THE PRC'S LAW FOR THE PROTECTION OF CULTURAL RELICS

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INTRODUCTION

China is one of the world’s great and historic cultures, in fact the oldest continuous culture. As a result, the country is a virtual antiquities warehouse, with countless new discoveries being made all the time. This is indeed, as an exhibition of Chinese antiquities in the United States declared, the ‘Golden Age of Chinese Archeology’.

The pace of development, which entails large amounts of digging for construction work and the opening up of new land, has contributed to the discovery of a staggering array of cultural objects. As one investment advisor has written:

Because of mainland economic and land reforms, rapid market formation from technological innovation, and a more aggressive Chinese building and road development policy, an extraordinary buying situation exists. This amazing opportunity is caused by what I call a ‘supply bubble’. Fine quality Chinese antiques are available in greater number and many are at lower price levels today than at almost any time in the past.

However, two problems have arisen. First, the rapid rate of construction and development means not only that many sites are being found, but that these same sites, and many others, are being quickly destroyed in the rush to build the economy. Secondly, with the rise of the ‘socialist market economy’,...
increasing local demand for artefacts and strong international demand for Chinese antiquities have given rise to a vast trade, legal and illegal, in precious cultural objects, which causes many protected works to leave the country and encourages illegal digging, theft and unlawful sale or acquisition of protected cultural property at home.\(^5\)

The Chinese Government now sees it as its mission to ensure that excessively rapid development and the trade in antiquities do not endanger the integrity of the country’s cultural patrimony.\(^6\) The main legal instrument by which the Government attempts to achieve this aim is the Law for the Protection of Cultural Relics (LPCR).\(^7\)

1. The LPCR and its Wide-Ranging Implications

The first Law for the Protection of Cultural Relics was passed in 1982. There were some marginal amendments in the 1990s, but the law remained essentially unchanged for two decades while China was radically transformed. A new, vastly overhauled, version of the LPCR emerged in 2002, and except for a few amendments made at the end of 2007, the 2002 LPCR has remained the prevailing law in this field in China.

The 2002 LPCR is worth studying for a number of reasons. Aside from its importance as law per se, cultural property protection has been a flashpoint for critical domestic and international policy issues.\(^8\) The many domestic policy
issues on which the LPCR sheds light include: weighing the interests of the individual economic actors in a market economy against public goods; balancing construction and economic exploitation of resources versus their preservation; reducing corruption and illegality at the local government level in a country whose local officials are often beyond central control, media oversight, or the reach of the judiciary; strengthening routine law enforcement while reducing intrusion into citizens' lives, property and rights; the appropriate extent of State ownership; and the allocation of financial resources.

At the international level, important issues on which the LPCR sheds light include China's role in the world, balancing open-door trade with the foreign acquisition of Chinese assets, 'national' vs. 'international' claims on culture, whether cultural goods should be treated as ordinary goods and services, and whether art purchasing nations should actively assist art 'source' nations to block the drain (legal and illegal) of cultural artefacts from the latter to the former.

I should like to draw attention in particular to two subjects connected to the LPCR that are worth widespread attention from all scholars of China, and not just scholars of law or culture.

The first is that the LPCR is a mirror of, and partly a product of, the emergence of social pluralisation and increasingly open political conflict among interest groups in China. Among those involved are art dealers and auction houses, academics and other intellectuals, developers and industrialists, preservationist citizen-advocacy groups and individuals, officials (with conflicting interests not only among different bureaucracies but among different levels of government), public and private museums, private collectors, the police and the criminals who play their roles in the art trade, foreign collectors and museums, and the tourism industry, and even local hawkers of cheap souvenirs, poverty-stricken farmers who stumble upon valuable antiquities, and citizens who may live in or near heritage zones and would like to preserve (or alter) their living environment. Not only do all of these groups of people have interests at stake in the LPCR, but they have made their views known, in the media, to the Government, in the marketplace, and even in the National People's Congress, which took four readings to pass the law in 2002. Thus cultural property protection law in China is worth our attention, if only because this is sure to remain a highly contested area, as it is everywhere else in the world.

9 In the language of Michael Mann, this problem is one of increasing the 'infrastructural power' of the Chinese State (essentially law enforcement and administration) while simultaneously reducing its 'despotic power'. In 'The Autonomous Power of the State' in John Hall, ed., States in History (Oxford, Basil Blackwell, 1986): esp. pp. 113-116.

10 Perhaps needless to say, China is mainly an art 'source' nation, and has signed on to four international instruments (the World Heritage Convention of 1972, the Hague Convention of 1954, the UNESCO Convention of 1970 and the UNIDROIT Convention of 1995) in an attempt to use international law to slow down the flow of cultural goods from China to other nations.

11 As a matter of comparative politics, it is noteworthy that two key elements in the early stages
Secondly, study of the LPCR offers insight into China’s evolving role in the international system. It is clear from many aspects of Chinese foreign policy that China, though naturally placing its national interests first, sees its national interests as including membership in good standing of the world community. According to He Shuzhong (founder and chairman of the Beijing Cultural Heritage Protection Center and director of the Law and Policy Department of the State Administration of Cultural Heritage), during the campaign to get the LPCR passed, one of the strongest arguments marshalled by pro-LPCR advocates was that China needed strong legislation to protect cultural property because only in this way would China achieve world standards. China remains attentive to international opinion about its cultural preservation efforts, especially to the views of international organisations.

At the same time, China will not forever remain a passive subject of international norms, and in fact, as the official Xinhua news agency proudly tells us:

In recent years China has been playing an increasingly larger role in this field internationally. It has hosted a number of major international events, such as the 38th World Heritage Conference in 2004 and the 15th Congress of the International Council on Museums and Sites. In 2010, China will also host the 22nd Congress of the International Council of Museums.

In many places in this paper we will see a number of illustrations of the interplay of the LPCR with international norms. Before turning to the LPCR itself, however, a few housekeeping comments are in order.

2. Preliminary Notes for this Paper

First, on structure. The structure of the paper is very simple. I will look at each Chapter of the LPCR individually, and discuss the themes that predominate in each. As this discussion proceeds, reference will be made where appropriate to additional materials that can help improve the understanding of the LPCR itself. These materials include the Implementing Regulations for the LPCR, other relevant PRC instruments (such as the Property Law and the Criminal...
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Code), media stories, secondary sources written by academics and officials, and any enlightening insights that may suggest themselves from the documents and academic literature of comparative and international heritage law.

Secondly, on terminology. Many English terms are used in the discourse about the subject matter of this law, known in Chinese as wenwu: cultural heritage, cultural patrimony, cultural property, cultural objects, cultural artefacts and cultural relics. Strictly speaking these terms do not all mean the same things. However, no attempt will be made here to choose any one of these terms as definitive or ‘better’ than the others; they will be used more or less interchangeably in this paper. However, the LPCR is addressed only to the tangible cultural heritage. Protection of intangible cultural heritage is a separate issue.

Thirdly, on language versions of various legal provisions in this paper. I have used the original Chinese language texts for the Law for the Protection of Cultural Relics and the Implementing Regulations of the LPCR. Therefore, although there is an English version of the LPCR, the English translations of the LPCR and Implementing Regulations that occur in this paper are my own. For the limited 2007 amendments, I used a very helpful article which included not only the amendments but an explanation of each. I used an official online version in Chinese for the Property Law. For the Criminal Code, I used an authorised English translation from the website of the National People’s Congress.

Fourthly, these being postmodern times, readers deserve to know something about the biases and limitations of the author’s background and sources. I should emphasise that I am not a lawyer by training. My academic interest is in international and comparative cultural law. Also, I have been, as the Chinese say, a ‘cultural worker’, and my bias is cultural preservation rather than economic efficiency. In terms of sources, with the exception of only two interviews and some very helpful comments by reviewers, I have relied on published sources. Finally, this paper has been written from Taiwan; no field research in the PRC has been involved. (This fact accounts for the numerous comparisons to Taiwan that will be found in the paper.)

Fifthly, the fact that certain problems in this paper are discussed in the Chinese context does not in any sense mean that these problems are exclusive to China. For example, the fact that museum authorities have been less than thorough

16 See China Heritage Quarterly online for more discussion of intangible cultural heritage, esp. issues 2 (June 2005) and 7 (Sept. 2006).
at cataloguing and displaying their holdings (see Chapter 4) is hardly limited
to the PRC; institutions anywhere can be simply overwhelmed by material.\(^\text{19}\)
Also, the problems of theft, illegal excavation, illicit trafficking, and the like
(see Chapter 5) are widespread, indeed global.\(^\text{20}\)

The LPCR has 80 articles in eight chapters, covering the following subjects:
(1) General provisions. (2) Immovable cultural artefacts. (3) Archaeological
projects. (4) Cultural objects in institutional collections. (5) Cultural objects
in private collections. (6) Import and export of cultural property. (7) Legal
responsibility. (8) Final provisions.\(^\text{21}\)

**CHAPTER I: GENERAL PROVISIONS**

**ARTICLES 1-12**

Chapter 1 is the most far-reaching of all the chapters, focusing as it does on basic
definitional and political issues. Chapter 1 has at least four themes that I want
to highlight. First, it makes clear that the LPCR is nationalist and political in
intent. Secondly, it defines objects to be protected. Thirdly, it takes some initial
steps to tackle the tricky question of ownership. Fourthly, it sets out numerous
basic principles for responsibilities and duties vis-à-vis cultural property.

1. A ‘Nationalist’ and ‘Political’ Law

The LPCR begins with a statement of its purposes, and it makes no
attempt to hide a clearly *nationalist* agenda. This statement may need some
clarification.

In the field of cultural law, there are often said to be two main schools of thought:
nationalist and internationalist.\(^\text{22}\) Nationalist cultural law defines objects as
belonging to whoever currently happens to share the same geographic space
as the creators of the objects; thus all art found in Greece should belong to
modern Greeks, all art found in China is part of that nation’s heritage, and so
on, even when it diverges from the main forms of art known to be practised
by the modern residents of a location.\(^\text{23}\)

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\(^\text{19}\) For example, some extremely rare Korean books – all thought to have been destroyed in the
1860s – were found in the French National Library by a Korean scholar, “uncatalogued and
apparently unrecognised, among the Chinese holdings of the library”. See the article attached
to the collection of readings prepared for the Workshop on International Cultural Heritage
Law, held by Taiwan’s Council for Cultural Affairs (23-24 Nov. 2006). Editor’s note: see also


\(^\text{21}\) The final provisions include only one article, which states the date on which the law took effect.
Therefore there will be only seven chapter headings in this paper.

\(^\text{22}\) The classic statement of this dialectic is in John Henry Merryman, ‘Two Ways of Thinking

\(^\text{23}\) For example, the mysterious Sanxingdui find in Sichuan, the product of a 3,000 to 5,000-year-
old culture, with works unlike any others found before, is claimed by *People’s Daily* to be part
Those who hold the view termed 'internationalist' — who are often eager to justify their vast holdings of foreign objects of irreplaceable value — counter that culture rightly belongs to the world; that cultural property best serves the interests of its home nation when it is widely shared abroad, where it serves as excellent advertising; and that important cultural objects are likely to be given better care when held in wealthier countries.

What matters here is not who is right or wrong in this argument. Both sides make valid points. What matters in this paper is that China's LPCR is openly and unarguably 'nationalist'. As Chapter 1 declares, the LPCR is not only intended to “strengthen protection for cultural objects” and “promote scientific research”, it also serves to “carry forward the outstanding historical and cultural heritage of the Chinese people” and, more overtly, to “promote patriotism”.

Moreover, the protection of cultural artefacts is not merely to enhance the sense of pride in nationality among Chinese, but also to serve the political interests of the regime itself. These goals are also stated very overtly. The LPCR aims to “promote education in revolutionary traditions” and to “construct socialist spiritual civilisation and material civilisation”.

It is important to keep in mind here that it is not a criticism to say that the LPCR is nationalist and political. Indeed, the whole process of heritage protection and treatment of cultural objects is heavily politicised around the world. I merely here wish to point out that China is overt about the primacy of these objectives.

2. Defining the Subject Matter and Levels of Protection

Another important theme in Chapter 1 is to clarify the subject matter under protection. In terms of strategy, the LPCR opts for relatively generalised criteria. In comparison, domestic law in other countries or international instruments often specify objects in long, detailed lists, and others attach age or value requirements for protection. It is not certain that one strategy or the other is better. The LPCR does not provide a list of specific objects. Instead, it defines cultural objects as those that "have significant cultural, historical, or artistic value and are considered to be important to the cultural heritage of China".

The LPCR is based on an understanding that cultural objects are not just possessions of individuals or nations, but are part of a shared heritage. This approach reflects a broader recognition that cultural property is not just an expression of national identity, but is also a source of knowledge and understanding of human history and culture.

25 The PRC is not itself insensitive to this possibility. A conference of heads of provincial departments of cultural heritage protection called overseas exhibitions 'namecards' and 'envoys' to the world. See 'Shows Strengthen Protection of Chinese Cultural Heritage', above, note 14.
26 Article 1. See also Article 40, which calls on museums and other institutions to "strengthen education and public awareness about the outstanding history and culture of the Chinese people and about revolutionary traditions."
27 Article 1.
other is more inclusive; the point here is simply that the drafters of the LPCR opted for the former.

In any case, items that "receive protection from the State" include the following:  

(a) Ancient cultural sites, ancient tombs, ancient structures, ancient cave temples, and stone carvings and murals "of historic, artistic or scientific value." This definition thus makes sure to include not only the kinds of archaeological sites and buildings that one typically thinks of as cultural heritage, but also the ancient grottoes and their associated carvings that have such an important place in China’s patrimony.  

(b) Modern sites, objects, or structures of particular commemorative, educational, or historical value that are connected to major historical events, the revolutionary movement or famous persons. This highlights the political functions of the law, as we can assume that the items chosen will typically be hagiographic (Naturally, the PRC has no monopoly on using sites for political purposes.)  

(c) Works of art and handicrafts from all historical periods. Documents from all historical periods. Manuscripts and photographs of historic, artistic or scientific value.  

(d) Objects reflecting the social systems, production and lives of the various nationalities from all historical periods. Note that China also may protect sites of non-local origin that are of international interest, as it is doing with Western-built historic structures in Shanghai.  

(e) Fossilised ancient vertebrate animals and human fossil remains. These are not defined as 'cultural property' but are also declared by the LPCR as being entitled to State protection. It may be surprising to learn that there is a huge trade in Chinese fossils as well as cultural objects, and that, as a result of this provision in the LPCR, the same legal framework applies. A recent case of repatriation from Australia of 10,000 illegally exported fossils highlights the importance of extending protection to these objects as well.
The LPCR does not consider all these objects equal in value. Rather, objects are graded according to their importance. Immovable cultural property that falls into categories (a) or (b) above can be deemed to be of national importance, provincial-level importance, or county-level importance. The immovable objects are grouped into ‘cultural property protection sites’ (*wenwu baohu danwei*) at the local and provincial level, and ‘national priority cultural property protection sites’ (*guanguo zhongdian wenwu baohu danwei*) at the national level.

Articles in categories (c) and (d) – movable cultural artefacts – are classified into two groups: ‘precious’ (*zhengui*) or ‘ordinary’ (*yiban*). Precious objects are in turn classified into one of three levels, with ‘grade one’ being the highest. The LPCR requires the State Administration for Cultural Heritage to determine the ‘criteria and methods’ for placing objects into these various categories. Critics have judged the criteria and methods to be less than well-defined and say that it is often unclear what the legal effect of different categories is.

I would like to make one final point with regard to the definition of protected objects in Chapter 1 of the LPCR. There is an ongoing debate as to whether ‘cultural goods’ should be considered for purposes of commercial law as ordinary goods, or whether there is something inherently unique and special about them. The European Court of Justice, for example, has declared very clearly that cultural goods should be treated like other goods unless specific exceptions are made in law. However, UNESCO has taken a different view, declaring that cultural goods are “vectors of identity” which “must not be treated as mere commodities or consumer goods.”

The LPCR says that “cultural artefacts are irreplaceable cultural resources”,

mr22nov06.html>. It should be emphasised, however, that it was not Chinese domestic law alone that created the conditions for the return of the objects, but rather the fact that both the PRC and Australia are bound by the UNESCO 1970 Convention on the Return of Illegally Exported Cultural Objects. I thank Lyndel Prott for bringing this to my attention.

37 Special municipalities like Shanghai are considered ‘provincial level’ for legal purposes, and there are cities within provinces that are on a par with counties. There are also ‘autonomous’ areas at the province and county level. The terms ‘provincial’ or ‘county’ level used in this paper should be understood to refer to all of these; the term ‘local’ (as opposed to ‘central’ or ‘national’) means all provincial and county level jurisdictions.

38 Article 3, para. 1.
39 Article 3, para. 2.
40 Article 2, para. 3.
41 Dutra, above, note 7, esp. pp. 84-88.
42 The ECJ has stated, “[W]hatever may be the characteristics which distinguish them from other types of merchandise,” cultural goods “nevertheless resemble the latter, inasmuch as they can be valued in money and are capable, as such, of forming the subject of commercial transactions.” *EC Commission v. Italy* (10 Dec. 1968) Case 7-68.
43 UNESCO Universal Declaration on Cultural Diversity, Article 8.
44 Article 11. ‘Irreplaceable’ is my translation of a term that literally means ‘cannot be recreated’.
which one commentator has declared “reasonably and powerfully provides a basis on which to resist attacks from other sectors [mainly commercial] that are disadvantageous to cultural property protection.” This suggests that the PRC does not see cultural goods as mere commodities, but as deserving of exceptional treatment in a world of increasingly free trade. This conclusion is reinforced by the PRC’s appeal to international agreements to block trade in illegally exported cultural goods and its signing and ratification of the Cultural Diversity Convention (an act that, in theory at least, automatically makes the Convention PRC domestic law).

3. Defining Ownership

The idea of property rights and ownership has been revolutionised in China during the reform period. The State monopoly of ownership – and associated rights to buy, sell and trade – has come undone. But it is not always entirely certain what the new property rules are. Thus, it is one of the ambitions of the LPCR to clarify the ownership of cultural property. This includes not only who ultimately owns the property, but what limits there may be on what they can do with it. This subject matter recurs throughout the LPCR, and we will revisit it in other chapters, but the point here is that Chapter 1 makes a start at clarifying these issues.

The LPCR asserts automatic State ownership over a variety of objects. Indeed, in the eyes of many officials, such as Zhang Wenlin, former head of the State Administration for Cultural Heritage, one of the most important aspects of the 2002 LPCR in contrast to the 1982 LPCR is that the 2002 version strengthens legal protection for State ownership.

The first category of State-owned objects is all cultural objects found under the soil, as well as all such objects found in the inland waters and territorial waters of the PRC. (The maritime claims are in line with international instruments governing underwater cultural property.) In addition, some category (a)

47 The Cultural Diversity Convention takes an especially strong stand against treating culture simply as a commercial good; early drafts would have allowed countries to violate WTO free trade rules in order to protect cultural diversity, but these proposals were blocked by powerful countries.
50 Article 5, para. 1. See the UNESCO Convention for the Protection of the Underwater Cultural Heritage (2001), and the article by Craig Forrest, ‘Protection of Underwater Cultural Heritage’
immovable cultural properties – specifically cultural sites, tombs and cave temples – are also by definition State-owned. In addition, other designated category (a) and (b) properties are State-owned, unless otherwise provided in law. These include murals and stone statuary.\(^{51}\) (It is thus possible that some of these objects could be privately owned, a point whose importance will become clear when I discuss Chapter 5 later.)

Interestingly, 'ancient structures' (gu jianzhu) which as we saw earlier are automatically eligible for State protection (under Article 2), do not fall under the rules for automatic State ownership. Such buildings may be privately owned.\(^{52}\) (By the way, 'ancient' is the conventional translation for the Chinese word gu, but this could mean anything from a century or two for residential structures to several millennia for archaeological sites. Thus 'ancient' is not an ideal translation, but it is widely used.)

There is also a separate list of 'movable cultural property' that belongs to the State automatically. This includes all such objects 'uneared' in Chinese territory\(^{53}\) (unless otherwise provided in law), objects held by State institutions (including State-run corporations, military units, state agencies and other State organisations), objects acquired by the State (by open market purchase, compulsory purchase, or confiscation), objects donated to the State, and any other objects defined by law as State-owned.\(^{54}\)

Importantly, the Government's ownership of immovable cultural property does not exclude the possibility that the land on which it is found is not State-owned, nor does it exclude the possibility that the user of either the land or the site will not be the State. However, regardless of the ownership of the land or the identity of the user, the State's title to the cultural property cannot be altered.

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51 Article 5, para. 2.
52 An article about protection of ancient structures in Suzhou says that over 50 per cent of the 'ancient structures' were privately owned. See 'Anli: Jianzhu Baohu Nengfou Zou Shichanghua Daolu?' [Case Study: Can Protection of Structures Take the Path of Marketisation?] Neither the author nor the date is identified, but judging from the content it dates from around 2003 or 2004. At: <http://218.5.84.172/zckx/doc/4-14.doc>.
53 The provision creating State ownership over all cultural objects found underground uses the term dixia (beneath the ground), whereas the rule discussed here, applying only to movable cultural objects, uses the term chutu (uneared). According to He Shuzhong (interview of 3 Sept. 2007), chutu refers to objects unearthed prior to the passage of the law but after 1949. Objects unearthed before 1949 are referred to as chuanshi, which, if I interpret the term correctly, means 'inherited' or 'passed down'. Chuanshi items may be privately owned.
54 Article 5, para. 4.
Likewise, the ownership of movable cultural property cannot be affected by the fact that a non-State entity may be in charge of the object's care, or that the state agency owning the object may itself disappear; the State’s claim has, in theory, absolute inviolability.55 We may surmise that this point was inserted in the law to block private appropriation of State property, a widespread problem that hangs over the entire field of cultural property protection — and indeed economic development as a whole — in China.

At the same time as Chapter 1 of the 2002 LPCR strongly asserts State ownership claims, however, it also provides blanket protection for collective or individual ownership rights for any legally acquired cultural object.56 These rights are limited in Chapter 1 only by the stated requirement that the owners obey relevant laws on cultural property. Private ownership rights constitute a major innovation in the 2002 LPCR, so we do not want to underestimate the importance of this provision in Chapter 1. However, further discussion is best left until Chapter 5.

4. Defining Duties and Behaviour

Chapter 1 of the LPCR also attempts to establish some basic criteria for behaviour and duties with regard to the protection of cultural property. Thus, the basic principles of cultural property protection work are said to be “to thoroughly protect in the main, to give highest priority to emergency interventions, to use within reasonable limits, and to strengthen management.”57 In the eyes of some commentators, it is of the highest importance that these principles — previously stated only in policy documents — have been given formal legal status.58

Chapter 1 also creates a generalised ‘duty’ to “protect cultural objects according to law” for “all agencies, organisations, and individuals”.59 At this point, this is essentially a hortatory provision. However, over time, as administrative agencies interpret the law and issue orders and regulations of their own for its practical implementation, this provision may take more concrete form as a positive legal obligation.60

In addition to this generalised obligation, Chapter 1 assigns specific jurisdictions and roles. The State Administration for Cultural Heritage
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(SACH)\(^{61}\) is “in charge of” [zhuguan] all cultural property preservation work nationwide. “Local governments at all levels” (i.e. provincial and county levels) are “responsible for” [fuze] cultural property preservation work within their respective jurisdictions. In those local governments that have agencies charged specifically with cultural property protection work, such agencies “implement monitoring and management” [shishi jiandu guanli] of cultural property protection in their respective jurisdictions.\(^{62}\)

Meanwhile, administrative departments other than the cultural property departments are “responsible for relevant cultural property protection work” within their respective jurisdictions.\(^{63}\) An especially interesting provision instructs police agencies, agencies in charge of commercial and industrial activities, customs units, and urban planning organs to “earnestly fulfil” their responsibilities.\(^{64}\) This provision is viewed by some commentators as a major achievement of the 2002 Law.\(^{65}\) This suggests that the cultural authorities have had difficulty getting co-operation from other government agencies that are supposed to help them. (Inter-bureaucratic non-co-operation: yet another phenomenon hardly unique to China!)

In particular, it seems that cultural bureaucrats have often felt “helpless”\(^{66}\) when locked in a struggle with development bureaucrats over whether cultural sites should be protected even when they may interrupt economic construction. Thus the 2002 LPCR calls on governments at all levels to “treat seriously” cultural property protection, and to “correctly handle the relationship among economic construction, social development, and cultural property protection work.”\(^{67}\) This applies to infrastructure and tourism development in particular, both of which pose major threats to preserving cultural sites.\(^{68}\) We will look more deeply at this problem of construction vs. protection under Chapter 3 below.

The task of balancing economic against cultural priorities cannot, however,

\(^{61}\) The LPCR does not in fact mention SACH by name. It instead uses the term ‘cultural property administrative agency [wenwu xingzheng bumen] of the State Council’. But, under the current organisation of the national government, this effectively refers to SACH.

\(^{62}\) Article 8, paras 1 and 2.

\(^{63}\) Article 8, para. 3.

\(^{64}\) Article 9, Paragraph 2.

\(^{65}\) See note 58.


\(^{67}\) Article 9, para. 1.

\(^{68}\) The risk posed by tourism to cultural heritage is now a major international concern. A Google search for the term ‘heritage tourism’ yields over 800,000 hits. Among many articles about this problem in China, see ‘Reconciling Tourism and Conservation: The Case of Historic Towns’ in China Heritage Newsletter (online). No. 2 (June 2005). An entire conference was to be devoted to this subject 8-10 July 2007, in Guangzhou. See the conference website at <http://www.geog.nau.edu/igust/China2007/> (last visited 10 June 2007).
be made easier by a further provision in Chapter 1 of the LPCR declaring that “the State shall develop cultural protection enterprises”. Local governments are required to incorporate such enterprises into their economic development plans and to provide for them out of the local budget.69 This raises the very tricky question of whether local bureaucrats will put ‘economic efficiency’ ahead of ‘social efficiency’.70 This is a very real problem for local officials, who are strapped for funds and are being told to come up with creative ways to earn their own incomes.71

The LPCR provides some answer to this possible problem by stating that income earned by State-owned museums, memorial halls and cultural property protection units must be spent on protection of cultural property.72 But just as the US Congress finds the ‘untouchable’ Social Security budget too tempting to resist dipping into, it is hard to imagine that even well-intentioned local officials can resist the temptation to make popular cultural sites into local cash cows. Sites that attract many tourists are especially vulnerable,73 as the following story74 may illustrate:

A county government in Shanxi has been forced to suspend a controversial plan to allow private investors to manage a two-century-old courtyard seen in Chinese director Zhang Yimou’s 1990 film, Raise the Red Lantern. In late December [2007], local officials in Qixian County agreed to let a trio of investment companies establish a tourism development company to manage the Qiao Family Courtyard, a key cultural relic under state protection. The plan set off an outcry, with critics charging that the deal was tantamount to selling off the national heritage. Higher-level officials stepped in and ordered an end to the deal. The company was to invest 200 million

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69 Article 10, para. 1.
70 The terms ‘economic efficiency’ and ‘social efficiency’ appear in several articles on this topic. See, e.g. Guo Yanhong, ‘Qiantan Xianji Wenboguan Wenwu de Baohu he Liyong’ [Some Brief Comments on the Protection and Use of Cultural Property in County Level Museums] in Wenwu Shijie [Antiquities World] (2003.5); the article begins on p. 7, the terms appear on p. 55.
72 Article 10, para. 3. A list of specific uses to which such funds may be put is to be found in the Implementing Regulations of the LPCR, Article 3.
73 Some insight into local heritage financing can be gleaned from reports that China makes to UNESCO under its World Heritage Convention commitments. I have found two such reports online, one on Lhasa’s Potala Palace (<http://whc.unesco.org/archive/periodicreporting/apacycle01/section2/707.pdf>) and one on the Chengde Summer Palace (<http://whc.unesco.org/archive/periodicreporting/apacycle01/section2/703.pdf>). Both suggest that while some staffing and large projects are paid for by the central or local governments, routine expenses are covered exclusively by ticket sales. Both also seem to show large surpluses from ticket sales for some years, though I cannot be sure. In any case both reports also state that excessive tourism may become a problem.
yuan on courtyard protection and development of local tourism. The company would keep all ticket income during a 20-year period, in return for which it would pay the Qixian county government 10 million yuan in ‘cultural relics protection fees’ per year.

Li Dingfu, head of the county government, said the transfer was intended “to introduce more investment for building maintenance and to tap the potential of the Qiao Family Courtyard and its neighborhood as tourist attractions.” However, employees of the folk culture museum [argued] that the deal was “selling of State property at a cheap price.” The courtyard had more than 800,000 visitors in 2007 with ticket income alone exceeding 20 million yuan. “The local government spent some 8 million yuan on the operation of the museum and maintenance of the buildings, which can fully be covered by the ticket income,” said a museum employee who declined to be identified. Lu Yu, an expert with the Shanxi provincial cultural development planning and research centre, said the dispute between the government and the public over the deal reflects the tension between the protection of cultural relics in China and their development for economic purposes.

To close our discussion under the heading of ‘duties and behaviours’ under the LPCR, Chapter 1 includes a few more duties or responsibilities for government than those previously cited.

(a) Local governments now have to include cultural property protection in their local budgets, and the budget allocation that the State sets aside for cultural property protection work “will increase as financial revenues increase.” Some analysts consider these provisions very helpful, arguing that they “provide a guarantee that cultural protection work will be able to adapt to new developments and construction.” (In fact, it is hard to imagine how the provisions for funding can be enforced. For example, Taiwan’s Constitution long required the government to spend 15 per cent of its budget on education, science, and culture; the provision was ignored for decades until it was finally repealed.)

(b) The LPCR says that the State ‘will encourage’ the creation of foundations

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75 Article 10, para. 2. The occasional ambiguity of verb tenses in Chinese makes this translation a bit tricky. It could also be rendered “increases as...” These two versions both suggest a natural phenomenon rather than a State obligation. A genuinely concrete obligation under Chinese law would more likely read “shall [yingdang] increase...” Such terminology is indeed used where the LPCR creates definite obligations for specific parties. But the term yingdang is pointedly absent from items (a) to (d) here. By the way, the budget requirement is part of the ‘five inclusions’ [wu naru] proposed by the State Council in 1997 for improvement of cultural protection work, and finally codified (albeit incompletely) in the 2002 LPCR. See Wang Zhongwei, ‘Wenwu Baohu ‘Wu Naru’ de Fazhihua Sikao’ [Thoughts on the Codification of the ‘Five Inclusions’ of Cultural Property Protection] in Wenwu Shijie [Antiquities World] (2006.1).

76 Views of Fu Xinian, in article cited above, note 45.
through private donations to engage in cultural property protection work, and will ensure that such foundations’ assets cannot be misused by individuals or agencies.\textsuperscript{77} (The latter part of this provision is perhaps designed to avoid a problem that I personally have observed in Taiwan, but that also exists in the United States and United Kingdom, where financial incentives have been created for ‘support for the arts’ that have only dubious benefits for the public but great benefit for corporations or their chief officers.\textsuperscript{78})

(c) The LPCR also says that the Government “will strengthen” public education and information about the importance of protecting cultural property, and encourage scientific research and improvement of preservation techniques.\textsuperscript{79}

(d) Finally, the government ‘will give’ material or spiritual rewards to organisations or individuals that make important contributions to cultural property protection work.\textsuperscript{80} It is this system of rewards that is supposed to reduce the likelihood that ordinary citizens will participate in China’s vast illegal art trade. So far, as we shall see under Chapter 5, these policies have proven unable to counterbalance the tremendous incentives to join in that trade, largely because the rewards are too small. In fact, as of late 2007, the Government had never budgeted any money specifically to reward persons under the LPCR, with cultural agencies having to scrape together small rewards out of their own budgets. SACH chief Shan Jixiang was quoted as saying in a meeting of the National Committee of the Chinese People’s Political Consultative Conference that “since the State has not reserved special funds for that end, the provision has never really been implemented”, and was paraphrased as saying that “the failure to do so makes a mockery of the law”.\textsuperscript{81}

What can citizens do if government agencies fail to follow the law and fulfil their responsibilities? Citizens in China are becoming more aware of their rights, and are increasingly turning to the courts to overturn administrative actions. It is difficult, but by no means impossible, for ordinary citizens to defeat local bureaucrats through the courts.\textsuperscript{82} However, there is no provision

\textsuperscript{77} Article 10, para. 4.

\textsuperscript{78} See Chin-tao Wu, \textit{Privatising Culture: Corporate Art Intervention Since the 1980s} (London, Verso, 2002).

\textsuperscript{79} Article 11.

\textsuperscript{80} Article 12.

\textsuperscript{81} From Zhao Huanxin, ‘Reward People who Protect Cultural Relics” in \textit{China Daily} (9 March 2007). Online at: <www.chinadaily.com.cn/china/2007-03/09/content_823161.htm>. Though Shan is a State official, his speaking out at the CPPCC is an excellent example of the increasingly open use of different forums to voice specialised interests, a development that I mentioned in the Introduction as one the LPCR could shed some light on.

\textsuperscript{82} Kevin O’Brien and Lianjiang Li, ‘Suing the Local State: Administrative Litigation in Rural China’ in Diamant, Lubman and O’Brien, above, note 71. Note also the following quote from the website of an NGO in Beijing: “On the first of May, 2005, the Regulations for the Protection of the Famous Historical Culture of Beijing started to be implemented. The eighth clause of that regulation states that, ‘Every unit and individual person in Beijing has an obligation to protect
specifically in the LPCR to address the problem, and I am not certain whether there is any mechanism in China for citizens to sue the State in order to make bureaucrats enforce the law (whereas this is possible in, e.g., the US). Scholars of Chinese administrative law may be able to fill in my gap in knowledge here.

This brings us to the close of Chapter 1. We have seen that it introduces four broad and fundamental themes: general principles and purposes of the law, scope of protection, ownership rights and duties and responsibilities. With these points in mind we may turn to more specific, narrowly focused chapters. Chapter 2 covers immovable cultural artefacts.

**CHAPTER 2: IMMOVABLE CULTURAL ARTEFACTS**

(Articles 13-26)

In this part of the paper we shall look at three themes associated with immovable cultural artefacts (ICAs), including: (1) the roles and functions of various levels of government, (2) the measures adopted to protect sites, and (3) rules covering the alteration, relocation, or destruction of sites.

1. The Roles and Functions of Government

The first role of government with regard to ICAs is primarily administrative. Officials must first decide which of those ICAs that qualify for government protection (see Article 2) will actually be designated as `cultural property protection sites' (CPPSs) [wenwu baohu danwei]. Local CPPSs (provincial-level and county-level) are determined by the same level of government; no approval is required from a higher level. At the national level, SACH may choose from among already named local-level sites, or may directly choose a new site, to be categorised as a ‘national priority CPPS’.

Interestingly, ICAs that have *not* been formally designated as CPPSs must

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83 For example, US environmental groups sued the Environmental Protection Agency to compel enforcement of clean air standards. See <http://www.nrdc.org/media/pressreleases/021113.asp>. Interestingly, Taiwan’s Cultural Assets Preservation Law has a clear statement that citizens may challenge administrative decisions made by the Council for Cultural Affairs. But it is designed to protect citizens from bureaucratic arbitrariness, not to empower citizens to force the government to more actively enforce protection measures. See the Cultural Assets Preservation Law of the ROC (amended version 2005), Article 9.

84 *Danwei* literally means ‘unit’, but strikes me as an awkward translation. I have opted for ‘site’ instead.

85 Article 13, paras 2 and 3. There is merely a requirement that the next higher level of government be informed.

86 Article 13, para. 1.
still be ‘listed’ or ‘registered’ by the local government. This is similar to
the British system in which sites are divided into two categories: scheduled
and listed, with much stricter restrictions applying to the former. This is
important because the pace of official designation of ICA sites as CPPSs is
slow compared to the total number of historic sites in the country. According
to one estimate from 2003, at that point the country had about 400,000 ICAs,
but fewer than 70,000 had been given protected status, and at the time of
writing the number is apparently still around 70,000.

Local governments are responsible for mapping out the area of each CPPS,
putting up signs and creating documentation for the site. Provincial governments
are responsible for this work not only at provincial-level sites, but also at
National Priority CPPSs; county-level governments are responsible only for
county-level units. It is left up to governments at each level to devise and
carry out specific, concrete measures to protect all ICAs in their jurisdiction, not
only designated CPPSs, but also ICAs that have not yet been so designated.
Local planning authorities at all levels are required to work with the cultural
authorities to integrate these protection measures into urban and rural plans.

Importantly, a specific organ or person is supposed to be designated as
taking responsibility for each site. While this system presumably creates
somewhere where ‘the buck stops’ and ultimate responsibility can be assessed,
it is rather confusing. In most administrative systems, responsibility is passed
upward, and the ultimate responsibility rests with the ultimate authority. But
under the LPCR scheme, it appears that the ‘responsible’ organ or individual
is at the bottom of the ladder of authority. However, the apparent dilemma
here is resolved by the fact that the ‘responsibility’ is limited essentially to
management of the site, not to disposition or ownership of its components.

Besides identifying individual Cultural Property Protection Sites, governments
are also empowered to designate entire cities or districts as protected areas.

87 Article 13, para. 4.
88 Allison Carter Jett, ‘Domestic, Supranational, and International Historic Preservation
Legislation’ in Georgia Journal of International and Comparative Law Vol 31:3 (2003): see
esp. p. 668.
89 ‘Wenwu Baohu Xin Dongzuo’ [New Actions in the Protection of Cultural Property], originally
cn/PublishCenter/sach/dtb/zhuanti/wwbhf/gddt/639.htm>), gives the 2003 numbers. A source
from 2006 says that there were at that time 770 National Priority Sites, 7,000 provincial level
sites, and 60,000 county-level sites. See ‘Preservation of Cultural Relics’ at <http://english.gov.
cn/2006-02/08/content_182628.htm>. A news story from 2007 says that government-protected
sites accounted for 17.5 per cent of the total of 400,000 ‘relics sites’, which works out to about
70,000. See ‘Reward People who Protect Cultural Relics’, above, note 81.
90 Article 15. Article 8 of the Implementing Regulations sets a time limit of one year for these
tasks. See also Articles 10 and 11 of the Implementing Regulations.
91 Article 15.
92 Article 16.
93 Article 15, and Implementing Regulations, Article 12, para. 1.
The State Council may declare an entire urban area to be 'a city of historic or cultural importance' \[lishi wenhua mingcheng\]. Provincial-level governments may likewise designate towns, neighbourhoods, streets or villages meeting the same criteria.\(^{94}\)

Actual management of these cities or districts is left to local governments. These governments are required by the LPCR to create special programmes for such areas and integrate these into their local planning,\(^{95}\) a provision which is said to have greatly strengthened protection for these cities.\(^{96}\) Overall planning for historically or culturally significant cities or districts is critical because many of these cities and districts in China were themselves carefully laid out at their origins, and therefore need integrated, comprehensive management that cannot be provided by the protection of individual buildings or sites.\(^{97}\) Comprehensive planning is supposed to be based on additional regulations to be issued by the State Council, but unfortunately, as of the time of writing such regulations are still in the drafting process.\(^{98}\)

As with all aspects of heritage law in China, it is not always possible to get compliance. Consider the situation in Beijing as of 2005:\(^{99}\)

The Old City of Beijing... is one of the world's most well-known cultural heritage sites. To protect the Old City, the municipal government on 18 September 2002 promulgated a detailed protection plan and started to implement the plan from 16 October of that year.... [T]hese plans have the power of law and must be enforced as such. Unless the plans have gone through the legally stipulated amendment process, the contents of the plans may not be altered.

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\(^{94}\) Article 14, paras 1 and 2. See also Article 7 of the Implementing Regulations. For some relevant statistics, see the heading 'Preservation of Cultural Relics' at: <http://chinaabc.showchina.org/chinaabc_en/culture/200701/1105714.htm>.

\(^{95}\) Article 14, para. 3. Note that here the law clearly says that they 'shall' do so, using the term \[yingdang\], a term that is noticeably absent from some earlier measures mentioned in Chapter 1.


\(^{97}\) Comments by Xie Zhensheng, former advisor to SACH, in 'Zhuanjia Pingshuo Xin Wenhua Baohufa' [Experts Assess the New LPCR] above, note 45.

\(^{98}\) Article 14, Paragraph 4. I suspect – though I am just guessing here – that the draft regulations are being held up by the same kind of interest group conflicts that made the passage of the LPCR itself so controversial. In my experience in Taiwan, it has been eye-opening to see how battles over cultural law move from legislation itself to the subordinate rules and regulations that are theoretically mandated by the law, but are often delayed indefinitely by political or bureaucratic opposition. When I sat in on meetings of Taiwan's Council for Cultural Affairs to discuss the 30-plus-year-old Law for Cultural Rewards and Subsidies, I was startled to discover that many of the administrative regulations mandated by the law have never been adopted.

When we look into the actual condition of the Old City, we find that the protection work has not been assiduously undertaken.... [A]ll over we find buildings that are not in harmony with the overall form and style of the Old City; there are frequently instances of forced demolition of old structures under the pretext that they are hazardous structures, and there seems no way to stop this sort of activity; some of the new structures are seriously in violation of height restrictions;... many historical relics are inappropriately occupied and misused, to the extent that their appearance has been totally altered...

The state of affairs described above, to the extent that it occurred prior to the implementation of the plans, stems from stupidity and ignorance; to the extent that it occurred after the implementation of the plans, it is illegal.

Naturally, enforcement problems exist everywhere, especially where States – however authoritarian – lack sufficient resources to police their societies effectively, or where the resources exist but are diverted more to regime protection than law enforcement. Nonetheless, the enforcement problem is especially acute in China because of the breakneck pace of development, the large number of sites threatened, and the large profits to be earned from construction and corruption. Which brings us to the question of what specific measures are called for in the LPCR to protect sites.

2. Measures to Protect ICAs

There are basically two levels of protected area. CPPSs themselves have a defined ‘zone of protection’ [bao hu fan wei]. In addition, the authorities may designate the surrounding area as a ‘construction control belt’ [jian she kong zhi didai].

Within the defined zone of protection, no other construction is allowed, nor may there be digging, exploration or destruction of any kind. In construction control belts, construction is allowed, but may not affect the original appearance of the CPPS. Moreover, each construction project plan must receive ‘agreement’ [tong yi] from the cultural authorities of the same level as the site followed by ‘approval’ [pi zhu n] from the planning authorities of the same level.

In addition, no facilities may be built in either the zone or the belt that will pollute the protected site, or endanger safety or interfere with activities in

100 Article 15. Criteria for designation are in Implementing Regulations Article 9.
101 Article 18, para. 1. Criteria and procedures are in Implementing Regulations Articles 13 and 14, respectively.
102 Article 17.
103 Article 18, para. 2.
the area. If such problems currently exist, they "shall be rectified within a specific time limit". Interestingly, enforcement of pollution rules is done by the environmental authorities, not the cultural authorities.

Another protective measure for ICAs is that "when locations are selected for construction projects [jianshe gongcheng]", those choosing a location "must as much as possible avoid immovable cultural artefacts." If an ICA site cannot be avoided, those doing the work "shall to the extent possible protect the artefact in its original site". In the latter case, the construction firm must get approval from the cultural authorities of the government of the same level as the site itself, and integrate protective measures into their feasibility study and construction plan.

These measures would seem to ensure that sites will be left alone, and that their appearance and surroundings will remain intact. But sites can decay unless maintained. Thus there are also protective measures related to renovation and repair. The LPCR requires users to maintain state-owned ICAs, and requires owners to maintain non-state-owned ICAs (When the owner is unable to do so, the local government ‘shall’ provide help; when the owner is unwilling to do, the local government can intervene to maintain the ICA, with the owner paying the bill.) There are also criteria that aim to ensure that renovation or maintenance plans are well-made and are carried out only by qualified persons.

Other protective measures include limitations on the use of State-owned ICAs, and a reporting system for putting privately owned ICAs to any

104 Article 19.
105 While China is now infamous for the deterioration of its environment, the local environmental authorities can, with proper resources and incentives, act effectively. See Jimin Zhao and Leonard Ortolano, ‘The Chinese Government’s Role in Implementing Multilateral Environmental Agreements: The Case of the Montreal Protocol’ in China Quarterly No 175 (Sept. 2003).
106 This may refer only to infrastructure projects, though I am not sure. See the terminological problems encountered in Section 2 of Chapter 3 in this paper, entitled ‘Rules for Archaeology Incidental to Economic Activities’, esp. the first para.
107 Article 20.
109 Article 21. This is another example of the use of yingdang to create a definite State obligation.
110 According to Article 21, renovation/maintenance plans must be approved, maintenance contractors must have a certificate of qualification, and renovation/maintenance cannot change the original appearance of the ICA. See also Implementing Regulations Articles 15, 16, 17 and 18.
111 Article 23. This was one of the three amended in 2007. Local governments were previously required to get the permission of the cultural authorities at the next higher level before changing the use of a State-owned ICA. Under the new Article 23, county-level governments must still seek such authorisation, but provincial governments need not seek approval from SACH.

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alternative use.\textsuperscript{112} Users must in all cases respect the original appearance of ICAs, and the government can forcibly remove any additions or alterations made to ICAs.\textsuperscript{113} At sites containing nothing but ruins ('completely destroyed sites'), no replica constructions or other forms of rebuilding are allowed without the approval of the State Council for National Priority CPPSs or the provincial-level government for lower level CPPSs.\textsuperscript{114}

Finally, there are provisions to ensure that ICAs cannot be alienated. State-owned ICAs can never be transferred or used as collateral, nor be considered as a corporate asset.\textsuperscript{115} This has apparently been a problem, as a recent Ministry of Culture circular about the Great Wall of China attests:\textsuperscript{116}

\begin{quote}
Governments of provinces, autonomous regions and municipalities containing the Great Wall should study and implement the Law for the Protection of Cultural Relics, and... should not relinquish the management right of the Great Wall to any enterprises or allow enterprises to manage the Great Wall as enterprise capital. Those who are already doing so should rectify the situation within certain time limits.
\end{quote}

Finally, non-State-owned ICAs may be sold or mortgaged, but not to foreigners.\textsuperscript{117}

If the above measures can be enforced (a very difficult 'if'), they would seem to suggest that designated CPPSs composed of immovable cultural artefacts will be left alone, that their surroundings will not be altered in such a way as to undermine the value of the sites, and that they will be maintained in their original form. But in fact it is possible to build on, relocate or even destroy a site legally.

\begin{footnotes}
\item[112] Article 25, para. 2.
\item[113] Article 26, para. 2. See also Implementing Regulations Article 19 for responsibility for investigating such situations.
\item[114] Article 22. This article was also amended in 2007. Any reconstruction of a local ruined site previously needed permission from both provincial authorities and SACH; SACH permission is no longer required.
\item[115] Article 24. This complements para. 1 of Article 27 of the Company Law of the PRC: "Shareholders may put up capital in currency, or may also use material objects, intellectual property rights, land-use rights or any other non-currency assets which can be evaluated in monetary terms and transferred legally to put up capital; however, assets which under the rules established by law or regulation may not be used as capital are excluded." [Author's translation, emphasis added.]
\item[117] Article 25, para. 1.
\end{footnotes}
3. Alteration, Relocation, Removal

The ban on construction within the ‘zone of protection’ of a site has one large caveat: “When there are needs dictated by special circumstances” construction and digging may go forward. There are of course safeguards built in to this caveat: all work must take the safety of the ICA into account, and must receive approval from the corresponding level of government and agreement from the next higher level. Agreement of the State Council is required for construction or digging in National Priority CPPSs. The point here, however, is to note that protection of sites is not absolute.

Even more challenging are cases in which it is declared ‘impossible’ to protect an ICA in situ when a construction project goes forward. Under these circumstances, the ICA — even a National Priority CPPS — can, with appropriate approval, be relocated. Provincial-level or county-level sites may also be demolished on the same terms.

One final provision of relevance is that all costs for preservation or relocation of an ICA are to be borne by the construction unit. In specific cases this might be problematic: given the way the rule is written, unless the costs of demolition actually outweigh the costs of bypassing or relocating the ICA, there will be an added incentive to destroy the site. In any case, there are no guidelines or rules dictating how much the construction unit has to spend, which can lead to problems like that reported in the following narrative:

Countless treasures waiting to be excavated from the Danjiangkou reservoir area face being buried underwater, as funds for uncovering them run out, experts have warned. In 2004, heritage protection officials made detailed rescue plans to speed up archaeological work at 247 sites before the flooding of the area. Although the project budget includes money for the protection of cultural relics, the three investment bodies — the central and local governments and private enterprises — have failed to agree on exactly how much is needed. Experts have warned that by the time agreement is reached, it might already be too late.

That completes our discussion of Chapter 2, dealing with immovable cultural artefacts. We have looked at three themes: government roles and functions; protective measures; and rules for alteration, relocation or demolition of protected sites.

118 Article 17.
119 Article 20. Note that movable objects that can be rescued from a site that is to be destroyed are to be turned over to an institutional collector designated by the relevant cultural property administrative agency. See Article 20, para. 4.
120 Article 20, para. 4.
But known ICAs are only part of the subject matter of protection in China today. In fact, new cultural properties are being discovered all the time, either deliberately through archaeological projects or incidentally through construction work. It is the goal of the next chapter to regulate these activities and provide greater safety for sites and objects that may be found in either archeological or construction work.

**CHAPTER 3: ARCHAEOLOGICAL PROJECTS**  
(*Articles 27-35*)

In looking at this Chapter, we shall consider the following themes. First we shall look at rules that apply to deliberate searches for cultural objects, i.e. academic archaeology. Secondly, we shall look at the rules that apply to what I call ‘incidental’ searches for cultural objects, i.e. the rules that apply at construction sites, which try to force private firms and development bureaucrats to systematically incorporate archaeology into their projects.

1. **Rules for Deliberate Archaeological Projects**

The rules in the LPCR are very simple. All archaeological work must follow the necessary reporting and approval procedures; all units that engage in archaeological work must be certified by SACH; no private groups or individuals can deliberately dig for underground cultural objects at any time.\(^\text{122}\) Foreigners wishing to do digs or even survey work must receive ‘special permission’ from SACH.\(^\text{123}\)

Groups that are certified to do archaeological projects must have each specific project plan approved by SACH; projects at National Priority CPPSs must receive approval from the State Council itself.\(^\text{124}\) Each project must moreover have a legally certified team leader operating under the ‘responsibility system’.\(^\text{125}\) There are also requirements that final reports be filed, and that all finds be catalogued. All artefacts found must be turned over to the State, though, with approval from the appropriate authorities, researchers may keep ‘a small number’ of objects as ‘samples for scientific research’.\(^\text{126}\) One archaeologist who has excavated in China relates that the requirement for compiling of a catalogue [*zao ce*] and publishing their results is especially important for those doing fieldwork.\(^\text{127}\)

\(^{122}\) Article 27. Certification procedures are discussed in Implementing Regulations Articles 20 and 21.


\(^{124}\) Article 28. The administrative agency is required by this article to consult with archaeological research authorities before approving research plans.

\(^{125}\) Implementing Regulations, Article 22.

\(^{126}\) Article 34. See also Implementing Regulations, Articles 26 and 27.

\(^{127}\) I thank Lukas Nickel for his comments on an earlier draft of this paper. SACH director Shan Jixiang has been paraphrased as saying that Chinese archaeologists have been too slow to
All these rules are simple and direct. And as one Chinese archaeological authority says, they are also "timely and necessary", because there are now more and more professional archaeological teams at work, and it is necessary to raise the standards in order to weed out the unqualified and illegal operators.\(^{128}\)

It has been argued that the LPCR does not go nearly far enough in this professionalisation goal, since it lacks specific rules governing how archaeological digs should be conducted. There are, however, other sets of domestic rules that govern archaeological work.\(^{129}\) Moreover, China is increasingly interacting with ICOMOS to establish standards for all kinds of conservation work, archaeological and otherwise.\(^{130}\) And in the field of marine archaeology, China is a signatory to the Underwater Cultural Heritage Convention (2001), which includes extensive rules governing all "activities directed at underwater cultural heritage".\(^{131}\)

Besides dealing with the straightforward problem of professional archaeology, an even more pressing problem for China has been institutionalising archaeology into construction and other basically economic projects. As noted at the very beginning of this paper, economic development is a powerful force for the discovery of underground cultural property. However, unless such finds are handled properly, it is an even more powerful force for the destruction of the cultural patrimony. This is the next theme to which we turn.

2. Rules for Archaeology Incidental to Economic Activities

The first problem to tackle here is terminological. In the course of the four relevant articles,\(^{132}\) five different Chinese terms are used to depict the types of economic activity that are regulated: (i) large-scale basic construction (essentially infrastructure) projects [\textit{daxing jiben jianshe gongcheng}]; (ii) construction projects [\textit{jianshe gongcheng}]; (iii) basic construction...
[jiben jianshe]; (iv) production construction [shengchan gongcheng]; and (v) agricultural production [nongye shengchan].

The second problem is to see what rules there are for persons engaged in these various types of construction or economic activity.133 I will divide the following discussion into two parts, one focusing on large-scale construction sites, the other on the problems of dealing with finds made in small-scale economic activity.

Archaeology at large construction sites

The first rule to notice calls for the cultural authorities of provincial-level governments to designate an archaeological unit to do a survey of the site of any ‘large-scale basic construction project’.

One Chinese archaeological authority notes that the language absolutely requires the economic actors to request a survey, whereas past practice had been for the two sides to negotiate prior to construction work. The 2002 LCPR also requires that objects be preserved, whereas old practice was simply for objects to be ‘dealt with’ by common agreement among interested parties. Finally, the LPCR now requires that funding needed for preservation must be included in the project budget, rather than (as in the past) “resolved by application to the higher level economic planning agency”.135 These are powerful new requirements to increase the efficiency and effectiveness of ‘incidental archaeology’.

Interestingly, there is no specific requirement for an archaeological survey before beginning work for any of the other four categories of economic activity described above. However, the rule stating that all expenses for archaeological surveys shall be borne by the construction unit uses the terms ‘basic construction’ and ‘production construction’.

Assuming that ‘basic construction’ and ‘large-scale basic construction’ are essentially the same (i.e. infrastructure), this budgeting rule seems by implication to also include ‘production construction’ in the requirement for archaeological surveys before work actually begins. Unfortunately, there is no indication of what criteria (size, ownership) there might be for the term ‘production construction’.

In any case, once a survey is done, if the survey team makes some discoveries, there are further rules to follow. Finds of only local interest are to be protected by the local cultural authorities, working together with local building

133 It may be mentioned in passing that several of these requirements seem to be another illustration of the impact of international norms, especially the United Nations Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works of 1968.

134 Article 39, para. 1. The ‘unit’ is to be organised by the cultural authority with jurisdiction at the relevant level. See Implementing Regulations, Article 23.

135 See the comments by Liu Qingzhu, director of the Institute of Archaeology at the Chinese Academy of Social Sciences, in ‘Zhuanjia Pingshuo Xin Wenhua Baohufa’ [Experts Assess the New LPCR] above, note 45.

136 Article 31.
The PRC’s Law for the Protection of Cultural Relics

authorities and the construction firm itself. Finds of national importance are to be reported to the State Council. When there is a need to do a more comprehensive dig, the provincial-level authorities may apply to SACH for approval of such a dig. In emergency situations at ancient cultural sites or ancient tombs, the provincial-level government may intervene without delay, applying afterwards for review of their actions by SACH.

How well are these rules followed? It is very easy to find sources that decry the demolition of historic China in the interests of economic development. There is no doubt that the problem is severe. Nonetheless, the law is sometimes, perhaps even often, followed.

This seems especially to be case with high-profile public infrastructure projects like the Beijing Olympics. But there are success stories even with more modest projects, as the following media story suggests:

Chinese archaeologists have discovered over 290 tombs, some of which date back 1,800 years, in Yanqing County, in the northern outskirts of Beijing. The excavation was conducted by the Beijing Archaeological Research Institute from July to October in order to preserve the ancient relics in the area, where construction of living quarters is to start by the end of 2007.

And an archaeologist with field experience in China relates that where he worked, construction firms generously funded surveys of proposed construction sites by the local archaeological institute, even if only out of self-interest in moving the project along as quickly as possible.

With respect to ‘production construction’ sites, the authorities generally try to ensure that archaeological surveys are built into the investment plans during the proposal and approval process. However the sheer scale and pace of economic development and the lack of sufficient trained archaeologists mean that the big infrastructure projects get the lion’s share of the attention, while most smaller construction falls through the cracks.

137 Article 29, para. 2.
138 Article 30. See also Implementing Regulations, Article 24.
139 For a typical example, see Jim Yardly, ‘Steamrolling Antiquities at an Olympian’s Pace” in The New York Times Monday, 5 Feb. 2007. Thanks to Butler Waugh for this reference. See also the citations in the ‘Concluding Remarks’ section of this paper.
140 Ibid.
142 Again, I thank Lukas Nickel for his comments on an earlier draft of this paper.
143 Interview with He Shuzhong (3 Sept. 2007).
144 For example, for a massive water diversion project for which archaeologists nationwide were mobilised, Du Jinpeng, an archaeologist from the Archaeological Research Institute under the Chinese Academy of Social Science, stated: “All other archaeological activities except the Yin Ruins research will have to be suspended because of this rescue mission” and “about half of
Meanwhile, an architect from Taiwan who has worked on many projects in central and northern China says that while his firm has not met any situation related to the LPCR, his observations have been as follows: Where there are significant known important cultural property sites, such as ancient tombs, the government will closely monitor construction. Where there are less important known sites, the developers will generally follow the law, even without the government looking over their shoulder. Where finds are made accidentally once work proceeds, sometimes they are preserved, but often — perhaps deliberately, often just out of ignorance — they are destroyed. One thing this architect says for sure is that, for commercial construction, either industrial or residential, "there is nothing that [builders] fear more than coming upon a cultural heritage site." 

Of course it is easy to demonise developers, so we may spare a thought that it is after all their time and money that is being traded for a public good. But this is no excuse for breaking the law. After all, any public good (defence, environmental protection, healthcare) will cost somebody something. And cost is especially no excuse for the nation’s biggest developer by far — the government itself — since in protecting cultural sites it is merely transferring money from one priority to another, not losing it.

Turning to the question of who owns finds, there is of course no need to make a special rule for ownership of objects found during these archaeological surveys or digs, since we saw in Chapter 1 that the State owns everything found under the soil in China.

We now turn to the second part of the discussion of ‘incidental archaeology’. While for infrastructure or production construction, archaeological surveys are supposed to be done as a matter of course, in ordinary construction or agricultural production, finds are made entirely by accident. This brings us to the problem of small-scale finds.

**Small-Scale Finds**

The law is clear on small-scale finds: it requires the reporting and cataloguing of any such find, and prohibits any individual from possessing or hiding such a find. 

The main problem here is that small-scale finds are not only cultural treasures; to peasants or construction workers, or indeed almost anyone, they are genuine buried treasure. Citizens cannot but be sorely tempted to supplement their incomes by keeping and privately selling objects. Even if they do not intend to act illegally, Chinese have apparently been acting in accord with the profound

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145 The interview with this architect was done on condition of anonymity.
146 Article 32.
The PRC’s Law for the Protection of Cultural Relics

legal principle so well known to American children: “finders keepers.” As a surprisingly sympathetic analysis in the journal People’s Police says:

According to the LPCR, anyone who discovers a buried cultural object must turn it over or report it to the local cultural authorities, after which the government will give a reward. But the rewards will always be far behind the windfall profit to be made by selling the object illegally.... Farmers who aspire to get out of poverty and become wealthy usually are willing to take the risk, and mass illegal digging of tombs has been rampant.

According to the same journal, rural people now say, “If you want to get rich, just dig up an old tomb, and you’ll become a 10,000-yuan household overnight!”

Problems of enforcement aside, a clear goal of Chapter 3 is to ensure that the products of incidental archaeology stay in the hands of the State. From the Government’s point of view, archaeologists, construction firms and peasants are essentially surveyors, reporting their finds to the Government, which then keeps the pieces for itself. Unfortunately, as we saw in Chapter 1, the Government offers only weak financial incentives for citizens to co-operate.

Is this the best way to protect China’s archaeological riches? It all depends on whether there is in fact a need for the State to keep everything, even relatively unimportant or duplicate objects. It is likely that many finds are rather commonplace, and that their sale on the open market would find caring owners for pieces that would otherwise sit in museum cellars or government warehouses. But allowing private finders to retain their finds, as is done in many other countries, is objectionable to heritage activists on principle, and especially objectionable to archaeologists because they need to see the objects in their original surroundings and in their original forms to be able to make the most intelligent observations about them.

147 The chief of the Chongqing Municipal Bureau of Cultural Heritage has written that one of the achievements of the 2002 LPCR is to ‘thoroughly rectify’ what he calls “the past way of incorrect thinking that ‘whoever digs it up, that’s whose it is,’ or ‘whoever has the right to use the land has the right to decide what to do with cultural objects that come along with it ....” See comments by Wang Chuaping cited in ‘Zhuanjia Jiedu Xin Wenwufa’ [Expert Interprets New LPCR] above, note 66.


149 Ibid.

150 Zhao Huanxin, above, note 81.

151 An article on the proposed privatisation in 2002 of some ‘ancient structures’ under Government control in Suzhou offers a very balanced analysis of the benefits and pitfalls of private ownership of cultural property. See ‘Anli: Jianzhu Baohu Nengfou Zou Shichanghua Daolu?’ [Case Study: Can Protection of Structures Take the Path of Marketisation?], above, note 52. The proposed plan was rendered moot by the passage of the LPCR, which bans such privatisation.

152 For an instructive contemporary example, see the case of the Black Swan, a ship packed
This brings us to the end of the discussion of Chapter 3. Before going on, I want to emphasise that whereas Chapters 2 and 3 were primarily directed at immovable cultural artefacts (ICAs), in which the main concern is protection in situ of the object’s physical security, Chapters 4 and 5 will shift the subject matter to movable cultural artefacts (MCAs), which involves a very different set of problems and solutions, because the main issues involve managing and regulating the flow and use of such objects, rather than merely their physical protection.\(^{153}\)

Of course, this distinction is not fully realistic, since numerous supposedly ‘immovable’ artefacts – cave or building murals, carvings and sculptures hewn out of rock walls, construction materials from ancient temples and so on – do end up far removed from their original locations. Fortunately, such materials do not appear to be in any way excluded from the protections and rules of Chapters 4 or 5.\(^ {154}\)

MCAs ultimately end up in one of two places: in museums or in private hands. Chapter 4 covers institutional collections, while Chapter 5 deals with private holdings.

**CHAPTER 4: CULTURAL PROPERTY IN INSTITUTIONAL COLLECTIONS**

(Articles 36-49)

In this section I will talk about the following themes: the first will be the scope of application of the rules pertaining to ‘cultural property collecting institutions’ [wenwu shoucang danwei]\(^ {155}\) (hereafter CPCIs), as museums, libraries and the like are known in the LPCR. Secondly, Chapter 4 strongly emphasises documentation and internal management, including rules for the responsibility for, and control of, objects in institutional hands. Thirdly and finally, it creates rules for the exhibition and care of these objects.

Before beginning, I want to highlight some of the issues that underlie this Chapter. One is the issue of use. Many commentators praise the fact that this Chapter requires CPCIs to exhibit their works and make them available for scientific research, and also authorises lending or exchange among them. One can draw the inference that prior to the passage of the new law in 2002, CPCIs were more like

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154 My thanks to Felicity Lufkin for raising the issue of the legal implications of the movable nature of much ‘immovable’ cultural property.

155 As with the translation of Cultural Property Protected Sites, I have chosen not to render danwei by its literal meaning of ‘unit’, but to translate it as ‘institution’.

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storehouses or bank vaults, merely keeping the objects but too understaffed, too inert, or too conservative to make them available to the public.\footnote{A national conference of directors of provincial cultural relics department in late 2007 was aimed (at least in part) at "trying to improve the role of the country's more than 2,400 museums to make them more accessible to the public". See 'China Trying to Improve Public Accessibility of Museums' at: <http://english.people.com.cn/90001/90782/90873/6325618.html>. For a fascinating study of museum access in Europe that puts the complexity of this issue in perspective, see Pierre Bourdieu and Alain Darbel, \textit{The Love of Art} (Cambridge, Polity Press, 1997, reprinted in 2002).}

Another key issue is making sure that State-owned cultural assets remain State-owned. There was considerable debate in the National People's Congress over whether non-State institutions should be able to 'borrow with compensation' MCAs from State-run CPCIs, and whether State museums had sufficiently documented their holdings to ensure that items 'lent out' would be tracked and returned.\footnote{See 'Wenwu Baohufa Xiugaizhong Liang Da Remen Wenti Yinqi Gefang Guanzhu' [Two Major Problems Attract Widespread Attention in the Process of Amending the LPCR], from Xinhua, at: <http://www.sach.gov.cn:8080/gate/big5/www.sach.gov.cn/PublishCenter/sach/dbtf/zhuanti/wwbhfxfps/536.htm>. This source suggests that early proposals advocated legalising the 'transfer [zhuanrang] with compensation' of cultural property among institutions. This would have \textit{de facto} legitimised the sale of State-owned cultural property to private institutions, an action that is considered a criminal offence elsewhere in PRC law. The LPCR as it is currently written does not permit such transfers.}
The picture that emerges here is one of bleeding of State-owned cultural property into private hands. This is also not surprising in the reform era, as many officials have treated the State-owned resources (both tangible and intangible) within their control as marketable personal resources.\footnote{This is known in the political economy literature as 'rent-seeking'. Under reform, State bureaucrats have, according to David Zweig, "become increasingly rapacious, expending enormous energy seeking rents." David Zweig, \textit{Internationalizing China} (Cornell University Press, 2002), p. 13. See also He Shuzhong, 'The Mainland's Environment and the Protection of China's Cultural Heritage', above, note 7.}

We now turn to the three themes I want to highlight in this chapter.

1. **Scope of Application: Public vs. Private Collections**

Since the beginning of the reform era, there has been a boom in the creation of private museums and collections in China. By the time of the passage of the new LPCR in 2002, there were at least 500 private CPCIs, accounting for one quarter of all museums in China.\footnote{This is known in the political economy literature as 'rent-seeking'. Under reform, State bureaucrats have, according to David Zweig, "become increasingly rapacious, expending enormous energy seeking rents." David Zweig, \textit{Internationalizing China} (Cornell University Press, 2002), p. 13. See also He Shuzhong, 'The Mainland's Environment and the Protection of China's Cultural Heritage', above, note 7.}

The question is: does Chapter 4 of the LPCR apply as much to these private collections as public?
The LPCR does not answer this question directly. However, it does describe the ways in which CPCIs can legitimately acquire holdings: by purchase, gift, legal exchange or other legally mandated method. It also says that “State-owned CPCIs may also acquire cultural property through allocation methods or being designated as the holding institution by a cultural property administrative agency.” The only conclusion that can logically be drawn from this is that the first four methods of acquisition apply to both State-owned and non-State-owned institutions.

In addition, Article 40 uses the term ‘non-State-owned CPCIs’, in the context of discussing the rules for their borrowing objects from state-owned institutions for exhibitions, thereby recognising the existence of this category of institution. Thus private museums or exhibition halls in China appear to fall under the rules governing ‘institutional collections’, not the rules governing ‘private holdings’. However, this raises the question of when a ‘private’ collection becomes a CPC. The distinction lies in a formal registration process required when one seeks to open a private collection to public access.

2. Documentation and Management

Chapter 4 of the LPCR places great emphasis on sound documentation and management practices. But this is rather strange, isn’t it? After all, isn’t it only natural that a CPC should keep track of its holdings? But documentation and management need to be emphasised in China right now. Given the pace of change and rapid marketisation, what the cultural authorities most crave is information. They first need to be able to know what they have in order to know what is missing, and to recreate a paper trail (provenance) for objects that have gone astray. As the director of SACH said in 2003:

Our nation has 12 million cultural objects in institutional collections. These objects are divided into ordinary cultural objects and precious cultural objects. Precious cultural objects are further divided into grade one, grade two, and grade three categories. But how many objects are there of each category currently? Where are they held? What is their condition? On the basis of what are they classified? We need to understand more about all of these things.


160 Article 37.
161 See Para. 3.
This is why the LPCR requires all CPCIs to classify, catalogue and ‘strictly manage’ their holdings; why institutions must follow ‘relevant government regulations’ in creating their management systems and must have those systems formally approved by cultural authorities; and why governments at all levels are required to create files on all the CPCIs in their jurisdiction.\(^{164}\) It is also the reason why documentation and permission are required for the exchange or lending of cultural property, and why institutions that have not yet catalogued their holdings may not participate in mutual exchanges or loans.\(^{165}\)

To help ensure that these rules are followed, the LPCR mandates that a “legally designated representative of a cultural property collecting institution is responsible for the safety of the cultural property held by the institution”. Moreover this person cannot leave his or her post without formally handing over legal responsibility to a successor.\(^{166}\)

The problem is that the ‘responsible’ person is generally not the person who has ultimate control. The LPCR declares that SACH has ultimate control over the allocation of all State-owned cultural objects, and provincial-level authorities can also allocate cultural objects within their jurisdictions.\(^{167}\) This raises the spectre of a division between authority and responsibility, a problem that has plagued China repeatedly in its attempts to create a ‘responsibility system’ in State-Run Enterprises.\(^{168}\) However, I am informed that the agreement of museum heads is required before disposition of any of their holdings,\(^{169}\) which gives them a veto power that conforms to their level of responsibility for the objects in their care.

### 3. Rules Governing Exhibition and Care

The third and last theme I want to discuss under Chapter 4 of the LPCR is the rules governing exhibition and care of objects. The LPCR makes it an obligation of CPCIs to exhibit and do scientific research on their holdings in order to “strengthen education and public awareness of about the outstanding history and culture of Chinese people and about revolutionary traditions.”\(^{170}\) It also allows institutions, within certain limits, to mutually lend or exchange holdings (properly documented) for exhibitions or research.\(^{171}\) Lending and exchange

\(^{164}\) Article 36. See also Article 38, para. 1, and Implementing Regulations, Articles 28 and 29. The Government expects to complete a national database of cultural relics information by 2015. See the website ‘Preservation of Cultural Relics’ above, note 89.

\(^{165}\) Article 42. See also Implementing Regulations, Article 31.

\(^{166}\) Article 38, para. 2.

\(^{167}\) Article 40.


\(^{169}\) Interview with He Shuzhong (3 Sept. 2007).

\(^{170}\) Article 40, para. 1.

\(^{171}\) Articles 40 and 41. Responsibility for safety of borrowed objects is with the borrower. See also Implementing Regulations, Article 30. Article 40 was one of the three articles amended in Dec. 2007. Previously, museums needed to report lending of CPCI holdings to the cultural authorities with jurisdiction, and lending of grade-one objects had to be approved by SACH. Now museums need approval only from provincial-level authorities for grade-one objects and need no longer report other inter-institutional loans to the cultural authorities.

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also is a way in which poorer museums may collect fees from wealthier museums.\textsuperscript{172}

These rules are seen by many commentators as a major breakthrough, for they allow the circulation of works held by different institutions, thereby making the holdings of CPCIs more useful and accessible to a larger public. However, it should also be noted that these rules will privilege richer regions and CPCIs. Ironically, these richer regions and CPCIs now find themselves in the same position with regard to the domestic geographic flow of cultural objects that the internationalists are in with regard to the international flow of cultural objects – except that the LCPR takes a highly national position on the latter issue!

Finally, Chapter 4 includes a number of simple rules to enhance the security and safety of holdings, such as: don’t give them away to anyone; don’t alter their appearance when you repair them, photograph them or reproduce them; meet government standards for protection against fire, theft, and natural disaster; report to the relevant cultural property authorities if an object is damaged; report to the police if an object is lost or stolen; and (for institutional staff) don’t take any objects home with you!\textsuperscript{173}

Among this rather mundane collection of rules, there is one intriguingly incomplete one. It is apparently possible for a museum, even a State-owned museum, to legally get rid of objects that it holds. The LPCR merely states, however, that rules governing this process – deaccession – have to be made separately by the State Council.\textsuperscript{174} Nonetheless, as a result of continued controversy over this provision, these deaccession rules have yet to appear, and seem unlikely to appear anytime soon.\textsuperscript{175}

This completes our survey of the LPCR’s rules governing CPCIs. We have examined three themes in the Chapter: (1) Chapter 4 applies to both State-owned and non-State institutions; (2) it places great emphasis on documentation and management in order to track the flow of China’s vast institutional holdings, and creates a ‘responsibility system’ for managers; (3) it codifies rules to enhance the quality of care that holdings receive, as well as rules that encourage greater use of the holdings through exhibitions, research, lending and exchange.

We now turn to the question of cultural property in private hands, covered in Chapter 5 of the LPCR.

\textsuperscript{172} Article 43.
\textsuperscript{173} Articles 44 and 46-49. See also Implementing Regulations, Articles 32-36.
\textsuperscript{174} Article 45.
\textsuperscript{175} Interview with He Shuzhong (3 Sept. 2007). This is probably another example of the moving of conflicts of interest into the ‘administrative regulation’ stage of the regulatory process.
CHAPTER 5: HOLDINGS IN PRIVATE COLLECTIONS
(ARTICLES 50-59)

Chapter 5 is, to my mind, the most subtle and interesting Chapter in the LPCR. This is because, more than any other part of this law, it is expressive of the larger problems of social and economic change in China today. It attempts to recognise and accommodate the development of the 'socialist market economy' while at the same time it shows that the State will give up its authority only very slowly. It is also interesting because, whereas many foreign scholars view the increase in private trading of cultural property as a bad thing – because it is likely to encourage unprofessional excavation, theft and illegal export of cultural property – many Chinese see it as finally being released from irrational limitations imposed by the State on commerce and on what a person can do with private property.

Ironically, these developments make for strange cross-national alliances that seem to defy the nationalist purpose of the LPCR. Dealers of art in China and in foreign countries now have much more in common with each other than they do with the cultural scholars, bureaucrats and law enforcement officials who oppose them. And even as some commentators praise the retreat of the Chinese State from private life in most other areas, others bemoan the weak capacity of that same Chinese State to regulate the antiquities trade (the problem of the 'despotic power' vs. the 'infrastructural power' of the State as mentioned above in note 9). Meanwhile, traders and dealers speak the language of human rights and freedom from arbitrary State oppression in arguing for liberalisation of controls over their own activities.

For reasons such as these, Chapter 5 also proved to be highly controversial in the National People's Congress, underlining the rise of interest-group conflict and increasingly open political conflict that is developing out of the new social pluralisation, the rise of a merchant class, and growing personal space in China. The English edition of People's Daily, reporting before passage of the law back in 2002, tells the story in a way that neatly summarises many of the issues that will come up under this Chapter:

176 Thus one Chinese private collector, with respect to the problem mentioned earlier in this paper as to whether cultural goods and services should be treated as exceptional or just as ordinary goods, has written that "since they are commercial goods, it is only in the process of circulation that their value can be realised". This is a classic pro-marketisation position. See 'Tan Wenwu Baohufa de Xiugai' [On the Amending of the LPCR], at: <http://www.sach.gov.cn:8080/gate/big5/www.sachgov.cn/PublishCenter/sach/dtbzhuanti/wwbh/mjgd/mjgd/460.htm>.

177 It is interesting to see that even in Europe, where protection of cultural property is a widely recognised public good, some are beginning to challenge restrictions on the flow of cultural property on the grounds of economic rights as human rights. See Marie Cornu, 'L'Europe des biens culturels et le marché' in Journal du Droit International No. 129 (Juillet-Aout-Septembre 2002): esp. pp. 708-735. This poses a troubling dilemma for those hoping to see better protection of both cultural property and civil/political rights in China.

178 'Chinese Lawmakers Divide Over Opening of Relics Market' from People's Daily (26 April 2002).
Chinese lawmakers Thursday fiercely debated whether the country should cautiously open its cultural relics market to private collectors. A proposed amendment to the Law on the Protection of Cultural Relics would permit private transactions of cultural relics while the nation enhances supervision and management of the cultural relics market. The draft amendment says people can get legally maintained cultural relics through purchases or exchanges.

The regulation was drafted in response to calls by some legislators to meet the increasing demand of private cultural relics collectors, who believe opening the market will help protect cultural relics, said Zhou Keyu, vice-director of NPC Law Committee. [On the other hand,] noting that grave robberies and embezzlement of cultural relics by management staff are still rampant, legislator Zhu Kaixuan said Thursday that the law should put some restrictions on the transaction of cultural relics among private holders.

The structure of Chapter 5 will differ somewhat from that of other Chapters. First I will provide some further background information. Secondly, I will discuss one of the two themes that I want to identify from this Chapter: rules governing private ownership and ‘circulation’ of privately owned cultural property. Thirdly, I will examine the second of these themes, the rules governing commercial ventures dealing in cultural property. The discussion of the private market for cultural property connects naturally to the problems of theft, pillage, and non-reporting of finds. Thus the fourth topic will be ‘illegal behaviour, ownership and private circulation of cultural property’. Fifthly and lastly, since the problem of illegal behaviour is tied to the general rules of property ownership, I will look at the relationship between the new Property Law and the protection of cultural property.

1. Background

Prior to the passage of the 2002 LPCR, all collecting and circulation of cultural property outside of State-owned shops was, in theory, completely forbidden. However, given the extent to which the Chinese State was already losing control of economic and social behaviour in the 1990s, it is no surprise that this rule was frequently violated in practice. As Kamada Fumihiko notes, even in 1990 informal antiques markets were springing up in empty lots and open spaces in major cities. By 2000, in Beijing alone there were fourteen large-scale, well-known antiques markets.


Of course the authorities knew that these markets existed, and also knew that they were technically illegal. According to Kamada, the authorities essentially defined these markets out of existence by classifying the objects sold there as not being cultural property, despite the fact that these markets have always dealt mainly in *objets d'art*.\(^{181}\)

In addition, a Chinese source claims that by the time the revised LPCR was passed in 2002, there were 'hundreds' of art and artefact collecting organisations, and more than 30 million individual collectors.\(^{182}\) There were also more than 160 auction houses engaging in the sale of cultural property.\(^{183}\) Again, insofar as they bought or sold cultural objects, all of them were acting illegally.

As the authorities wrestled with where to draw the line, the lack of legal clarity exposed collectors and dealers to apparently arbitrary arrest or police intervention. As one 'collector' complained in a newspaper column, law enforcement officials "have even been lawlessly beating and rampantly fining innocent persons, using charges of 'illegal sale of cultural property' and 'smuggling of cultural property' whenever they feel like it to limit people's freedom, creating a bad effect on society...."\(^{184}\)

This is the background against which to understand the first theme in Chapter 5.

### 2. Private Ownership and Circulation of Cultural Goods

We saw above in Chapter 1 that the LPCR guarantees protection of private property rights over legally acquired objects. Chapter 5 enlarges on that by stating in Article 50 that "citizens, juridical persons and organisations other than institutional collectors may collect cultural property that has been acquired in any of the following ways...." The ways are inheritance, gift, purchase from an authorised shop, purchase through a legal auction house, exchange [*jiaohuan*] of legally owned objects, 'transfer according to law' [*yifa zhuanrang*] among citizens, and other methods approved by the State. Even more importantly, the same article states that "cultural objects collected by citizens, juridical persons, and organisations... may circulate [*liutong*] according to law."

Yet these remain tantalisingly vague provisions. Do they legalise the private trade in cultural objects for private collections? The answer is, not exactly.

There are a number of limits. First, there is a list of objects which non-
institutional actors may never ‘buy or sell’ [maimai].\textsuperscript{185} These include State-owned objects; ‘precious’ objects\textsuperscript{186} even if not owned by the State; murals, carvings or building materials from structures that have not been legally demolished; or any object whose provenance does not conform to Article 50. In addition, articles that cannot be legally exported may not be transferred, rented, or mortgaged to foreigners.\textsuperscript{187}

But even more intriguing is this later provision: “Except for approved cultural stores and auction enterprises that handle auctions of cultural objects, no other unit or individual is permitted to undertake commercial operational activities in cultural property.”\textsuperscript{188}

This leaves us with problems of interpretation. At what point does the ‘circulation’ or ‘transfer according to law’ of privately owned cultural property (authorised under the LPCR) become ‘buying and selling’ or ‘commercial operational activities’?

This question can be definitively answered only in the Chinese court system. However, we may say the following: Chinese citizens have been avidly collecting antiques and art objects for many centuries, and under the new law they are certainly permitted to renew their traditional enthusiasm for buying cultural property. Yet, as was said in the debates in the National People’s Congress, “to only authorise people to buy but not to sell privately-collected cultural objects would be unrealistic and impractical.”\textsuperscript{189} Even only by using the terms ‘circulate’ and ‘transfer’ the LPCR has certainly taken a major step toward legitimising the market for private sale of cultural goods.

There seems every likelihood now that the private market will continue to expand, whatever the courts decide. For one thing, as the journal People’s Police states, “the enormous size of the market makes it absolutely impossible for the relevant authorities to manage....” Moreover, although the authorities know that “most of the people buying and selling antiques are doing it for profit and are not genuine collectors”,\textsuperscript{190} for any given transaction it will remain difficult to make an effective legal distinction between ‘circulation’ or ‘transfer’ (which are legal) and unlawful commerce.

For those who feel that the growth of the private market will only encourage

\textsuperscript{185} Article 51.

\textsuperscript{186} The reader is reminded of the classification scheme for cultural objects discussed under Chapter 1. Note that citizens are legally entitled to free advice from cultural authorities in classifying their holdings. See Implementing Regulations, Article 38.

\textsuperscript{187} Article 52, para. 3.

\textsuperscript{188} Article 55, para. 4.

\textsuperscript{189} See ‘Wenwu Baohufa Xiugaizhong Liang Da Remen Wenti Yinqi Gefang Guanzhu’ [Two Major Problems Attract Widespread Attention in the Process of Amending the LPCR] above, note 157.

\textsuperscript{190} Ju Yan, ‘Wenwu Baohu de Falu Nanti’ above, note 148.
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theft and pillage, this is clearly not good news. But in the view of He Shuzhong (a very strong advocate of cultural property protection), the 2002 law, though partly legitimising the market, also for the first time formally makes that market subject to law, and creates certain norms for it. That is, whereas before 2002, the market was formally illegal, this simply allowed it to thrive without any rules whatsoever. It was, says He, "a horrific mess". Therefore the 2002 LPCR can also be seen as the first step toward reining in market excesses even as it lends greater legitimacy to the trade in antiquities.

The interpretation of the Law as strengthening the regulation of the private market is strengthened by the greater regulation it also imposes on the large-scale commercial market: shops and auction houses. We now turn to this second theme in Chapter 5.

3. Rules Governing Commercial Ventures

Numerous rules govern 'commercial' activity in cultural property. Under the LPCR, only two categories of commercial operations are allowed: shops and auction houses. Shops can be established only with permission from the cultural authorities at the national or provincial level, and may engage only in direct sales, not auctioning. Auction houses require a special permit from SACH, and can only engage in auctions, not direct sales. There is also a rule prohibiting foreigners from investing in an auction house in China (by any of the "three investment corporate structures" [sanzi qiye]: joint venture, co-operative investment, or wholly owned venture). In keeping with the emphasis on documentation we have seen throughout this law, both shops and auction houses must keep detailed records.

There is also a rule prohibiting government cultural agencies or their staff members from getting involved in commercial operations, in order to prevent conflicts of interest. Like many of the rules in the LPCR, however, it appears this one is also often violated, as local cultural authorities and auction houses become 'in-laws' through the employment of current or retired officials as consultants, or there is direct collusion between government agencies and auction firms.

191 "Luan dao hen kepa de chengdu" were his exact words. Interview of 3 Sept. 2007.
192 Article 53. Criteria and procedures for establishment of stores are in Implementing Regulations, Articles 39 and 40, respectively. These shops are presumably covered by all normal commercial laws as well.
193 Article 54. Criteria and procedures for the establishment of auction houses for cultural property are in Implementing Regulations, Articles 41 and 42 respectively. Note that there is also a special Auction Law, an English translation of which is available at: <http://www.cguardian.com/en/gypm_5.php>.
194 Article 55, para. 3.
195 Article 57. See also Implementing Regulations, Article 43.
196 Article 55, paras 1 to 3. This provision might be made more problematic by the fact that many auction houses in China are State-owned or State-invested.
197 Ju Yan, above, note 148.
There are, naturally, controls to try to ensure that national treasures are not sold through these shops or auction houses. Thus all objects to be sold at shops must first be approved and labeled by the provincial-level cultural authorities.\textsuperscript{198} Items to be sold at auction houses must be ‘reviewed’ by provincial-level cultural authorities, and their decisions reported to SACH.\textsuperscript{199}

The media recently reported a very unusual instance of official intervention to block the auction of unauthorised antiques:\textsuperscript{200}

The auction of four cultural relics claimed to be ‘State heirlooms’ was halted by the Beijing Municipal Administration of Cultural Heritage. The reason is that the auction company has conducted misleading advertisements for its goods. Royal International Auction Co., Ltd, a major cultural relic auction agent, has been found to have advertised their goods as state-level treasures without examination from the expert panel of the Beijing Municipal Administration of Cultural Relics.

The Royal International Auction Co., Ltd admitted that it had organized its own expert panel and published news of the auction without the authorisation of the Municipal Administration of Cultural Relics. From the point of view of the company’s experts, the to-be-auctioned goods are all authentic. The company immediately stopped its auction activity soon after receiving the order. These art works will be returned to the Taiwan clients after the closing of the matter. The Beijing Municipal Administration of Cultural Relics has vowed to regulate the auction market of cultural relics in the future.

What makes this case quirky is that one might expect the authorities to intervene to prevent ‘State heirlooms’ from being auctioned if they were real, but in this case they did so because they were possibly fake! But it is still a useful illustration, since such fraud is a direct corollary of the rise of the private art market in China; after all, if real artefacts were not allowed to go up for auction, it would be impossible to try to pass off a fake to any legitimate bidder.

From a comparative perspective, there is one additional rule that is especially interesting. If the cultural authorities see a ‘precious’ [zhengui] item that is legally up for sale at an auction house, they may designate a domestic

\begin{itemize}
\item \textsuperscript{198} Article 56, para. 1. The US State Department has made a special point of warning tourists to make sure that the ‘red wax seal’ is affixed to any items they buy, to avoid possible arrest upon leaving China. <http://www.pueblo.gsa.gov/cic_text/state/tips_china.html>.
\item \textsuperscript{199} Article 56, para. 2. In sensitive cases, the provincial authorities may leave the final decision about a specific cultural artefact up to the national level cultural authorities.
\item \textsuperscript{200} ‘Auction of “State Heirlooms” Halted’ (27 Nov. 2007), at <http://english.people.com.cn/90001/90782/91341/6308778.html>.
\end{itemize}
institutional collector to purchase the item directly. The price is to be determined by ‘negotiation’ [xiexiang] between the original owner and the collecting institution.\(^\text{201}\) In comparison, the United Kingdom blocks the export of especially valuable pieces for six months to give local institutions the option to acquire the pieces at the market price. There is no compulsion or price negotiation.\(^\text{202}\)

These rules – and especially the rules applying to auction houses – are efforts to impose regulation on a field of economic activity that had outgrown State control. By the early 2000s, there were 1,200 auction houses in China, 160 of which were engaged in selling cultural property, and this number was growing fast. In debates at the National People’s Congress during deliberations over the 2002 LPCR, “one view held that strict controls should be imposed over the number of auction houses engaging in sale of cultural property,” considering that lack of regulation was leading to market confusion, fraud and laundering of stolen property.\(^\text{203}\)

It is highly debatable how well these rules are working. For one thing, the presence of the Hong Kong SAR complicates matters considerably. It is reported to be the world’s third largest art auction market,\(^\text{204}\) and its commercial art dealers are largely unregulated. Within China itself, the auction market has been booming. One source claims that by 2005 turnover in auction sales within China had reached US$1.5 billion.\(^\text{205}\) And a Taiwanese guide to investment in cultural industries in China identifies auctioning as one of its big areas of opportunity.\(^\text{206}\)

The boom in the Chinese art market and the linkage to ‘market confusion, fraud and laundering of stolen property’ brings us to an important issue that is not directly addressed in the LPCR, but that is intimately related to the themes of private ownership and commercial sales that we have been discussing under Chapter 5: the relationship between the private market and the problems of theft and pillage of cultural sites. Can the written law do anything about this?

4. Illegal Behaviour and Private Circulation of Cultural Property

In some writings on Chinese cultural property law, the problems of theft, pillage of protected sites, illegal digging and failure to report and deliver

\(^\text{201}\) Article 58.
\(^\text{206}\) Xu Zhongmeng (Hsu Chung-meng), *Wenhua Da Shangji* [Big Commercial Opportunities in Culture] (Taipei, Licai Wenhua Shiyue Gufen Youxian Gongs, 2007)
finds to the State occupy a prominent position. Clearly the problem is serious, and the police seem to be unable to keep up with it. But in my view cultural property criminals are not that interesting. After all, they are merely responding to powerful economic incentives. I am more interested in where those incentives come from: market demand.

Where does the market come from? International demand certainly fuels theft of cultural property in China, especially for very high-end products. But in this respect we cannot look much to the law of China. The LPCR already has strict export rules. (See Chapter 6.) Rather, it is international law or the domestic laws of other countries that will have to do most of the work in this area. Thus, for example, China has recently requested help from the US under the UNESCO 1970 Convention to impose far-reaching restrictions on imports to the US of illegally exported cultural property from the PRC.

But what can Chinese domestic law do? After all, it seems likely that much of the demand comes from within China itself.

The statistics and facts cited earlier in connection with auctions certainly support this view. Those who oppose greater regulation of Chinese art sales in the US also claim that this is the case (apparently on the bizarre reasoning that if Chinese are going to — legally or otherwise — buy Chinese antiquities, there is no reason why international agreements against sale of illegally exported objects in the US should be enforced.) Moreover, a New York art dealer claimed in 2006 that, “There is a little known statistic that people don’t seem to pay any attention to that far more Chinese art has been sent into China last year than came out.” And a media report from Hong Kong says that “an

207 For those interested in the policing problem, there are some interesting statistics and comments in Jiang Zhuqing ‘Cultural Relics See High-Tech Crime Risk’ in China Daily (28 Feb. 2005), at: [http://www.chinadaily.com.cn/english/doc/2005-02/28/content_420056.htm]. Especially odd is that only 40 cases (not including tomb pillaging) of theft of protected cultural property were reported in all of 2004, suggesting serious underreporting, and only seven of these were ‘uncovered’ by the police or cultural authorities. For a list of illustrative cases, see ‘Shanxisheng Gongbu Shida Weifan Wenwu Baohu Jingshi Anli’ [Shanxi Province Announces Ten Typical Cases of Violations of the LPCR as an Instructive Precautionary Measure] (8 June 2007) originally printed in Shanxi Shangbao [Shanxi Commercial News], at: [http://www.sx.xinhuanet.com/jryw/2007-06/08/content_10248994.htm].

208 One story in the Chinese press from 2007 claims that 1.67 million Chinese artefacts are held by museums in foreign countries, but that even this number accounts for only 10 per cent of ‘lost Chinese cultural treasures’; the rest are held, the story continues, by private collectors. Unfortunately, no source is cited for these statistics in the article I have, and there is no definition of ‘lost cultural treasure’. See ‘Tycoon to Return 8.9-Million-Dollar Bronze Horse Head to China’ at: [http://english.people.com.cn/90001/90782/6267749.htm].

209 Taylor, ‘The Rape and Return of China’s Cultural Property’ above, note 46. See also the mention earlier in this paper (under Chapter 1) of the return of fossils from Australia.

210 See the comments by dealers and others, summarised on the SAFE website cited above, note 5. Dutra also cites the “rekindled interest in collecting relics” as “the most important factor” imperilling cultural property: above, note 7 at p. 72.

increasing number of buyers from mainland China are crossing the border to buy antiques from the nation's hinterland provinces, which they take back to China as legitimate purchases.\textsuperscript{212}

This is interesting but hardly overwhelming evidence. However, that will not affect my point here.

What I want to say here is that, regardless of whether domestic demand is the most serious factor behind theft and pillage of China's heritage, it is undeniably an increasingly important factor. Since Chinese citizens, juridical persons and organisations can now collect cultural artefacts and these can 'circulate', then demand will surely increase as incomes increase. As advocates of strict regulation of the private market argued in the National People's Congress, "given that the government still does not have a handle on the private collecting of cultural property, lax management of the circulation of cultural property will create opportunities for cultural theft, pillage, smuggling, and other criminal activities."\textsuperscript{213}

Unfortunately, the real key to reducing demand cannot be found in the LPCR. Besides simply having better law enforcement, the real problem is in defining what legal ownership is. The question is whether objects obtained on the open market can easily be kept by the buyer even if the objects were originally stolen. If they cannot, demand for stolen objects will fall. If they can, then, as in the case of Italy,\textsuperscript{214} the country's legal antiquities market will simply become a huge clearinghouse for the laundering of illegal objects into legal objects of commerce. As one Chinese analysis notes: "The loss of cultural property generally goes through several links: theft or pillage, fencing, repair, sale or auction, legal possession."\textsuperscript{215}

This is in reality a problem not of heritage law, but of property law, to which we now turn.

5. Property Law and Cultural Property

China's Property Law just came into effect in October of 2007.\textsuperscript{216} I am not a

\begin{itemize}
\item \textsuperscript{212} John Saeki, 'China's Heritage is Drifting Away Via Hong Kong' in 
\item \textsuperscript{213} See 'Wenwu Baohufa Xiugaizhong Liang Da Remen Wenti Yinqi Gefang Guanzhu' [Two Major Problems Attract Widespread Attention in the Process of Amending the LPCR] above, note 157.
\item \textsuperscript{214} Stephanie Doyal, 'Implementing the UNIDROIT Convention on Cultural Property into Domestic Law: The Case of Italy' in 
\item \textsuperscript{215} Ju Yan, above, note 148.
\item \textsuperscript{216} There is an English translation done by a law firm online at: <http://www.lehmanlaw.com/fileadmin/lehmanlaw_com/Laws_Regulations/Property_Rights_Law_of_the_PRC(LLXX_03162007_.pdf>, which I have referred to in the reading of the Chinese, but whose translation differs from mine. While there are differences in our English wordings, however, there are no major differences in terms of the meaning of the text in relationship to the issues raised here.
\end{itemize}
lawyer, much less an expert in property law, so please remember in reading this section that the main goal in offering my own interpretations of this law is to address only those issues that are important for protection of cultural property.

The main problem is that Articles 106 to 108 of the Property Law include some confusing provisions regarding the acquisition of legal title by ‘good faith’ [shanyi] buyers. Since a great deal of the cultural property on the market comes from scattered graves and temples, and therefore is not catalogued and has no provenance, the question must be raised: can buyers of items which come from sellers who do not have the legal right to dispose of such items obtain legal title to those items?

Article 106 provides that a transferee may gain legal title to property purchased even from someone without the right to dispose of such property, in any one of three ways. The first is simply that “the transferee has acted in good faith” or is “a good faith transferee”. The second is that the transfer has taken place “at a reasonable price”. The third is that, for property which must be registered, registration in the name of the transferee has already taken place, and for property which need not be registered, delivery to the transferee has already taken place.

Thus it appears at first glance relatively easy to obtain legal title to items obtained even from someone without the legal right to dispose of those items, something critics of the Property Law have not missed.

However, the Property Law also includes some safeguards which, I will argue, minimise the possibilities for obtaining title to stolen cultural property.

The first thing to notice is that the Property Law makes explicit provision for State-owned property. It states unequivocally that “no institution or individual shall be allowed to obtain ownership of immovable or movable properties that are by law exclusively owned by the State”. The Property Law further specifies that “cultural relics that by law belong to the State shall be owned by the State”. It also says that for items adrift, buried or hidden, the stipulations in the LPCR making such items State property shall prevail.

In combination with Article 5 of the LPCR, which says that “State ownership...
is protected by law, and may not be infringed”, it appears that State-owned cultural objects are protected absolutely and indefinitely. If this interpretation is correct, no reading of the Property Law could ever allow a cultural artefact to remain in private hands if its origin conforms to the provisions of Chapter 1 of the LPCR related to State ownership, and the State can always seek restitution of property that belongs to it under the LPCR.

It is possible that this interpretation is incorrect, and some sources argue that the State’s property rights are merely on the same level as those of individuals.\footnote{One article states: “According to some scholars, it is inappropriate in a socialist system for the Law to constrain the rights of the State as against private rights. This debate raged for a considerable period of time... [but] it is now clear that the property rights of the State, agricultural collectives, corporations, and individuals are all equally protected under the Law.” See ‘Jones Day Commentaries: The New PRC Property Law’ at <http://www.jonesday.com/pubs/pubs_detail.aspx?pubID=S4223>.

225 First sentence of Article 106, Property Law of the PRC.
226 This is also the interpretation of the translator whose work was cited above, note 216.
227 Article 107, paras 1 and 2.}

Even if this were so, however, there are other remedies in the Property Law that could be applied by any owner of missing cultural property that has been sold on to a third party.

First, Article 106 declares: “Owners may seek restitution where immovable or movable property has been transferred to a transferee by a person without rights to dispose of the property.”\footnote{First sentence of Article 106, Property Law of the PRC.} Though this is later qualified by the statement that where the transferee has gained legal title through one of the three criteria mentioned above, the original owner may seek compensation only from the person who had no right to dispose of the property to begin with, such compensation would still be a deterrent to the illicit movement of cultural property.

There is another assertion of a right to restitution in Article 107, though somewhat different from that which begins Article 106. It says: “An owner or other person with rights has the right to seek restitution of missing items.” This adds “other person with rights” to the list of those able to seek restitution, but here in reference to “missing items” rather than immovable or movable property. (I am interpreting “missing items” to include objects that have been lost or stolen.\footnote{This is also the interpretation of the translator whose work was cited above, note 216.}) More specifically, Article 107 states that the owner may seek return of the property within two years of the day that he or she “knows or should know” the identity of the transferee.

The owner may also at any time seek compensation from the person who had no right to dispose of the missing property. Moreover, the owner may seek compensation from the person who had no right to dispose of the missing property if the owner had to compensate the transferee for return of the property (which an owner must do if the item was acquired legally by the transferee through either auction or from a licensed operator).\footnote{Article 107, paras 1 and 2.}
These provisions are all useful in specific cases. But none has the deterrent effect to reduce demand for movable cultural artefacts that is offered by Article 108, which states:

After the good faith buyer acquires movable property, the original ownership rights over that property lapse, unless at the time of the transfer the good faith transferee knew or should have known of those rights. [Emphasis added.]

As Lyndel Prott pointed out in her comments on an earlier draft of this paper, this language echoes the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 1995. Under that document, a transferee would have to prove that he or she exercised a very high standard of ‘due diligence’ in seeking to know of any original ownership rights.228

Considering that China has been a Party to this Convention since 2001, it is bound to legislate to implement its provisions, and is unlikely to have adopted rules which violate its obligations under that Convention. Thus, we should assume that the standards for ‘knew or should have known’ which China applies in its domestic law will be (at least) as rigorous as those it has already agreed to apply to international transactions in cultural property, and that it should be extremely difficult to obtain ownership rights within China over any object that did not have a clear provenance.

I do not want this digression on Property Law to distract too much from the focus of this paper, which is after all the LPCR. With hopes that more qualified scholars than myself may soon address these issues, and that the PRC Supreme People’s Court will issue a definitive commentary229 confirming a UNIDROIT-consistent interpretation of the Property Law, I will leave this discussion here.

This completes the discussion of Chapter 5. We have seen that society has been far ahead of the law in terms of deregulation of the private art market, as it has raced ahead with the ‘socialist market economy’. In response, the Government has essentially recognised and legitimated the activities of collectors and private antiques dealers, but in so doing has taken the first steps toward regulating those activities.

We have also seen that while the wider scope permitted to private trading may in turn fuel the demand for cultural property (demand that will in turn fuel theft,

228 See esp. Articles 4 and 6 of that Convention, as well as L.V. Prott, Commentary on the UNIDROIT Convention 1995 (Institute of Art and Law, UK, 1997), esp. pp. 46 to 51.
229 Under the PRC’s judicial system, one of the functions of the Supreme People’s Court is “giving judicial explanations of the specific utilisation of laws in the judicial process that must be carried out nationwide.” As I understand it, this is not case law per se, but rather expressions of opinion and clarifications that carry the same force as the law itself. See the SPC website: <http://en.chinacourt.org/public/detail.php?id=24>.
pillage and smuggling), the LPCR appears to place stricter controls on large commercial operations – shops and especially auction houses (albeit with only debatable success). Finally, we have seen that attention should also be paid to property law in discussing how to reduce domestic demand, which is one way to attack the problems of theft and pillage of protected cultural sites.

**CHAPTER 6: IMPORT AND EXPORT OF CULTURAL PROPERTY**

(Articles 60-63)

Chapter 6 includes only a few provisions, most of which are of a procedural nature. It should be noted at the outset that for this Chapter international standard-setting instruments were especially influential in the drafting process.\(^{230}\)

The most important general point to make about Chapter 6 has been made already by Katya Lubina in *Art Loss Review*:\(^{231}\)

China is an extreme example of cultural retentionism and has been severely criticized for its strict embargo on the export of cultural objects. [The 1982 LPCR] prohibited the export of all such items. For dealers in and outside China, and for collectors and admirers of Chinese antiquities outside the “Middle Country,” the most important change introduced by the 2002 Law is the fact that export of Chinese relics, be it in very limited cases, is now allowed. Under the 2002 Law, relics can be exported both for trade and for exhibition purposes.

The rules remain strict, however.

Chapter 6 bans the export of all State-owned objects, as well as all non-State objects that are classified as ‘precious’ [zhengui].\(^{232}\) Aside from special permission given by the State Council, the only exceptions are for exhibitions. However, even when permission for an overseas exhibition is given, there is a numerical limit on the number of grade-one precious artefacts that may go abroad; a total ban on overseas exhibitions for grade-one objects that are unique or fragile; a similar ban for objects that have not previously been shown in China; and a time limit of one year for exhibitions. Also, permission for overseas shows can be cancelled even after they have begun if the works are thought to be endangered.\(^{233}\)

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230 Interview with He Shuzhong (3 Sept. 2007).
232 Article 60. There is an exception for ‘special needs’, under which such items may be exported with approval from the State Council. Presumably this refers to things such as gifts to foreign governments and the like.
233 Article 62. See also Implementing Regulations, Articles 48, 49 para. 2, 50, and 51. The numerical limit, mentioned in Article 48 of the Implementing Regulations, states that permission must
These rules may seem rather rigid, but from the perspective of Taiwan, where there was a raging debate several years ago over the overseas exhibition of rare paintings that even the Taiwanese public can see only on a limited basis, they do not appear extraordinary. Moreover, there are actual cases from other countries of people using the ‘exhibition’ exception get around customs officials, so extreme caution is not uncalled for.

Even for objects which can legally be exported, it is still necessary to receive permission from a specialised organ designated by the cultural authorities, and staffed by cultural experts; to use only a port of exit designated for that item; and, of course, to clear customs. As we have seen in other places in the LPCR, there is also a ‘responsibility system’ for those government officials who must review requests for export approval.

How well do these rules work? As Lubina advises dealers and collectors, “[B]e very cautious: either that Ming Vase is a ‘genuine fake,’ or it has been exported illegally. Only on very rare occasions will it be an authentic vase that has not been illegally exported.” But the fact that such exports are illegal does not mean they are not happening, as the quote at the very beginning of this paper – the one by a US investment advisor citing a ‘supply bubble’ of Chinese antiquities – testifies.

As a final note to Chapter 6, there is also an article describing the procedures necessary for objects that are brought into the country to be legally brought out again. We may now move on to Chapter 7, which covers legal remedies and responsibilities.

**CHAPTER 7: LEGAL RESPONSIBILITY (ARTICLES 64-79)**

It is interesting to note how widely assessments of the punitive provisions...
The PRC's Law for the Protection of Cultural Relics of the LPCR may vary. Some foreign commentators have gone so far as to argue that the LPCR includes no punitive provisions whatsoever, and that all punishments for violations of cultural property laws are to be found only in the Criminal Code. Some Chinese commentators, on the other hand, are effusive in their praise of Chapter 7, calling it a powerful new tool to protect cultural property. As one analyst has argued:

The amended LPCR further improves the rules for legal responsibility, and strengthens the power of the cultural property authorities. Building on a foundation of enforcement of the law by other relevant agencies and departments, the new LPCR vastly strengthens the power of the cultural authorities to administer and implement the law.239

As usual, the truth lies between the two extremes. We will look at the following themes in connection with Chapter 7. First, we will note that the worst offences are indeed covered by the Criminal Code. However there are many possible misdeeds which are not serious enough to be considered 'criminal'. Thus, our second theme will be administrative sanctions for violations of specified acts. We will note that the law strengthens the hand of the cultural authorities directly, and also imposes a stronger legal obligation on other government agencies to assist the cultural authorities. Third, in addition to regulating the activities of citizens, companies, and collecting institutions, Chapter 7 also provides for punishments for government officials who fail in their duties with respect to cultural property.

1. Remedies under the Criminal Code

The first provision in Chapter 7 of the LPCR lists a series of actions that violate the LPCR, and states that these will be punished under the Criminal Code in cases where they are serious enough to 'constitute a crime'.240 Thus the first thing to do here is look at the Criminal Code.

The main provisions of relevance in the Criminal Code are those in a section entitled 'Crimes Against Control of Cultural Relics'.241 Under this section, persons may be imprisoned for up to three years for intentionally destroying protected cultural property, and for up to ten years in cases that are 'serious'.242 Persons

239 See "Wenwu Baohu Youle Xinde 'Shangfang Baojian' [Cultural Protection Has a New Precious Sword], above, note 96.

240 Article 64.


242 Article 324 of the Criminal Code. I first used an official English language version of the Criminal Code, found at the website of the National People's Congress at <http://www.npc.gov.cn/zgrdw/english/news/newsDetail.jsp?id=2204<articleId=344938>. All the provisions cited were later
who sell or give to foreigners any object whose export is banned may be punished by up to five years in prison. The law also targets ‘units’ that give such gifts to foreigners; the units shall be fined and their responsible persons punished by the same term of imprisonment as an individual who commits this offence.\(^{243}\)

The sale-for-profit of cultural objects whose sale is banned by the state may be punishable by up to five years in prison, or ten years for ‘serious’ cases. Again, if a unit is guilty of the offence, those ‘directly responsible’ are criminally liable.\(^{244}\) When a State-owned institution illegally sells or gives an object under State protection to a non-State institution or individual, the institution shall be fined and the responsible persons sentenced up to three years in prison.\(^{245}\)

Elsewhere in the Criminal Code there is also a provision which states: “Employees of State agencies that seriously neglect their responsibilities so as to cause damage or loss to precious cultural property, with serious consequences” shall be punished by up to three years in prison.\(^{246}\) Interestingly, a museum director prosecuted under this provision was found not guilty on the grounds that it applied only to ‘employees of State agencies’, not employees of State-Run Enterprises (SREs). As one legal analysis of the case noted, since all State-run cultural property collecting institutions are SREs, the provision would have been rendered meaningless by this ruling. Fortunately the Standing Committee of the National People’s Congress has since issued a ruling saying that the term ‘employees of State agencies’ here also applies to employees of SREs.\(^{247}\)

The most serious punishments in the Criminal Code are reserved for plundering key cultural or archaeological sites. Thus, persons who illegally excavate or rob ancient cultural sites or ancient tombs receive three years in prison if the offence is ‘relatively minor’, between three and ten years if the offence is ordinary, and from ten years up to life in prison or even the death sentence for any of the following cases: excavating a national priority cultural property protected site; repeatedly illegally excavating or robbing protected sites or tombs; or causing ‘serious damage’ to objects when illegally excavating or robbing such sites. The same punishments apply to illegal excavation or theft of fossils under State protection.\(^{248}\)

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\(^{244}\) Article 325 of the Criminal Code.

\(^{245}\) Article 326 of the Criminal Code.

\(^{246}\) Article 327 of the Criminal Code.

\(^{247}\) Article 419 of the Criminal Code.


\(^{248}\) Article 328 of the Criminal Code.
The death penalty is no idle threat, since the standard for a ‘serious offence’ appears to be rather low, at least as illustrated in one case where the defendants were prosecuted under the ‘Larceny’ provisions of the Criminal Code rather than the Cultural Relics provisions. One man was sentenced to death and two others to life in prison, and all three were stripped of all their personal property, after a grade-one statue they were attempting to steal broke into five pieces. An analysis of the case explores the question:

According to Article 264 of the Criminal Code, in serious cases of larceny of precious cultural artefacts, the death penalty or life imprisonment can be applied. What constitutes a ‘serious case’? In ‘Explanations of Several Problems in the Concrete Application of the Law in Trials for Larceny’, the Supreme People’s Court ruled that a ‘serious case’ involved one of the following two situations: (1) Irreparable damage or loss [is] caused during or after theft of a grade-one State-owned cultural relic.... (2) [The defendant is] the ringleader or a major participant in a criminal organisation, and the crime involves serious damage, is a repeat offense, or leads to other serious loss.

According to the ‘Explanations’, under the first set of criteria for serious cases, there is no flexibility. So long as there is irreparable damage or loss caused during or after theft of a grade-one State-owned cultural relic, all such cases are serious, even if [the defendant] is not a leading participant or a repeat offender. All those involved in the crime will be prosecuted for serious offences....

To be fair, all three defendants in the case in question appeared from the case summary to have been repeat offenders operating in a gang systematically stealing cultural property. Nonetheless, the imposition of the death penalty raises a dilemma for those seeking better protection of both cultural property and human rights in China.

In sum, for the crimes of destruction, sale or gift of protected objects, punishments are generally reserved to three to five years, or ten at most. We may surmise that these are the kinds of crimes that are generally engaged in for profit, with destruction of cultural property often done by construction firms, and illegal sale or gift often engaged in by dealers or bureaucrats. Theft by low-grade criminals, on the other hand, can readily be punishable by death or life imprisonment.

I would argue that here the LPCR sheds light on the extent to which China has embraced the ideology of the market, for, as in most capitalist systems, commercial crimes are not the most severely punished. This is true also

in China, even though there is much greater destruction of artefacts in construction projects than through common crime, and even though it is the commercial market – especially the black market – that creates the enormous financial incentives for common criminals.

Finally, I should note here that the Criminal Code also has penalties for the smuggling of certain cultural artefacts and the ‘buying and selling’ of certain protected cultural artefacts. The former appear in Article 181, the latter in Article 326. I will not go into these in detail here, except to say that the revisions to the LPCR in 2002 raised complications for both. In the former case, whereas previously the export of any cultural object was considered ‘smuggling’, now export of some objects is allowed (see Chapter 6). And for the latter, the line between illegal and legal buying and selling has been greatly blurred by allowing the ‘circulation’ of privately owned cultural property (see Chapter 5). Both of these changes make life that much harder for law enforcement officials.

The Criminal Code does not exhaust the remedies for violation of cultural property law. We now turn to penalties and remedies in the LPCR itself.

2. Non-Criminal Remedies in the LPCR

First, Chapter 7 provides specifically for civil liability for damage or loss of cultural property where such damage or loss results from “violations of the provisions of this law”. Since I am not well-informed about the PRC’s Civil Code, I will not explore this issue further here, but there is certainly room for more research.

Second, Chapter 7 authorises various agencies of the Government to administratively sanction violations of the LPCR that fall within their functional realms. Thus the public security organs may mete out ‘public security control punishments’ for violations of the LPCR that also constitute violations of public security rules. Customs officials may punish people for violations of

250 For a wide-ranging discussion that covers this issue and also many issues raised elsewhere under Chapter 7 and in the Concluding Remarks to this paper, see Liu Jing, ‘Wenwu Zhifa, Jiujing Nan zai Na’er?’ [What is the Real Difficulty with Implementation of Cultural Property Law?], originally in Renmin Ribao [People’s Daily] (23 June 2005), found on the website of the Guangdong Wenhua Ting [Guangdong Department of Cultural Affairs], at: <http://www.gdwh.gov.cn/shownews.php?BAS_ID=8345>.


252 Article 65, para. 1.
the LPCR that constitute customs violations (but not smuggling to a criminal extent). Environmental agencies may punish violations of the LPCR involving pollution levels at protected sites. And commercial authorities may punish persons who engage in commercial art activity (stores, auctions) without the necessary permission, or they may punish legally established stores or auction houses for violations of their relevant operational rules.\(^{253}\)

These are interesting enough, but add little to the authority already vested in those government bodies. Even more interesting is the power to punish invested by Chapter 7 directly in the cultural authorities.\(^{254}\)

One provision allows local cultural authorities to order the termination of a number of behaviours that violate the LPCR, and to fine those persons who do not cease and desist from such activities. These include illegal construction at designated protected sites; or renovation, relocation or destruction of such sites without permission or without proper qualifications. Another provision allows them to fine violators and confiscate profits for the illegal sale or use of State-owned protected sites or objects; or the illegal transfer of non-State-owned precious artefacts to foreigners.\(^{255}\)

Other provisions allow cultural authorities to punish violations of rules that apply to collecting institutions in a number of areas: building safety, management, documentation, lending of objects, qualifications of those who maintain or reproduce objects, or misuse of revenues. Still others allow the cultural authorities to deal with failures to report or turn over finds of cultural objects; or to ‘rectify’ cases of archaeological digs proceeding without permission or in violation of their original plans.\(^{256}\)

Besides allowing government officials to punish citizens, companies and institutions, the LPCR also has rules for government officials themselves to be disciplined.

3. Sanctions for Failure of Government Officials in their Duties

The first provision of interest here is that, when officials responsible for preservation of ‘cities (or streets/towns/villages) of historic or cultural importance’ fail to maintain the sites up to standard, the locality will lose this

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254 This was very much a conscious choice in the 2002 law to remedy shortcomings in the 1982 version, according to Liu Jing, above, note 250. Liu further states that SACH and some provincial cultural bureaus have created specialised enforcement units for these purposes.

255 Articles 66 and 68, respectively; also, Implementing Regulations, Articles 55, 57 and 62.

256 Articles 70, 71, 74 and 75, para. 1(4), respectively; also, Implementing Regulations, Articles 56, 58-60 and 63.
designation – which is generally much desired among local officials\textsuperscript{257} – and those officials will receive administrative punishments.\textsuperscript{258}

Also, managers of State-owned immovable cultural artefacts can be disciplined for failings such as inadequate documentation, failure to report damage to cultural property, failure to follow correct procedures for changing the use of a protected State-owned site, and so on.\textsuperscript{259} Administrative punishments are also authorised for persons in charge of underlings who violate the law, if those in charge are State employees.\textsuperscript{260} Administrative sanctions are authorised for persons in non-cultural government agencies (police, commercial authorities, etc.) whose failure of duty leads to serious consequences; the same persons may be turned over for criminal prosecution in the event that their actions are serious enough to constitute a crime.\textsuperscript{261}

Nor are the staff of agencies in charge of cultural property themselves exempt from punishments for failure to perform their duties. They may be fired from their jobs for violation of the law, unwarranted use of their power to approve sales, failure to investigate illegal behaviour, taking personal possession of State-owned artifacts, participating in retail or auction activity, neglect of duty that causes damage or loss to a protected site or to a precious cultural object, or corruption.\textsuperscript{262}

Of course, the real question is, are any of these methods effective? Are they sufficient to deter violations of the LPCR? If they are not, is there any point in studying the LPCR in the first place? We will address these questions in the conclusion to this paper.

**CONCLUDING REMARKS**

We have just examined in great detail the PRC’s Law for the Protection of Cultural Relics. In closing this subject, I want to make two final points. First, our expectations for such a law should remain low. Secondly, it remains nonetheless important to study this law, and the field of cultural property preservation, in China.

\textsuperscript{257} Most local governments in China want to have their cities recognised as cultural or historic centres, because of the tourist dollars. However, there are already cases in other countries of citizens actively lobbying against special designation because they would pay high costs in terms of local economic activities and also local culture. See Werner Krauss, ‘The Natural and Cultural Landscape Heritage of Northern Friesland’, in Kenneth Olwing and David Lowenthal, eds., *The Nature of Cultural Heritage and the Culture of Natural Heritage* (London, Routledge, 2006), pp. 37-50. It will be interesting to see whether this begins to occur in China if the LPCR can ever be strictly enforced to limit modern development in these historic locales.

\textsuperscript{258} Article 69. This ends the system under which cities could never lose their designations. See ‘Wenwu Bahu Youle Xinde ‘Shangfang Baojian” [Cultural Protection Has a New Precious Sword] above, note 96.

\textsuperscript{259} Article 75.

\textsuperscript{260} Article 77; also Implementing Regulations, Article 54.

\textsuperscript{261} Article 78.

\textsuperscript{262} Article 76.
The PRC’s Law for the Protection of Cultural Relics

1. Low Expectations for the Law

There are several interlocking reasons why the LPCR in and of itself cannot solve the problems of cultural property protection in the PRC.

First, enforcement is problematic. Despite being a dictatorship, the reforming Chinese State seems to be very weak at controlling its officials and enforcing the law. Complaints by central government officials who are theoretically in charge reveal the extent to which local behaviour is often beyond their control, as these excerpts from a recent AP report indicate:263

‘Senseless actions’ by local officials in their pursuit of renovation and modernisation have ‘devastated’ [heritage] sites, Qiu Baosheng, the vice minister of construction, was quoted as saying by the China Daily. “They are totally unaware of the value of cultural heritage”, Qiu said. Tong Mingkang, deputy director of [SACH], accused some local governments of pulling down valuable historical sites in need of repair and replacing them with fakes.

Secondly, the economic incentives to break the law remain compelling. The result is that the LPCR is often ignored in practice at the local level. As one frustrated cultural official wrote in 2006:

I have been working more than twenty years in cultural property departments. In the past, when the situation was discovered of cultural property being threatened with destruction, we would just go to the local administrative chief, and often a single phone call would lead to the property being saved and protected. But now it is different.... Local officials almost all take the side of local economic development, and the vast majority of protected cultural properties have no current economic value, so to talk about cultural property protection at the current stage is virtually impossible!264

Given that in China the State itself is far and away the biggest developer and builder, the fact is that it is often those who are supposed to enforce the law who lead the way in breaking it. As one Shanxi archaeologist has written,265

In recent years, there have been countless cases of ‘show projects’ and ‘policy accomplishments’ violating the LPCR and destroying

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265 Li Zizhi, ‘Chengshi Jianshe Zhong de Wenwu Baohu Wenti’ [The Problem of Cultural Property Protection in Urban Construction"], found at: <http://zj.cangcn.com/u/411.shtml>. This is apparently a personal blog site, but the author’s credentials make his comments worth paying attention to.
cultural property. Because these are political objectives, and it is leaders who are doing them, the cultural heritage departments are powerless to do anything. This reveals a systemic flaw – that there is no effective oversight of government or leaders; it also shows that many in the government and leadership lack self-restraint....

And SACH director Shan Jixiang has said:266

One particularly important warning sign is that in recent years an ever-higher percentage of cases of violations of the law of cultural property have been of ‘those who should be upholding the law breaking the law’,... In comparison to individual cases of crime, cases of ‘those who should be upholding the law breaking the law’ – and especially of government officials – are destructive in the extreme.

Even where cultural officials are not themselves directly involved in breaking the law, Shan does not exempt such officials from charges of ignorance and laziness in the execution of their duties.267

To decry these problems is not to deny that very real dilemmas can exist between preservation and development. One official who is part of a project to document China’s remaining intact traditional villages – fast disappearing under a wave of rural construction – has said of the local residents: “They also desire a better life. It is impossible, and also unrealistic, to conserve all the ancient villages in a rapidly developing society.”268 Nonetheless, the point here is that even where the decision has already been made to give priority to preservation, the LPCR cannot, for both economic and political reasons, function at the level of effectiveness that is intended for it.

But that does not mean we have wasted our time in studying the LPCR.

2. The Larger Import of the LPCR

For one thing, it is certainly the case that some law is better than no law. The LPCR is only one step, but it is a critical step, in the construction of a giant web of national and local legislation, departmental directives, and ‘normative documents’ that will increasingly protect cultural property.269 Despite the

269 The ‘web-building’ or ‘network-building’ point was much emphasised in official reviews on the occasion in 2007 of the fifth anniversary of the passage of the LPCR. For a list of relevant
political and economic obstacles to enforcement, there are four reasons to persist in the construction of this legal framework.

First, the law is sometimes, perhaps even often, followed. We have seen examples of this in connection with the requirement for archaeological surveys prior to construction (see Chapter 3). Secondly, enforcement need not be uniformly bad; officials in some locales may well be more conscientious than in others, even in the face of vested economic interests, as has been the case with environmental pollution laws in some cities.270

Thirdly, it would be pointless to rely on self-restraint by developers, dealers or development bureaucrats, even when they are well-intentioned. For example, Hong Kong’s Urban Renewal Authority chairman, ‘touched’ by concerns that a new project will destroy a local market over 100 years old, suggested that the project might be altered to take these concerns into account. But according to news reports, his only remedy if the market disappears will be, essentially, to feel bad about it.271

Fourthly, the mere existence of the law has a certain educational and hortatory value. It is more than mere rhetoric that international agreements on cultural property protection almost all commit governments to educate citizens to value heritage. Treasuring artefacts for their cultural meaning rather than their short-term economic value is a learned behaviour, one that has taken centuries to evolve in the West.272 The LPCR at least keeps this issue in the public eye.

In addition to the value of the LPCR for itself, there is also a larger reason why it is worthwhile to study it.

The LPCR is a mirror, a case study and a flashpoint, for many larger dilemmas and conflicts that resonate throughout all of Chinese law and politics today: weighing private goods against public goods, balancing development against conservation, establishing effective and honest local government in an era of declining central control, improving policing while expanding private space and respect for human rights, allocating resources among regions and

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271 His exact words were reportedly, “I’ll take it upon myself as having failed.” James Pomfret, ‘Hong Kongers are Warming to the Defense of their Heritage’ in Taipei Times (11 Sept. 2007): p. 9.

functional bureaucracies, meeting international standards as China joins the world, balancing ‘opening up’ against foreign access to Chinese assets, assessing ‘national’ vs. ‘international’ claims on culture, deciding whether cultural goods should be treated as ordinary goods, and so on.

The LPCR is also a terrific illustration of the rising clash of interests in an increasingly pluralised society. One need only look though the footnotes to see that a variety of views are being expressed by a variety of actors in a variety of forums: the media, the academic press, the Internet, the marketplace, government bureaucracies, the courts, and even in the National People’s Congress. (My favourite example, albeit trivial, is the case of one writer who critiqued Chapter 6 of the LPCR under the guise of a movie review!)

The Chinese will have to work out all of these issues and conflicts as the country develops. Since the LPCR – indeed no law – can stand apart from its social context, it will only be when Chinese society reaches some sort of equilibrium in these dilemmas that we will see the LPCR function as it should. And since no nation has never really found a permanent equilibrium for any of them, the Law for Protection of Cultural Relics should continue to command attention for some time to come.
