from the air of much of these countries' cultural heritage was in many ways anomalous, a function of a specific moment in both the laws of armed conflict and military technology: legally, the classical rules on bombardment had been rendered obsolete but the regime that would come to replace them was still underdeveloped; technologically, the massive increase in the explosive yield of ordnance and the capacity to deliver it from the air had not been adequately matched by advances in the precision with which it could be targeted. Thanks, however, to crucial legal and technological developments since 1945, today there is a greater possibility than ever before of sparing cultural property from damage and destruction in war.

The laws of war codified in the 1907 Hague Regulations had permitted recourse to bombardment only against "undefended" localities. If, on the other hand, a city or town was defended, it was not just its defences that could be bombarded: whatever morality may have said, no positive rule of international law forbade bombardment of civilian quarters as long as all necessary steps were taken to spare, as far as possible, cultural property, hospitals and the like. And the qualified rule on sparing cultural property did not in practice amount to much, since it was difficult to spare cultural property when everything around it was a lawful object of attack, and bombardment was not prohibited where the foreseeable damage to cultural property outweighed the military advantage to be gained. In the final analysis, the fate of cultural property hung in the course of bombardment on the concept of a "defended" town. But World War One exposed the inadequacies of this concept in the age of long-range artillery and aircraft. With the lines on the Western Front stretching from Flanders to Verdun and beyond, every urban centre behind them could only be captured by fighting and was therefore, in effect, defended. Moreover, the scale of mobilisation meant that cities and towns were full of troops, making them defended in a second sense. They were usually also within range of defensive artillery or aerial counteraction. The assumption, therefore, was that virtually every single city and town was liable to bombardment, and in the absence of any positive restraint on bombarding civilian districts in defended towns, all civilian property, except for cultural property and certain protected institutions, was open to attack. As a consequence, even if cultural property situated in a defended town was not itself the object of bombardment, it was often damaged in attacks on surrounding property, as when, in March 1918, a German shell destroyed the nave of the thirteenth-century church of Saint Gervais in Paris, killing 88 people. If such damage was unavoidable in the bombardment of lawful targets, it was not unlawful.

There was general agreement after World War One that the law on bombardment was outmoded, especially as it applied to bombing from the air. As a result, the conceptual foundations of the law were recast. The dichotomy between undefended and defended towns was replaced by the more precise concept of individual military objectives. Any town or city could, in principle, be bombed from the air but bombing was to be restricted to objects whose destruction would deliver a distinct military advantage to the belligerent. But the problem was that an exhaustive list of military and related infrastructural targets, as posited in the 1923 draft Hague Rules on Aerial Warfare, was never binding on states as a matter of treaty law and did not emerge in the interwar years as customary international law. The same went for the rule, also laid down in the draft Hague Rules on Aerial Warfare, that a belligerent was to refrain from bombarding an otherwise-lawful military object if this could not be done without loss of civilian life or damage to civilian property, including cultural property, that was out of proportion to the military advantage anticipated. These shortcomings reaped the whirlwind in World War Two. The definition of a military objective expanded to encompass any object whose destruction would weaken the enemy's capacity to carry on. All civilian industry and infrastructure, and the residential districts where the industrial workforce slept, were viewed as lawful targets, and while targeting the general populace as such was publicly beyond the pale, its terrorisation was, at the very least, an intended by-product of aerial bombardment. The greater the number of military objectives, the greater the risk of incidental harm to cultural property, a risk rendered a virtual certainty by technological limitations. The "Butt Report", delivered to the UK's Bomber Command in 1941, concluded that the smallest targets in Germany operationally feasible at night with the aircraft and highly inaccurate delivery systems available were whole towns, so that although the British government expressed on the outbreak of war "a firm desire ... to preserve in every way possible those monuments of human achievement which are treasured in all civilized countries", it was not thought possible from the air. The secretary of

state for air explained the policy to the Commons as follows:

> *We cannot be prevented from bombing important military targets because, unfortunately, they happen to be close to ancient monuments … The same principles are applied to all centres. We must bomb important military objects. We must not be prevented from bombing important military objects, because beautiful or ancient buildings are near them.*

The upshot of all of these considerations was the practice of area bombing, in which multiple, distinct military objectives scattered over an urban concentration were destroyed by levelling the whole concentration indiscriminately. As for the prevailing law, it provided that as long as it was lawful to attack the intended objective, any unavoidable incidental damage to cultural property was subsumed within that lawfulness.

But today the legal and technological climates are crucially different. A generally accepted treaty-based and customary definition limits lawful military objectives to objects which make an effective contribution to military action, as distinct from the enemy's broader capacity to sustain the military effort. The result is far fewer military objectives in the course of whose destruction nearby cultural property will be placed at risk. Even more significantly, in what is probably the single greatest legal advance since 1945 in the protection of cultural property in armed conflict, both treaty and customary international law now embody a restraint on incidental damage to such property. As seen above, it is now unlawful to attack an otherwise-lawful military objective if this cannot be done without incidental damage to cultural property out of proportion to the military advantage anticipated. When it comes to technology, the advent of so-called "smart" ordnance has improved almost beyond belief the accuracy of aerial bombardment, at least at the hands of the military powers most likely to engage in it. All these developments have greatly improved the chances that cultural property will survive war unscathed.

Again, however, it is best to remain sanguine.

There are, in the end, limits to what international law can do to civilise war. No rules will ever stop parties to an armed conflict or individual combatants who, motivated by malice, ideology or arrogance and convinced of their impunity, bear contemptuous disregard for law itself. The Nazis' devastation and seizure of the cultural heritage of the occupied East was a phenomenon beyond the power of law to prevent. The same is probably true of Iraq's plunder of the cultural institutions of Kuwait in 1990, the destruction of historic and religious sites in the former Yugoslavia, the use by armed militants loyal to Moqtada al-Sadr of the Imam Ali mosque as both arsenal and refuge, and former Secretary of Defense Rumsfeld's breathtaking disregard for the security of Iraq's museums and archaeological sites. International law can only have purchase where abiding with international law holds intrinsic value. History shows that international legal compliance mechanisms—weak at the best of times, and even weaker in war—do little to restrain the die-hards.

Moreover, the gravest threat to cultural property during armed conflict today is its theft by private, civilian actors not bound in this regard by the laws of war. The breakdown of order that accompanies armed conflict and the corrupting lure of the worldwide illicit market in art and antiquities continue to drive the looting of archaeological sites and museums in war-zones and occupied territory. The laws of war do not extend to such private acts. And while international law does oblige an occupying power to prevent and put a stop to all this, much and perhaps most looting takes place in the context of non-international armed conflict, where the rules on belligerent occupation do not apply.

The point to be made, however, is that insofar as the laws of war are capable of modifying behaviour, the rules on the wartime protection of cultural property are as capable as any.

CALLOUS?

Lastly, the accusation commonly levelled in the context of its destruction that a desire to protect cultural property in war reflects a callousness to human beings is misplaced.

The argument can be rebutted as a matter of formal logic. There is no necessary reason why an interest in the one should mean a disregard for the other. It can also be dismissed for failing to understand the philosophical basis of heritage protection. Cultural property is protected not for its own sake but for the sake of the human beings who draw meaning and pleasure from it. The ultimate end of protecting cultural property is human flourishing.

But there is also a more pragmatic answer. The protection of cultural property in armed conflict is, as history shows, simply impossible without an equal or greater concern for the protection of civilians. If a civilian quarter is targeted, the cultural property in its midst will tend to suffer with it. Conversely, as the inhabitants of Rome, Kyoto and Nara could attest, a concern to spare cultural property from the destructive effects of war can end up saving the lives of the local people.

Ultimately, no matter what legal and practical measures are adopted, war is a threat to cultural property, and the only safe bet is not to wage it.

- This article is taken from a lecture given by the author at the Institute of Advanced Legal Studies on February 15, 2007.

Dr Roger O'Keefe

Lecturer in Law and Deputy Director of the Lauterpacht Centre for International Law, University of Cambridge; author, The Protection of Cultural Property in Armed Conflict (2006).

Dealing in cultural objects: a new criminal law for the UK

by Simon Mackenzie

A report on research to evaluate the impact of the Dealing in Cultural Objects (Offences) Act 2003 on the UK market and its role in the international illicit market.

Cultural artefacts are stolen from temples and underground sites in "source" countries. The list of source countries is long, but the most high profile cases of looting have been in respect of Egypt, Italy, Peru, Mexico, Greece, Turkey, and China. Antiquities are highly collectable for reasons both of value and of aesthetics, and there are several prominent international centres for trade, most notably London, New York, Paris, Brussels, Hong Kong, Geneva and Bangkok. The two largest market centres for the sale of antiquities, in terms of volume of trade, are New York and London. The UK is widely acknowledged to be a significant market for looted antiquities in global terms, both by way of "end point" in the chain of supply, and as a transit point for looted antiquities which will subsequently leave the country. Antiquities looted from source countries have in the past routinely traveled to London to be sold by international dealers and auction houses to other dealers, private collectors and museums.

Critics of the market suggest that this traffic continues. Source states from which looted objects are exported for sale have responded to the problem with a two-pronged legal approach: vesting legislation and export controls. "State vesting" legislation, as we will call it here, follows a similar model across many source countries: objects over a certain age, usually 100 years old, in the ground are declared to be the property of the state, making their finding and removal a theft from the state. Integral parts of national monuments are often also expressly declared to attract criminal sanction if removed. Export controls usually take the form of licence requirements. Objects of artistic or cultural interest over 100 years old should not be exported without a licence, which will be granted by the state arts or antiquities department. Despite these restrictions at source, many countries continue to report widespread looting and unauthorized export of their underground heritage.

Strategies of regulation at the demand end of the chain of supply have been thought potentially capable of achieving a sanitising effect on the market and it is under this broad philosophy of demand-reduction as applied to illicit antiquities that the Dealing in Cultural Objects (Offences) Act 2003 Act appears. The 2003 Act, an apparent attempt to confront the illicit element of the London antiquities market, was put before Parliament as a Private Member's Bill, taking effect as law on December 30, 2003. The Act in section 1 provides for a sentence on conviction on indictment of up to seven years imprisonment and/or a fine, where a person:

> dishonestly deals in a cultural object that is tainted, knowing or believing that the object is tainted.

Under section 2 of the Act, a cultural object is "tainted" if it is excavated, or removed from a monument or other building or structure of historical, architectural or archaeological interest, and such excavation or removal constitutes an offence. It is stated to be immaterial whether the excavation or removal took place in the UK or elsewhere. The intended effect of this legislation is therefore to criminalise (and by implication deter) the knowing possession or trade in the UK of antiquities looted either here or abroad.

The purpose of the research reported here was to evaluate the impact of the Act on the UK market and its role in the international illicit market. The first phase of the research was a postal survey which targeted the 89 people and institutions we identified as being significant informants in relation to London's antiquities market. The survey achieved a response rate of 24, which therefore represents about a quarter of the London market and its attendant spectators, commentators and regulators as we had originally identified them.

In the second phase of the research, interviews were conducted with targeted key respondents in London, Oxford, Cambridge, Cairo and Bangkok. The total number of interviews was 38. The interviews were qualitative in method, meaning that their goal was less to elicit quantifiable data than to gain, in an interpretive vein,

insight into what the 2003 Act means to actors "on the ground." We can provide a general breakdown of the actors we interviewed, as follows:

- Five dealers from a selection of the most prominent dealerships in London;
- Five "specialists" with expertise in observing, researching and commenting on the illicit market;
- Three specialist law enforcement representatives, including a private investigator, a member of the Metropolitan Police's Art and Antiquities Squad, and a specialist from customs;
- Four respondents in senior positions drawn from the UK's museums sector, including prestigious museums, their major funding sources and associations established to provide collaborative spaces for discussions of matters of museum governance;
- Two key actors in the legislative process who played central influential roles in the design and/or passage into force of the 2003 Act;
- Five respondents in Thailand, including a senior figure in the National Museum, a senior figure in the legal arm of the Fine Arts Department, a dealer and two archaeologists (one local, one foreign);
- Thirteen respondents in Egypt, including senior representatives of the Supreme Council of Antiquities, foreign and local archaeologists, specialist academics and a senior representative of the Egyptian museum.

THE SURVEY DATA

The survey produced the following data:

Respondents

What was the balance of trade/non-trade response to the survey? The survey was designed to be filled out anonymously if the respondent so desired, with the result that we cannot categorise respondents in this way unless they identified themselves on the form or otherwise made clear their affiliation in their answers. In fact, the vast majority of respondents were identifiable in this way. Therefore we can say that 58 per cent of respondents were definitely from the trade, 29 per cent were not (ie they fell into the categories of regulators, commentators, archaeologists and other specialists), and in respect of the rest (13%) affiliation is unknown.

Self-regulation

Seventy five per sent of respondents thought the trade required formal regulation, and that self-regulation was not adequate to prevent the purchase of illicit antiquities by the trade. This is against 25 per cent who thought that the trade could effectively self-regulate.

Knowledge of the 2003 Act

Seventy one per cent of respondents reported familiarity with the requirements of the 2003 Act; 17 per cent reported no such familiarity and 12 per cent did not answer this question on the survey.

Effect of the 2003 Act

Asked if they thought the impact of the Act on the trade in antiquities in London "has been or will be positive or negative", the majority of answers were neither. Seventeen per cent thought the effect positive only, and 8 per cent thought it negative only. Twelve point five per cent thought the effect to be both positive and negative, while the greatest proportion, 29 per cent of respondents, declined to answer the question as it was put but instead wrote that they thought the Act had been and/or would be "neutral", "minimal" or "little" in its effect, or would be "ineffective."

Perceived change in market

Asked whether they had noticed a change in the way dealers operate as a result of the Act, 50 per cent of respondents said they had seen no change, 21 per cent said they had noticed a change, and 29 per cent did not respond. The 21 per cent that had noticed change represents five responses, of which one suggested any change noticed was "purely cosmetic" and had in effect driven the market "more underground or more under the counter than it was before", one simply noted that the Art Newspaper had reported a small number of dealers relocating abroad, and another claimed to perceive "less activity" in the market due to "despondency." None of these responses would seem to accord with the aims of the 2003 Act. "Purely cosmetic" adaptation, dealer relocation and "despondency" have occurred precisely because a characterisation of the trade as bifurcated between "legitimate" and "illegitimate" dealers is in error. Illegitimate objects pass through the "legitmate" trade and therefore any regulatory attention paid to such objects will, rather than support "legitimate" dealers by eliminating their "illegitimate" peers, directly affect the business of the trade generally.

However, the Act appears to have been ineffective in achieving any substantial effect on the trade: the most important finding here for an evaluation of the Act is that half of respondents, and a significant majority of those who responded to this specific question, had seen no change in market routines as a result of the passage of the Act.

Change in personal routines

This question was asked only to trade respondents. Asked whether their knowledge of the Act had affected the way they carried on business, or whether it would in the future, 64 per cent said no, 22 per cent said yes (although in some cases only "formal" change was planned), and

there was 14 per cent non-response. The detail of these responses is important to understand their character within this statistical distribution. The majority "no change" group generally saw no reason to change their routines which they saw to be adequate to constitute legitimate dealing and therefore most unlikely to trigger an offence under the 2003 Act. That the majority of traders surveyed have not and do not intend to alter their activities in light of the Act must be seen to be a significant failing of the legislation unless the "bad apples" market story is believed.

There is considerable evidence that there are bad apples in the antiquities trade, as there are in any business enterprise, in the sense of individuals or organisations who willingly break the law or violate social or moral norms of behaviour. There is also, however, considerable evidence that the problem of dealing in illicit antiquities is an issue that affects the "legitimate" trade insofar as looted antiquities are bought and sold as part of the general routine dealing activity of the open trade, often it seems without direct knowledge of the illicit nature of an object due to a lack of provenance information. The absence of thorough and effective provenance investigation has become routinised in the trade, in the UK as elsewhere, and as such in some deals made on the "legitimate" market, illicit objects are traded with no direct knowledge as to whether they have been looted or not. Importantly, although perhaps obviously, this means that these objects could have been looted.

Bad apples

There was no specific question asking whether respondents were of the opinion that problems relating to looted antiquities in the trade were the work of a perceived minority of "bad apples" or whether the problem infected the trade as a whole. However, responses to the survey questions are noteworthy in that 25 per cent of respondents (6 in number) attributed problems in the trade to "bad apples", suggesting that a small sector of the trade was untrustworthy and should not be associated with the legitimate trade. Of these six respondents, five were from the trade. Thus, 36 per cent of the trade respondents associated the problem of looting with "bad apples" without being prompted by a specific question to that effect. Given that this response was unprompted, we suggest that the "bad apples" opinion carries significant weight in a diagnosis of the trade's relationship with the looting problem. In keeping with previous research, we suggest that this represents a somewhat pious and complacent view on the part of dealers who may well themselves be dealing in illicit antiquities, perhaps unwittingly.

THE INTERVIEW DATA

The conceptual starting point for an analysis of the data is the market reduction model of crime reduction strategy in relation to markets in illicit commodities as developed by Mike Sutton and colleagues and published by the Policing and Reducing Crime Unit at the Home Office. The 2003 Act on the face of it would seem to fit with a market reduction philosophy: in a simplified model of the movement of goods from source to market, that criminal sanctions applied to the purchase of illicit material in the market will reduce the uptake of such purchase opportunities; that this reduction in sales will filter back to the "suppliers" of the market, the middle-men; and that the reduction of demand among the customers of these middle-market traders will result in a concomitant reduction in their demand for illicit antiquities from the looters who take objects from the ground in source countries.

The market reduction approach (MRA) also acknowledges the structural parameters within which certain property crimes occur, for example the "strain" experienced by consumers who cannot afford products heavily advertised as fashionable or otherwise desirable. Sensibly, the model proposes that attending to the provision of alternative legitimate routes to the realisation of these goals for individuals or businesses will reduce the incentive to find or accept illegal means of goal-satisfaction. This might be characterised as a "harm reduction" component to the regulation of illicit markets and can be seen to form a complement in the model to the more traditional "penal deterrence" component outlined above and which, in our analysis, informs the 2003 Act.

The translation of the MRA model to the antiquities market is problematic, however. In a market which functions without the serious transmission of provenance (ie information about the history of ownership of an object), illicit dealing is seen as a standard risk, and remains so despite the creation of the offence in the 2003 Act. Dealers, in other words, are not deterred by virtue of the new legislation:

> *"So, stolen goods, yes, they must be here. Possibly over the course of time 10 per cent of my stock has probably been stolen at one time or another…I don't know, but it would not surprise me if it was that high…either stolen in China, or wherever, you just don't know" (London dealer).*

The 2003 Act is perceived by dealers and regulators alike as an ineffective control mechanism. A law enforcement respondent put it pithily: "they passed a dead duck there." We can identify the failings of the 2003 Act in terms of a series of "problems" which are given clear form by the data, and which come together to undermine the impact of the legislation. These are the problems of:

1. proof;
2. national self interest and political will;
3. how the 2003 Act fits into the overall structure of regulation of antiquities dealing in the UK;
4. power.

I cannot address each of these problems here in any great depth, but interested readers might like to obtain a copy of the full research report in respect of this project, which will be made available on the Scottish Centre for Crime and Justice Research website at www.sccjr.ac.uk.

The problem of proof

The problem of proof in relation to the 2003 Act arises in relation to three related matters:

(a) The non-retroactivity of the operative provisions of the Act

The 2003 Act came into force on December 30, 2003. It is not retroactive and therefore a "tainted" object is only such if it has been stolen after that date. This clearly restricts the application of the Act in respect of objects already in circulation in the market on that date. More seriously, in any successful prosecution it must be proven that the object in question was stolen after the above date. This perpetuates a problem of proof that existed for prosecutors under the law prior to 2003. The sites from which antiquities are stolen are often isolated, their contents are known only to the finders, and they cross national borders without being recognised or recorded. In these circumstances, it is very difficult indeed to establish proof of the date of theft of an object which has appeared on the market without accurate accompanying information relating to its date of finding.

(b) The absence of provision for enforcement of breach of foreign export prohibition

Objects which have been exported in breach of a foreign export restriction are not included in the definition of "tainted" under the 2003 Act and as such a considerable proportion of illicit antiquities are excluded from its scope. This could have been an effective site of intervention into the illicit market for the 2003 Act had it been decided to follow examples of international illicit market regulation for other commodities, such as the CITES regulation of the international movement of protected wildlife, which encourage countries to sight export documentation from source before allowing import. The opportunity to tie import into the UK with licit export overseas was not taken for antiquities however.

(c) The difficulty of availability of evidence in relation to the central "knowing or believing" provision

Proving that a defendant was aware, to the extent of "knowing or believing", that an object he or she dealt in was tainted, in practical terms renders unworkable the offence the Act creates. At the same time this wording serves to undermine the basic message that unites all critics of the market: that effective due diligence in relation to object provenance needs to become an essential component of any purchase of antiquities.

The problem of national self-interest and political will

The 2003 Act is designed to play a role in the control of London's part in the international market in illicit antiquities. As London is a central market for the sale of antiquities which originate, and in some cases have been stolen from, overseas, this mission involves the acceptance by the UK government of a role in policing crimes which predominantly affect the interests of foreign powers. In fact, the idea of the protection of the interests of humanity generally ? "the world's history", "our common cultural heritage" and other such emotive terminology – is lost in the practical implementation of a system of resource prioritisation which inevitably occurs in the routine conduct of policing in the context of limited funding and manpower.

The problem of national self-interest does not only manifest itself in relation to the priorities of market countries like the UK. Source countries have a reputation for similar stubborn insularity in addressing the problem of the looting of artefacts within their jurisdiction and their export. This source "nationalism" has been criticised as exacerbating the problem of the illicit market by encouraging the creation of a black market in looted antiquities as a result of overbearing source country excavation laws and export controls. Our interviews in Thailand and Egypt confirm the existence of "nationalistic" retentive attitudes towards cultural property in these source countries. This may well be considered rather normal insofar as pride in a national cultural heritage and the desire to prevent the theft and national loss-through-export of that heritage might be considered sensible, natural "sovereign emotions" which any country's more culturally-sensitive inhabitants and governors might be expected to feel. Unfortunately, despite the seeming reasonableness of such national interest, our research supports the "black market" theory: that harsh controls at source create pressure for illicit export where market demand externally remains constant.

The problem of how the 2003 Act fits into the overall structure of regulation of antiquities dealing, import and export in the UK

This problem incorporates elements of the problem of proof above. The problem of proof is severe, and when the 2003 Act is held alongside other avenues of prosecution, which permit of a greater chance of success in court, the offence in the 2003 Act finds itself languishing at the bottom of the toolbox available to the police, the CPS and customs. Thus, there have been no concluded prosecutions in terms of the offence in the 2003 Act.

The problem of power

At issue here is the capacity "powerful" constituencies have to protect their interests. In our study, the powerful constituency is the antiquities market, including museums

and collectors, but particularly comprised of a core of active dealers and their lawyers. This group has managed to achieve such a high level of representation in official circles that their interests have become fused with the more "controlling" elements of the 2003 Act. Market interests were in fact in considerable degree constitutive of the 2003 Act, and in this way a picture emerges of a market taking a leading role in its own regulation. This is not self-regulation, however. Rather it is a form of legislative influence corrosive of the regulatory mechanism; a purposive and forceful watering-down of the laws that govern a certain market sector through a process of inclusion in discussions around appropriate levels of control at the time the law was drafted.

Positive effects of the 2003 Act

The data are not uniformly dismissive of the effect of the 2003 Act, however. Despite the lack of prosecutions and the other problems, theoretical and practical, with the act listed above, there is evidence that some members of the trade have been affected by the new legislation.

Generally, the reaction from the trade which we have distilled from our interviews and our observations of the market more generally has been one of a cautious and more reflexive "business as usual." As one of our specialist informants euphemistically put it: "the impact of the Act is not instantly evident!" Dealers generally appear to engage in the same transaction routines as before the implementation of the 2003 Act, encouraged by the general (accurate) perception of a culture of non-enforcement around the new legislation. They remain conscious that at this relatively early stage in the aftermath of legislative activity this period of non-enforcement might come to an end, but we might hypothesise that the longer the period of enforcement inactivity continues, the more confident the market will become in the permanence of this state of affairs and the more likely it is that old dealer routines will persist.

That said, some dealers have reportedly begun to implement changes in their patterns of dealing as a result of the 2003 Act. One dealer in our sample in particular asserted that he was taking the new legislation very seriously and that his office had "cut down dramatically on things we buy from Hong Kong." In criminological terms, this reaction might be interpreted as the self-control of an individual particularly susceptible to criminal justice deterrence.

> Dealer: You mean, why am I self policing in this manner?
>
> Interviewer: Yes.
>
> Dealer: Well, I just think that the law…I mean, the general view in the trade is that the law is difficult to enforce and a bit toothless…although obviously the penalties are quite large, essentially. My own view is that laws might start off like that, but you never know, they might change one day! You just need a couple of zealots to go around trying to enforce it and the whole aspect of it changes quite rapidly. I don't like the idea of dealing with that sword of Damocles hanging over my head.

It would be mistaken, on our reading of the market, to take this extreme self-policing as common among market actors, although some level of self-policing is characteristic of the "semi-conscious state of siege" (London dealer) which typifies the current market reaction to the new Act.

Perhaps the most important latent potential the Act has is its cumulative effect. Problems of drafting and other issues with the practical workability of the legislation as it stands aside, the problem of non-retroactivity becomes less of a restraint to prosecution as time passes. It is harder to break the law put in place by the 2003 Act now than it will be in five years time, simply due to the increased number of objects which will be excavated in that time, and therefore which will fall foul of the Act. However, in the absence of mechanisms of object provenance identification it will remain very difficult to prove date of excavation.

Implications for policy

The MRA works where buyers of stolen goods feel that they are under a level of law enforcement scrutiny such that an illegal purchase will have adverse consequences for them. Deterrence theory traditionally has comprised of three elements: certainty (that is, likelihood of being caught); celerity (that is, swiftness of punishment); and severity (that is, a punishment of a level that is thought sufficient to provide a disincentive to law-breaking). The offence in the 2003 Act has failed to have a market reduction effect because although it may satisfy the severity test – and possibly the celerity test although without cases to study this is difficult to say – it falls down on the most basic premise of deterrence; likelihood of detection and punishment. The dealers in our sample were well aware that the police are largely unable to detect the crime of dealing in tainted cultural objects, for the several reasons set out in our research report and adverted to here.

Rather than attempting to close down the antiquities market by means of criminal deterrence targeted at illicit dealing, another option might involve working towards a compromise between the market and source countries. This would involve a shift in the weight attached to internal components of the MRA. The MRA component currently prioritised in UK policy approaches to the market, and embodied in the 2003 Act is punishment-based deterrence, focused on market purchase. In addition to the penal component of the MRA – which focuses on reducing the number of stolen goods passing into a market – is the desire of the MRA model to attend to structural "strains" which underpin stolen goods markets. Thus we might consider mechanisms to legitimate the goods passing into

the market; maintaining the market while reducing the damage it causes. This is a "harm reduction" approach to stolen goods markets which asks "what is the harm that this market causes, and what can we do about it?"

In the antiquities market the damage caused by looting is predominantly to the archaeological record, and secondarily to the financial interest of source countries in their heritage. Several examples of schemes for the sponsored excavation, cataloguing, division and sale of antiquities have been practised over the years, and many market participants support the idea of such schemes, which are said to involve benefit for all: for archaeologists who conduct the digs and can gather their data; the market which receives a share of the finds (in some models in return for sponsorship); and the source state which exercises control over proceedings and decides which objects to release to the market and which to retain. The suggestion that these schemes may provide a panacea for the current problems in the antiquities market often meets with disapproval from archaeologists, however, who argue that (amongst other things) legitimating a section of the market will not discourage illicit dealing, and may indeed provide opportunity and motive for greater illicit activity. There are in fact many serious objections to such a model of market sanitization, and clearly the application of a harm-reduction strategy through this mechanism is problematic on many fronts. Yet the structure of regulation we have now is not working, and further thought about alternative models of engagement with the problem remains a useful activity.

The regulation of the international market in antiquities does not have to be a zero sum game, and to achieve the mutual benefits which can occur from market reconstruction, a shift in the philosophy of the UK's intervention is required so that the structural dictates of the MRA model are given due weight alongside its more penal dictates. International co-operation towards worthwhile harm-reduction approaches, combined always with an effective deterrent for dealing outside any such co-operative schemes as are erected or revived, appears a more productive route to market sanitization than the bare implementation of the penal part of the MRA model which currently informs the philosophy of UK intervention into the market. It is hoped that the Department of Culture, Media and Sport will turn its attention to exploring possibilities for such international collaborative approaches, rather than investing further in the "crackdown' approach which has been shown here to be so problematic. In respect of what precise form a harm-reduction model for the antiquities market might take, further research is needed.

Dr Simon Mackenzie

Senior Research Fellow at the Scottish Centre for Crime and Justice Research, University of Glasgow. *This research was funded by the Economic and Social Research Council, grant reference RES-000-22-1074.*

Financial crimes and financial misdemeanours

by Colin Bamford

The author argues that undesirable behaviour in the financial markets has not been countered by appropriate controls.

Our society has developed a wide range of measures for controlling and deterring behaviour that is felt to be undesirable. At one end of the spectrum is the public expression of disapproval by an authoritative body – the "naming and shaming" of those who are thought to have misbehaved. At the other end of the spectrum is the use of the criminal law – a highly formalised process, the outcome of which might involve the imposition of severe penalties or punishment on the offender. Between the two extremes lie a number of administrative and regulatory procedures, each of which is designed to deter or penalise the transgressor.

The argument of this paper is that, in deciding which procedure is best applied to a particular form of undesirable behaviour, we should be careful to match the selected process and its potential outcome to the nature of the transgression and to the perception of the transgression held within society at large. In the case of activity in financial markets, we have not done this. In relation to some kinds of behaviour there is a mismatch between the legislative response to the behaviour, and the view of that behaviour generally held in the community. Consequently, if juries are faced with an offence for which they think the punishment is inappropriate they may acquit the defendant even though they have little doubt that the facts alleged by the prosecution are correct.

CRIME AND REGULATION

Most people would take the view that the purpose of the criminal law is to enforce modes of behaviour that are accepted by society as obligatory. Lord Coleridge CJ said of the criminal law in *R v Instan* [1893] 1 QB 450:

> *"… every legal duty is founded on a moral obligation. A legal common law duty is nothing else than the enforcing by law of that which is a moral obligation without legal enforcement."*

The current edition of *Archbold* puts it more trenchantly in its very first paragraph:

> *"An indictment lies at common law for a breach of duty which is not a mere private injury but an outrage on the moral duties of society".*

However, Parliament has not been as scrupulous as the common law in restricting criminality to those acts that imply a moral obligation. As early as the 19th century Wright J noted in *Sherras v De Rutzen* [1895] 1 QB 918 that Parliament sometimes used the criminal law to control:

> *"… acts which … are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty".*

The use by Parliament of the criminal law as a regulatory tool, divorced from issues of ethics or morality, grew dramatically during the 20th century and the present position is summarised by Halsbury as follows:

> *"A crime is frequently a moral wrong in that it amounts to conduct which is inimical to the general moral sense of the community … An act may be made criminal by Parliament simply because it is criminal, rather than civil, process which offers the more effective means of controlling the conduct in question" (Halsbury's Laws of England, vol 1(1), para 1).*

Parliament sometimes chooses the criminal law as the appropriate process for dealing with matters which are not "criminal in any real sense" (to use the words of Wright J) but which it decides should be inhibited or prevented, for social or political purposes. Unfortunately, there does not seem to be a reasoned approach by which Parliament chooses to use the criminal process, rather than establishing a separate regulatory structure for dealing with the conduct concerned. One might suspect that the choice to criminalise an activity is often be based on cost: the courts already exist, and asking them to deal with the regulation of the conduct in question will involve only a marginal cost to the taxpayer, while it would be very expensive to set up a new regulatory structure. The judiciary has also commented on the factor of cost, although judges approach the issue from a different direction. In evidence given to the Macrory Inquiry on Regulatory Justice (Report published 2006) the Criminal

Law Sub-Committee of the Council of HM Circuit Judges said:

> *"We support the view that a distinction must be drawn between matters of regulation and criminal offending. There is a pressing need to avoid expensive court time being taken up with matters that are better suited to an administrative penalty".*

Parliament sometimes decides to use the criminal courts for regulatory purposes, rather than incur the expense of setting up a separate system, while the judges would prefer Parliament to set up a separate system, rather than waste their expensive time. Both approaches miss the basic point: the overriding issue is whether the criminal law is the most appropriate way of dealing with the problem, not whether it is the cheapest option.

INSIDER DEALING

In the UK, our failure to see the importance of matching the process to the offence can be illustrated by examining the history of the way in which we have treated the offence of insider dealing.

Insider dealing has been a criminal offence in the UK for almost three decades. Throughout this period, prosecutors and regulators have complained about the difficulty in obtaining convictions before the criminal courts. Between 1987 and 1997 only 13 prosecutions led to conviction (see FSA Enforcement Division – *Company Lawyer*, vol 28, no 2, p 43). Frustration at the low conviction rate has been compounded by the perceived leniency of judges. As one of the leading textbooks – Brenda Hannigan, *Insider Dealing,* 2nd ed, p 127 – puts it:

> *"The difficulty in achieving a change of perception in the past decade has been compounded by the apparent unwillingness of the judiciary to treat the offence as seriously as it warrants, so that even when convictions are obtained they are often reluctant to use the full range of possible sanctions".*

However, the low conviction rate and the leniency of the sentencing may not result from a culpable failure on the part of judges and juries to take the matter seriously. The explanation may be that the conduct which is sought to be controlled by the creation of the criminal offence is not such as to produce the sense of "moral outrage" that characterises criminal offences "in the real sense." Members of the public know that stock markets live on rumour and gossip and money is made or lost by participants backing hunches, often because they believe that their information is better than the information of other participants. To an outsider, it may not be obvious that the use of a particular piece of information is criminal "in the real sense".

The offence of insider dealing first reached the statute book in Part V Companies Act 1980. The precursor to the legislation was a White Paper entitled *The Conduct of Company Directors* (1977 Cmd 7037). The White Paper was produced by the Callaghan Government in response to a series of scandals involving the misconduct of company directors and advisers. The thrust of the White Paper was the control of the behaviour of those people, rather than any wish to regulate a particular form of activity. When dealing with the use of inside information, the White Paper said:

> *"Public confidence in directors and others closely associated with companies requires that such people should not use inside information to further their own interests. Furthermore, if they were to do so, they would frequently be in breach of their obligations to the companies, and would be held to be taking an unfair advantage of the people with whom they were dealing."*

The rationale for criminalising insider trading by directors and advisers is to ensure that those people properly perform their fiduciary duties in order to bolster public confidence in these people. Only as a secondary point is it said that their failure to act properly may be said sometimes to involve them "taking an unfair advantage" of their trading counterparties.

The original statutory provisions were replaced in 1985 by the Company Securities (Insider Dealing) Act. Shortly afterwards, a case came before the courts, in which they were asked to consider the purpose for which the Act had been passed. Their decision had the effect of moving the statutory offence from the "moral outrage" category of criminal offences to the "controlled activity" category.

The respondent in the case was involved in negotiations for the purchase of a small listed company. He was one of several potential buyers who were talking to the company's advisers, Kleinwort Benson Limited. Ultimately, the vendors decided to sell to someone other than the respondent. As a matter of courtesy, an executive from Kleinwort Benson phoned him to tell him he had been unsuccessful, shortly before the successful transaction was announced to the Stock Exchange. As soon as his conversation finished, the respondent telephoned his brokers and bought shares in the company, expecting that the price would rise as soon as the announcement was made.

He was prosecuted under the terms of the 1985 Act, on the basis that he had "obtained" inside information and had then dealt, contrary to the terms of the Act. The only point at issue was whether the information in his possession had been "obtained". In the Crown Court, he argued successfully that the word "obtained" involved the acquisition by means of effort. He had done nothing to procure that he came into possession of the information. It had been given to him gratuitously by the company's advisers. The trial judge accepted the argument, and the respondent was acquitted.

The Attorney-General, Sir Patrick Mayhew QC, referred the matter to the Court of Appeal, and subsequently to the House of Lords (see *A-G's Reference (No 1 of 1988)* [1989] 1 AC 971. He made the following submission:

> *"It is submitted that the purpose of the legislation was not only to provide sanctions against individuals whether or not in a fiduciary position who breached a duty of confidentiality by using information not available to the markets as a whole; it was also to preserve confidence in securities markets and to maintain their integrity and efficiency. The market has to be seen to operate fairly and if it is not investors' confidence will be seriously undermined."*

The assertion is that one of the purposes of the legislation was to preserve the sanctity of the free market and, it was argued, for this reason Parliament had felt that any act that disturbed that principle, whether or not it involved moral turpitude, should be punished by the full sanction of the criminal law.

This is a most unlikely assertion. The Parliament that framed the 1980 legislation was dominated by Old Labour members, who did not regard the free market economy with the same reverence as their successors. The purpose of the legislation, as made clear by the White Paper, was to control the behaviour of company directors and advisers. It sought to criminalise activity motivated by dishonesty and greed, because such conduct invoked "moral outrage" in the wider community.

The Court of Appeal and the House of Lords, however, accepted the Attorney-General's submissions and decided, in effect, that the word "obtain" means "has". Thus, if anyone has information that he knows to be within the regulated category (irrespective of the propriety of his own conduct in bringing that about), he is precluded from dealing. Subsequent statutory amendments in the Criminal Justice Act 1993 changed the description of the offence to make it clear that no impropriety in connection with the acquisition of the information is required. The mens rea required is only the knowledge that the information is "inside information". Its use may involve no breach of any private duty. To use the terminology adopted by Lord Coleridge, there is no longer any moral obligation on which the legal duty is founded.

The position in the UK contrasts strongly with that in the United States. The United States courts began to convict insider dealers decades before their activities were criminalised in the UK. However, it has always been clear in the US that the criminal law is invoked because insider dealing is a species of fraud. It is not merely a procedural rule required to ensure smooth regulation of a market:

> *"There is no requirement of equality of information. Instead liability must arise from a breach of a fiduciary or other duty or from some misappropriation of information" (US v Chestman 947 F.2d 551 (2nd Cir) 1991).*

The position within the EU is rather more complex. The Insider Dealing Directive of 1989 (Council Directive 89/592/EEC of November 13, 1989) was implemented in the UK by Part V of the Criminal Justice Act 1993. Article 2(1) of the Directive requires Member States to prohibit:

> *"any person who .... possesses insider information from taking advantage of that information ... by acquiring or disposing of ..."*

relevant securities. This seems to follow the line taken in the UK in *A-G's Reference (No 1 of 1988)* that the prohibition bites when a person possesses information, and that the motives and methods that led to the acquisition are irrelevant. Certainly, that was the view taken in the UK in framing the implementing provisions of the Criminal Justice Act.

However, a recent decision of the ECJ in the *Georgakis* case (case C-391/04, May 10, 2007) has rejected this interpretation:

> *"... the purpose of the prohibition ... is to ensure equality between the contracting parties in stock-market transactions by preventing one of them who possesses inside information and who is, therefore, in an advantageous position vis-à-vis the other investors, from profiting from that information, to the detriment of the other party who is unaware of it."*

In effect, the ECJ adopted the view that is taken by the US courts, that insider dealing is a way in which an insider commits a fraud on his counterparty. The evil at which the legislation is aimed is not the mere act of disturbing the integrity of the market. Indeed the court in *Georgakis* specifically rejected the argument that the purpose of the Directive was to maintain investor confidence in the market (see para 41 of the judgment).

The Insider Dealing Directive has been repealed by the Market Abuse Directive (Council Directive 2003/6/EC of January 28, 2003), which requires Member States to implement legislation that prohibits insider dealing as part of the wider prohibition of market abuse. The position in the UK is confused. On the implementation of the Market Abuse Directive, it was decided to leave the criminal law provisions on insider dealing exactly as they were, and to add a new layer of regulatory provisions, also dealing with insider dealing, as required by the Market Abuse Directive. Section 118 Financial Services and Markets Act 2000 contains detailed provisions under which insider dealing is included as a form of market abuse, regulated by FSA as part of its administrative function in overseeing the operation of the financial services industry.

There are a number of technical reasons why it is desirable to give the FSA the ability to police the activity of insider trading along with other forms of behaviour that might disrupt the securities markets. The decision to leave the Criminal Law Act provisions in place, however, means that we now have two parallel forms of regulation: on the one hand, a particular type of conduct is regarded as so undesirable that it is appropriate to regulate it by the criminal law, while another form of regulation treats the same activity as a matter which is to be regulated through an administrative process.

The UK criminal law sanction contained in the Criminal Justice Act 1993 and implementing the Insider Dealing

Directive must now, following *Georgakis*, be taken to have as its purpose the wish to suppress fraud and the cheating of counterparties. The insider dealing provisions of the Financial Services and Markets Act, however, implement the Market Abuse Directive and have a quite different purpose, even though they are phrased in similar language.

Whatever the reason for the parallel streams of legislation, there was considerable concern that the regulatory system established by the Financial Services and Markets Act would be used as a way of side-stepping the inconvenient attitudes of the criminal courts.

This fear has turned out to be groundless. At the time when the structure of the Financial Services and Markets Act 2000 was under consideration, close thought was given to the requirements of the process by which regulatory decisions about market abuse would be reached. It was concluded that the Human Rights Act 1998 might require that proceedings under the administrative process should carry the same safeguards as would be available in criminal proceedings, given that the potential outcome in terms of penalties was of the same nature and magnitude as those in many criminal proceedings.

The response to this concern was to provide in the Act that the person accused of committing market abuse should be able to require that the matter be considered by an independent tribunal, rather than being decided by the FSA itself. The proceedings of that tribunal, the Financial Services and Markets Tribunal (FSMT), show that it will proceed in the way traditionally followed by the courts.

Of particular relevance to insider dealing is its decision of the FSMT in the *Davidson* case *(Davidson & Tatham v FSA,* decision of the Tribunal May 16, 2006). The crucial point decided in that case was that, although the standard of proof required in regulatory proceedings under the Financial Services and Markets Act was the "civil" standard, of proof on the balance of probabilities, rather than the "criminal" standard of proof beyond reasonable doubt, the two were in practice likely to be almost indistinguishable. Where the consequences for the regulated person were as severe as they would be in criminal proceedings, the level of proof required to tip the balance of probabilities would in effect be as great as that required by the criminal standard.

The way in which insider dealing is prosecuted and penalised is far from satisfactory. It is possible to summarise its history as follows:

1. Insider dealing began life as a criminal offence, the purpose of which was to prevent or punish the dishonesty and breach of duty of those in privileged positions.
2. In 1989 the courts redefined the purpose behind the Act to say that its purpose was, in part at least, to ensure the smooth working of securities markets, rather than controlling only behaviour that was criminal "in the real sense".
3. Whether or not as a consequence of this change of official view, juries and judges have not, it seems, felt "moral outrage" when faced with the offence, and accordingly have been reluctant to convict, or to punish heavily.
4. In the Financial Services and Markets Act, the FSA was given power to deal with the matter by way of regulatory punishment. Whether or not this was structured as a deliberate attempt to avoid the perceived difficulties in obtaining convictions under the criminal law, it was assumed that this would be the result.
5. In practice, the terms of the Human Rights Act and the approach of the Financial Services and Markets Tribunal have meant that the processes under the regulatory regime are very similar to those that would apply if the criminal regime were followed.
6. From the point of view of market regulation, the efficiency of the controls has not improved.

CONCLUSIONS

The history of the offence of insider dealing is an illustration of a wider problem that we have created for ourselves. We have not drawn a distinction between those kinds of behaviour that invoke "moral outrage", and those that call for a form of administrative control. As a result, our ability to control undesirable market conduct has been inhibited because we have chosen to treat it as criminal. We have found that the invocation of the criminal law has also called up the traditional safeguards, both in terms of procedures and in terms of judicial attitudes, that defend the citizen against the erroneous application of the criminal law. The unfortunate consequence is that insider dealing and other anti-social financial behaviour remains frustratingly difficult to inhibit and control.

The answer is not to shy away from using the criminal law in financial and commercial matters, but rather to apply rigorous analysis when deciding how a particular kind of behaviour should be dealt with. In the case of insider dealing, the 1980 legislation should have isolated the factors that prompted the "moral outrage" and criminalised those, rather than looking only at the economic result of the behaviour concerned. Instead, we seem to have identified a particular outcome from behaviour that might (or might not) be generally considered reprehensible and have then made criminal any activity that results in that outcome. In other words, we have identified the symptom rather than the disease.

In future, we should give more thought to the appropriate response to each perceived evil. In particular, we should not use the criminal law unless its use resonates with the moral values of those who will form the juries that try the offence.

Colin Bamford

Barrister, 3-4 South Square

The supervisory boards of large Dutch companies

by Frank Wooldridge

A summary of reforms relating to the appointment and function of supervisory boards in large private and public companies, and amendments to Dutch law governing employee participation.

PRELIMINARY REMARKS

The rules relating to the appointment and to a lesser extent the functions of such boards have undergone significant reforms as a result of the Law of 1 October 2004 that made a number of amendments to Articles 268 and 158 of book 2 of the Netherlands Commercial Code (*Burgerlijke Wetbook*), which are applicable to large (or "structure") private and public companies (NVs and BVs) respectively, as well as certain alterations to other relevant provisions of Dutch law governing employee participation.

"Structure" companies are defined in Articles 263(2) and 153(2) of Book 2 in an identical manner. A company is a large or structure company if: (i) its issued share capital together with its reserves according to the balance sheet amounts to at least €16 million; (ii) the company, or a dependent company, is legally bound to set up a works council; and (iii) the company generally employs at least 100 persons in the Netherlands. The amount of €16 million is subject to periodic revision. The obligation to appoint a works council is generally imposed on companies employing more than 50 persons.

Such companies are required to set up supervisory boards which are invested with particular functions. Other companies may set them up and thus make them a dual board system on a voluntary basis. The appointment of the supervisory board in large or structure companies used to be based upon a system of cooptation, according to which it appointed its own members. Those representing the employees were recommended by the works council, but their appointment could be prevented by the general meetings. Disputes about such appointments could be referred by the supervisory board to the Enterprise Chamber of the Amsterdam Court of Appeals. The system of co-optation has been replaced by a new method of appointing the supervisory boards of large companies, which is described below, where the dismissal of such members and their functions are also considered. The Dutch rules of law applicable to large companies only apply in a weakened form to large Dutch companies which belong to an international group of companies. The applicable rules of law governing the appointment of the members of the supervisory board of a large Dutch company are principally contained in Articles 265 and 155 of Book 2 of the Dutch Commercial Code. Other provisions, however, are of significant relevance.

APPOINTMENT OF MEMBERS OF THE SUPERVISORY BOARD

The new provisions governing the appointment of members of the supervisory board of a large company owe their existence to a proposal of the Netherlands Economic and Social Council in 2001, which considered matters relating to corporate governance. The new provisions contained in the Law of 1 October 2004 give the principal role in appointing members of the supervisory board to the general meeting, acting on a proposal which must be made by that board. The boards could be given an enhanced right (the Dutch term is *bindende*) of nominating up to one third of the members of the supervisory board. Article 270 of Book 2, and Article 160 thereof, which may be intended to prevent the formation of factions, provides that trade union officials who are active within the enterprise or one dependent on it, are ineligible for appointment to the supervisory board, as also are persons having a service contract with the company or one dependent on it.

By Articles 268(9) and 158(9) of Book 2 of the Commercial Code, the general meeting may reject a proposal for the appointment of a member of the board by itself or by the supervisory board, or by the works council by means of a resolution passed by an enhanced majority of the passing of votes of at least one third of the holders of the issued capital represented. The new provisions governing the appointment of the members of the supervisory board seem to have weakened the position of that board regarding such appointment. These provisions seem to have been influenced by considerations relating to satisfactory corporate governance.

Period of office

A member of the supervisory board of a large company holds office for a period of four years from his appointment according to Articles 271(2) and 161(2) of Book 2, which apply respectively to private and public companies. If the large company is listed, it will be subject to the Netherlands Corporate Governance Code, according to which the period of office for a member of the supervisory board is four years, which may be renewed for a maximum period of four years each.

Dismissal from office

The period of office of a member of the supervisory board may be terminated involuntarily as the result of a decision of the Enterprise Chamber of the Court of Appeals of Amsterdam. The relevant rules of law are set out in Articles 271(2) and 161(2) of Book 2 of the Commercial Code, which apply respectively to Dutch private and public companies. A decision to dismiss a member of the supervisory board may be requested by the board itself, the works council, or by the shareholders in general meeting, or the shareholders committee. It may only be taken by the Enterprise Chamber in the event of breaches of duties, other important reasons, or in the event of any significant changes in circumstances, for instance the merger of the company with another, which made it unreasonable for the relevant person to continue as a member.

Articles 272a and 161a of Book 2, which apply respectively to private and public companies, gave a significant power of dismissal to the general meeting. When it has lost confidence in the supervisory board as a whole, it may take proceedings to dismiss it without the intervention of the Enterprise Chamber. It has to act by an enhanced majority and at least one third of holders of the issued capital must be represented at the meeting. Furthermore, the proposed resolution must be submitted to the works council at least 30 days before the relevant meeting. The directors of the large company must request the Enterprise Chamber of the Court of Appeals of Amsterdam to appoint one or more directors on a temporary basis such that a new supervisory board may be constituted. The articles of a company may not depart from this procedure. However, the supervisory board remains competent to make nominations for all members thereof. It would seem that the new procedure would only be used in serious cases, but its existence may be thought to weaken the position of the supervisory board.

TASKS OF THE SUPERVISORY BOARD

The supervisory board has the normal tasks of any supervisory board of exercising supervision and tendering advice set out in Articles 250 and 140 of Book 2 of the Dutch Commercial Code, applicable respectively to Dutch private and public companies. It also has significant additional tasks, including the appointment and dismissal of the directors in accordance with Articles 272 and 162 of Book 2 and by Articles 274 and 164, the approval of the passing of certain resolutions of private and public companies, for example resolutions governing the issue of shares and bonds by such companies. The supervisory board is no longer entrusted with the adoption of the annual accounts. It cannot dismiss the directors until the general meeting has considered the matter. If it purports to do so, it act is void.

CONCLUDING REMARKS

The Dutch system governing large companies results in some degree of employee participation, and is designed to be one which, as far as possible, does not lead to confrontation. The role of the supervisory board has been significantly weakened since the reforms made in 2004, whilst there has been a considerable strengthening in the position of the general meeting. Whatever its merits may be, it does not seem one which will be adopted by a significant number of other countries. This is because of its balanced compromise character which is hardly likely to appeal to both parties to industrial relations. The very detailed character of certain of the provisions may not make them very acceptable models for legal transplants. This is especially true of those governing total and partial exemptions from the regime.

Dr Frank Wooldridge