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PERFORMATIVE REGULATION

A Case Study in How Powerful People Avoid Criminal Labels

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This paper explores the role of invested powerful business actors in the criminalisation process as applied to the illicit antiquities market. We present a case study of the precise mechanics of the role played by trade interests in the formation of the Dealing in Cultural Objects (Offences) Act 2003. This process involved the trade's entering appearance in the legislative process and neutralising the possible constraining effects on its members of the new criminal offence which was to be created. We begin by exploring the political, historical and economic context in which discussion of the terms of the 2003 Act first began. We then follow the Act from its genesis through its various stages of drafting and re-drafting, to its enactment. This case study of a single piece of legislation provides further data to add to the line of prior research that illustrates that powerful white-collar criminals, as well as sometimes preventing criminal legislation entering the statute books, can also influence the design of criminal legislation that does enter the statute books in order to protect themselves and their own business interests. We also use this case study of a process of contemporary law-making to outline the concept of performative regulation: broadly, that which in appearance serves political ends but in practice effects an inconsequential level of control.

Introduction

This paper explores the role of invested powerful business actors in the criminalisation process as applied to the illicit antiquities market. One of the antiquities dealers in our sample of this group of powerful and influential traders, keen to affirm his role as model law-abiding citizen, sums up his approach to the regulation of dealing in illicit antiquities in terms of passive reception (McBarnet 2003); he states his position as: 'If you make it illegal, I'll stop doing it'. What he fails to mention is that legislation has in fact been passed in his jurisdiction in relation

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to dealing in looted antiquities to ‘make it illegal’; that this legislation contains such a watered-down version of the offence it was conceived to tackle that while ‘it’ is illegal in spirit it remains effectively unprosecutable in practice; and that he was one of the leading figures instrumental in knocking the teeth out of this legislation as it was drafted. It is this process of influence on the legislative process we shall detail here.

In this paper we use a case study of a piece of antiquities legislation to draw together and empirically illustrate four key theoretical propositions pertinent to white-collar crime. These are first, that as well as ‘first and second dimensional’ power (in crude sum, the former being obvious force and the latter agenda-setting which pushes unpalatable prospects off the menu of possible regulatory decisions – both of which are, as we shall see, evident in our data) a highly effective form of power operates through ‘third dimensional’ activities which through influence on preference-formation encourage the apparently voluntary delivery of pleasing results to the exercisers of this power by those they so dominate (Lukes 2005). Second, our data supports a view of regulation as a facilitative instrument for the powerful. This is a counter-intuitive theoretical position that sees regulation as in some senses part of the constitutive context for wrongdoing. Regulation, controlled or affected by powerful interests, marks out certain activities as illegal but at the same time legitimates those areas outside the immediate boundary of its concern (Cain and Hunt 1979; McBarnet 1992). Third, we offer a view that the reality behind the veneer of democratic law-making, which might be thought to involve reasoned argumentation about the merits of any proposed law, often manifests in a less principled, strategic battle of personal interest which disguises itself in the language of democratic debate and professional

politics. This brings the sociological study of the legislative process directly into line with classic studies which have found similar micro-processes of interpersonal interaction providing the empirical foundation for the seemingly still waters of professional practices and routines in other institutions such as the academy (Bourdieu 1988), and laboratory science (Latour and Woolgar 1979). Certain processes of law-making emerge as particularly susceptible in their design to this form of influence: here we expose the inherent failures of a particular legislative mechanism, the Private Member's Bill, as a robust mode of creation of legal controls. Fourth, we offer a view of regulation as performativity: contemporary regulation, we argue, is not typified by level-headed calculation of principled legal-structural foundation designed to stand the test of time. Rather, regulation as it currently plays out empirically often operates a 'fire-fighting' model of panicked response to pressing crisis, led in its ethos not by problem-solving on the long view but by a political desire 'to be seen to be doing something'. The manufacture of regulation in this way opens particular opportunities for the exertion of influence by powerful interest groups over the content of the law, thus providing scope for the instrumental operation of 'law as a means to an end' for powerful groups, rather than an embodiment of aspirations towards the public good (Tamanaha 2006).

We have elsewhere attempted to unravel the power relations of the antiquities market, with a particular emphasis on the 'powerful' image and actions of dealers in the market and the 'moral entrepreneurs' (Becker 1963) who rail against their trade (Mackenzie and Green forthcoming). We attributed the power of the dealers to various cultural, historical, economic and perceptual factors. They are 'elite' in terms of personal financial wealth and the esteem which is associated with the cultural

capital of their profession. However, the antiquities trade in London does not seriously prop up the domestic economy by any measure – the value of the licit trade in classical antiquities in the UK was estimated at £15 million in 1999 (Palmer et al. 2000: 41) – nor are antiquities dealers employers of significant numbers of local workers. They are powerful therefore not in the brute sense of corporate financial muscle which might allow the prospect of political weight attaching to the relocation of the market abroad should regulation tighten up at home. Rather they are powerful in terms of personal economic and social capital – they have, or can buy, powerful connections – and in terms of the deference which is accorded to their traditional social role as preservers and displayers of culture.

It is precisely attacks on this historical elite status which dealers have reported pains them most about their current predicament. Many have profited handsomely from their career activities and have enough money to retire quite comfortably should their profession be banned entirely; it is not their financial future which worries them, but the ignominy of the fall from grace of their previously highly respected practices, now increasingly tainted with the vulgarity of accusations of dealing in stolen property. There is considerable empirical support for such accusations, however, and it is on this basis that we come to consider antiquities dealers as white-collar criminals. Previous research has shown both that they sometimes knowingly break export and handling laws, and that they also indulge in a form of creative compliance with these laws (McBarnet 2003, 2006) which involves deliberately not allowing themselves to be put in positions of knowledge about the origin of objects that would then render a purchase unlawful (Mackenzie 2005a, b, 2006).

It was noted in our other output that dealers' 'systemic power' included the capacity at crisis points to act in effective targeted ways to defend the future of the trade from regulatory constraint (Mackenzie and Green forthcoming). In this paper we present a case study of the precise mechanics of this process insofar as it related to the trade's entering appearance in the legislative process and neutralising the possible constraining effects on its members of a new criminal offence which was to be created.

The story which is told in the history of this legislation is populated by three key groups of 'players'. These can be summed up as 'trade', 'activist' and 'political' interests. The trade group consists of business people and organisations who buy and sell antiquities (dealers, auction houses) and their lobbyists, lawyers, and other representatives or sympathisers. The activists argue against the illicit trade, and often include the apparently legitimate trade in their critique. Many contend that the whole trade in antiquities is more or less complicit in the looting of objects from source countries, and recent empirical studies have provided data supporting these allegations (Mackenzie 2005b; Kersel 2006). The activists tend to be archaeologists, although there are also several international organisations concerned with the protection of cultural heritage, such as UNESCO and SAFE, which embody a somewhat diffuse level of activism in relation to the issue. Finally, the regulatory process described here is influenced by political interests: in our case these are the executive powers of the Department for Culture Media and Sport, the Ministerial powers of the Department's temporary figureheads, a Private Member of the House of Commons, an All Party interest group consisting of members of both Houses, and

members of the House of Lords who have influenced the legislation with speeches and manoeuvres based on their personal allegiances in the debate.

These three groups are not mutually exclusive. Our comment above on the Lords illustrates that some key political actors can also be members of the 'trade' and 'activist' groups, and museums occupy an interestingly ambiguous role sitting both as participants in the trade and as employers of various curators who are relatively activist. It is hard to categorise museums as a whole in the debate, but a brief and relatively accurate way to do so is to say that UK museums are considerably less pro-market than many in the US, and that within the UK a few resolutely pro-market institutions are the exception to the general appearance of a more balanced and reticent involvement in the looting issues affecting the trade.

The story that emerges is one of conflict-within-consensus. Here, an apparent process of mutual compromise and agreement in law-making between political, activist and trade interests structures and contains the pursuit of self-interest by the political and trade representatives, and exercises of power which obstruct the aims of the activists. It should be apparent already that our investigations at the micro-political level of legislative process reveal the inappropriate lack of detail provided in standard unreflective language of 'regulators' and 'regulated'. In the process we describe the trade is an active agent in its own regulation (thus both regulator and regulated), the activists are also included in the regulatory role, and the government, whom we might hitherto have assumed to be the major occupant of the regulator's chair, provides the infrastructure (the establishment of committees, drafting assistance in emerging private legislation) within which the decision-making processes of law occur but

doesn't in fact emerge as having done much 'regulating' at all, in the conventional sense of the word.

Through this case study of a single piece of legislation, we illustrate that white-collar criminals, as well as sometimes preventing criminal legislation entering the statute books, can also influence the design of criminal legislation that does enter the statute books in order to protect themselves and their own business interests. This is pre-legislative intervention: the legitimised manipulation and neutralisation by white-collar marketeers of laws directed at them.

Our illustration of market influence on the terms and content of legislation can be seen as the latest addition to a significant body of work which documents and analyses how elite interests can influence the formulation of laws to dilute or subvert regulatory attempts to control harmful corporate or white-collar activity (for useful introductions to which, see Passas and Goodwin 2004; Passas 2005). This form of corporate regulatory influence is perhaps nowhere clearer than in the history of the US automotive industry's attempts to subvert and delay the introduction of minimum auto safety standards, or in the asbestos industry's persistent campaign to thwart and delay the introduction of health and safety legislation throughout the twentieth century. In the case of the automotive industry, as with the antiques market, the government and the law 'afforded greater constitutional protection to ...profit maximization' than it did to the protective role of the state (Lee 1998: 390). When the US government belatedly began to take motor vehicle safety seriously the courts afforded the industry the right to object to every new safety standard proposed by the government's National Highway Transportation Safety Administration (NHTSA). In

effect this resulted in motor vehicle manufacturing companies consciously employing delay tactics, challenging single sections of every standard one at a time. With each challenge the NHTSA was obligated to conduct research and demonstrate ‘an objective safety benefit’ arising from the proposed standard. According to Lee ‘...manufacturers were able to use the ‘rule of reasonableness’...to consistently stall the regulatory process’ (Lee 1998: 398-99). This process naturally resulted in seriously delayed but also weakened safety standards. Asbestos corporations such as Turner and Newell and Manville Johns employed similar strategies to control attempts to regulate that industry’s harmful impact on workers. In fact following years of consciously attempting to reduce public awareness and embarking on its own results-driven research (to challenge the scientific evidence which had emerged directly linking asbestos to lung disease), Manville became involved as the principal drafter of federal legislation designed to establish a national compensation fund for victims of asbestos-induced disease (Calhoun and Hiller 1988). Both examples demonstrate not only the power of an occupational or industrial elite to limit the scope of regulatory regimes directed against their business activities but also reveal the easy access afforded these elites to processes of political and legislative decision-making. The parallels with the antiquities market will become apparent.

The Dealing in Cultural Objects (Offences) Act 2003 (‘the 2003 Act’) began as an attempt to tighten up the criminal law regarding the purchase in the UK of pieces of ancient art *inter alia* stolen overseas. We begin by exploring the political, historical and economic context in which discussion of the terms of the 2003 Act first began. We then follow the Act from its genesis through its various stages of drafting and re-drafting, to its enactment and coming into force on 31 December 2003. We conclude

with a discussion of the implications of this case study for conflict theories of regulation, and suggest a contemporary analysis of the role of political short-termism and insubstantial engagement with social issues that sees processes of regulation such as those leading to the 2003 Act as 'performative'. At the time of writing, four years after it came into force, there have been no convictions under the Act.

Where did the 2003 Act come from?

Braithwaite has noted that the criminalisation of certain forms of action can be seen to be representative of the development of wider social norms with regard to appropriate behaviour, illustrated by the relatively recent entry onto the books of new crimes concerning activities such as drink-driving, domestic violence and an increasing number of strict liability offences in the realm of workplace safety and pollution (Braithwaite 1995). Consciousness-raising in respect of 'new' forms of harmful activity begins with the work of pressure groups which fit the definition of 'moral entrepreneurs' (Becker 1963). These groups encourage social and political scrutiny of harmful action, leading first to the social re-definition as morally unacceptable of an act previously thought normal, and then perhaps to its criminalisation. This process of consciousness-raising has occurred in relation to the criminalisation in 2003 of the market in looted antiquities in the UK. In the case of looted antiquities the moral entrepreneurs who have challenged market notions of the acceptable trade in antiquities are a small but politically active group of archaeologists whom we have called activists. Their campaign has been both normative and regulatory and in essence revolves around a desire to reframe the antiquities market as an unethical industry founded on looting and theft.

This smooth vision of the process of social change conceals continuing resistance. Although criminal legislation has entered the books in respect of what parliament agreed was a criminally undesirable form of action, business interests implicated in the performance of that action have managed to ensure that they remain effectively exempt from prosecution. According to Vernon Rapley, head of the Art and Antiquities Unit of the Metropolitan Police:

We've estimated that we may pursue one charge under the new Act every five years. That's a view that was supported by CPS opinion at the time.

The work of the moral entrepreneurs in this case has been subverted by capitalist entrepreneurs. How did this happen?

On 24 May 2000 the then Minister for the Arts, the Rt Hon Alan Howarth CBE, appointed a body to examine the position of the UK in the international trade in illicit antiquities, and to make recommendations. That body was the Ministerial Advisory Panel on Illicit Trade, colloquially known as ITAP (for "Illicit Trade Advisory Panel"). ITAP was placed under the chairmanship of Professor Normal Palmer, a Barrister and Professor of Commercial Law at University College London, and one of a very few legal experts on art and cultural heritage law practising in the UK.

ITAP was geared toward trade interests from its inception. In addition to its chairman, ITAP had 8 members. Only two of these fell into our activist group: the Director of the McDonald Institute for Archaeological Research (Lord Renfrew, on whom more

to follow), and the Director of the York Archaeological Trust. Three were unequivocally identifiable with trade interests: the Chairman of the British Art Market Federation, the Chairman of the Antiquities Dealers' Association, and the Head of Antiquities and Associate Director at the auction house Bonhams and Brooks. The remaining three members consisted of two museum representatives and a journalist. They were the Director of the British Museum, the Deputy Director of the Museums Association, and the Editor of The Art Newspaper (Palmer et al. 2000). The interests represented by these three members are conflicting – their operations rely in many ways on the trade, but (as we have said in respect of museums, and as is also true for some of the newspaper's copy) they display activist leanings also. On this basis we might with diffidence call them neutral interests. Activists would vehemently disagree, and consider them trade interests without doubt. On our view then, which perhaps overindulges a trade interest in suggesting an impartial panel, the trade/activist split on the panel was 4.5/3.5; on the activists' very possibly more accurate reading the split was 6/2. Whichever view is right, the trade was generously represented.

It is noteworthy that in addition to the heavy trade representation on ITAP, no specialist representative from one of the agencies of enforcement (i.e. police or customs) was invited to join. A panel with such a constitution does not appear well suited to produce robust and energetic trade regulation. What is less clear is how such an imbalance of power came about. The answer seems to be in part related to one aspect of government-regulatory doxa, and in part to the blunt capacity of powerful high-status individuals to cast themselves as community representatives and thrust themselves into the regulatory machinery. In respect of the first, there appears to be an

unreflective assumption on the part of government and those it charges to establish and run committee investigations such as ITAP that the natural place to start when one is investigating trade regulation is with the trade itself. The unavoidable bias this 'research'-based approach involves does not seem to have figured in government thinking in setting up the panel. Thus, from the beginning, the question to be answered was not 'how should we (as outsiders, on behalf of society) regulate the trade', but rather 'what sort of regulation will the trade accept'? In respect of the second point – a blunt exercise of power – we have the extraordinary case of one of the trade members of the panel who reportedly 'invited' himself into membership. The backstory emerges that this person was stimulated to do so on hearing that one of the other members had been appointed, and considered themselves to be more central a market player. The fact that such self-invitations are possible at all is noteworthy, as is the ill-concealed egotism which attends status positions in the small world of antiquities.

The antiquities market is not a new phenomenon, but legislative attention to its workings is. The harm caused at source by looters who steal objects in order to feed the demand in market nations for archaeologically significant artefacts has been well-documented (e.g. Coggins 1969; Renfrew 1999; Brodie, Doole and Renfrew 2001; Mackenzie 2005b). Moral entrepreneurialism in relation to the destructive tendencies of the market in illicit antiquities began in earnest with the late 1960s and early 1970s writings of a crusading archaeologist (Coggins 1969, 1970, 1971) and the drafting of an international treaty which enshrined the principle of 'the impoverishment of the cultural heritage of the countries of origin of [looted cultural] property' (UNESCO 1970). The recognition that the market was linked to destruction at source led to an

increasing interest by concerned moralists in the workings of the market: particularly the amount of information which it passed in its purchase mechanism (Meyer 1973; Burnham 1975; Bator 1983; Gill and Chippindale 1993; Elia 1993a, b, 1994; Renfrew 1999; Chippindale and Gill 2000). This was quickly discovered to be close to none at all, raising the question how a market that did not know where any given object had come from could guard itself against the injection of illicit goods into its licit streams. In 1995 a second international convention, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects concerned itself with the international issues of restitution and return (UNIDROIT 1995).

When in the 1970s the UK came to consider accession to the UNESCO Convention it decided, wrongly, that it was unable or at least ill-advised to do so due to certain perceived conflicts between its domestic law and the Convention's requirements. This decision is acknowledged to have been wrong both by contemporary regulatory insiders (data from regulatory interviewee) and by ITAP's legal adviser who has written that when he investigated the matter on behalf of ITAP the conclusion was reached that the UK could accede to the convention without this necessitating amendment to its domestic law (Chamberlain 2002).

Research into the antiquities trade has produced an image of the market as one in which licit and illicit flows of goods mix (Polk 2000; Alder and Polk 2002). Stolen goods are widely suspected to circulate in large numbers in this market, and indeed there have been high profile cases of seizure, followed sometimes by prosecution, where this suspicion has been shown to be correct (see Stead 1998). The lack of provenance accompanying objects entering the market's channels enables dealers

either not to know about the illicit status of some of the objects they handle or if they do know to argue later, usually plausibly, that they didn't. Many of the market interviewees in a study by one of the authors had no ideological or practical objection to dealing in looted goods (Mackenzie 2005b). Such goods were not perceived to have been 'stolen' in the strict sense of the word, but rather were thought to be the subject of unduly retentive source country laws which could be ignored without action incurring the taint of immorality, or 'real' illegality. Looted antiquities are seen by these market traders as 'saved' from obscurity or possible destruction by their 'discovery' and on-sale. These market traders also make considerable profits from their businesses, enabling them to maintain stylish premises in expensive locations.

This being the case, we might reasonably expect that the trade representatives on ITAP would be little disposed to agreeing measures to control the import into the UK and sale of looted cultural material. By according them such central place in the regulatory process, the government ensured that a trade-friendly output would emerge. And so it did, in the form of the 2003 Act.

ITAP met twelve times before publishing on 18 December a document which detailed its 'findings' and recommendations (Palmer et al. 2000). From the first meeting it was apparent that the trade interests on the panel would not allow any recommendation to enter the final report which prejudiced their financial interests. As a result Professor Palmer's role quickly became one of 'peacemaker' (personal communication, confidential interviewee): it was his responsibility to produce at the conclusion of the panel's investigation and deliberation a report that framed a solution to the issue. At an early stage it became clear that without some conciliatory tactics from Palmer,

such were the polarised interests and views of the members that the panel would be proved constitutionally incapable of reaching any sort of consensus.

Conciliatory tactics were Palmer's strong point, and he was determined not to let the panel fail in its remit. Conciliation does not overcome disparities of power, however: where concessions must be made they are often made disproportionately. So it was with ITAP: the activists could not win. The two international treaties mentioned above (UNESCO 1970; UNIDROIT 1995) stood out as the obvious candidates in terms of which to frame the UK's response to the problem at hand, and ITAP's inquiry was based around establishing the suitability of recommending the UK's accession to either or both of these Conventions. Our interviews reveal that it was hoped by Professor Palmer as well as by the activists on the panel and some observers of the panel's work that it might be feasible to recommend the UK's accession to both Conventions. This hope would prove misplaced.

The panel correctly identified that the UNIDROIT Convention was more onerous in the obligations it placed on those who deal in antiquities than was the UNESCO Convention. The clash of interests on the panel meant that its ultimate decision would depend upon the resolution of a power conflict rather than upon an impartial and thorough investigation of the illicit market, the control mechanisms in the Conventions, their fit with UK law, and the prospects of them going some way towards solving the problem of stolen goods in the market. The power ratio and the vested interests of the trade representatives in continuing to deal in stolen goods transformed what was presented as an official move to consider and respond to the illicit trade into a negotiation over how much regulation the trade would acquiesce to

(ITAP 2001). The trade representatives agreed to a ‘compromise’ solution whereby they would endorse a recommendation to accede to the UNESCO Convention along with a package of attendant measures – which would include the 2003 Act – if the UNIDROIT Convention was dropped from the agenda. By way of this second dimensional Lukesian strategy of agenda setting, in which the trade interests made clear what was open for discussion and what was not, they manoeuvred Palmer and the activists into accepting the measure with the least teeth as an alternative to having nothing to show for the exercise. We emerge with a ‘better than nothing’ approach to regulation that characterises minor concessions by business as a regulatory success – a success that is as much as can be expected in the circumstances.

Following the publication of the ITAP report on 18 December 2000, two of its recommendations were realised. First, the UK achieved full accession to the UNESCO Convention on 31 October 2002. Second, the Dealing in Cultural Objects (Offences) Act, a piece of legislation with a single operative criminal provision representing the offence proposed by ITAP, was introduced into the House of Commons as a Private Member’s Bill by Richard Allen MP, receiving its Second Reading on 4 April 2003, gaining Royal Assent on 30 October 2003, and taking effect on 30 December 2003.

The progress of the criminal offence from recommendation to enactment

Several of ITAP’s recommendations have not come to fruition, and indeed the proposed criminal offence might have gone no further than a proposition in its report

had it not been for the confluence of several factors. First, at the same time as ITAP was pursuing its formal deliberations, an informal ‘All Party Archaeology Group’ was set up under the chairmanship of Lord Renfrew to bring together MPs and members of the House of Lords interested in archaeological issues. Second, since Renfrew was also a member of ITAP, he provided a bridge between these two bodies and introduced the All Party Archaeology Group to the issues with which ITAP were grappling. And third, a member of this group, Richard Allen MP, entered the Private Member’s Bill ballot and came out in seventeenth place. We interviewed Allen in order to get first-hand data on the process of law-making in respect of the 2003 Act, and report here some of the particularly illuminating elements of that process. Where it is helpful we use Allen’s own words, and unattributed quotes hereafter belong to him.

The Private Member’s Bill ballot is, in effect, a legislation lottery. Historically, every MP who is not a government member has the right to apply to propose one piece of legislation. Given the pressure on parliamentary time, in practice this right has been whittled down over the years, and now the 200-300 annual applications are subject to a process of random ranking, where the top twenty are deemed to be worth proceeding with, in order of numerical ranking. Thus the further down the top twenty one’s name appears, the less likely there will be sufficient parliamentary time to see a Bill through. At a ranking of seventeen Allen found himself near the back of the queue and with ‘a lot of behind-the-scenes things to do’ in order to maximise the chances of his Bill’s success by minimising the chances of its being derailed and running out of time. Party political consensus for these lower-ranking Private Member’s Bills becomes significantly more important as ‘if any member at any time

wants to be awkward and try and block something its pretty easy to do that' (see also Garner 2004: 211).

Suddenly given the opportunity to propose a piece of legislation, through his connection with the All Party Archaeology Group Allen selected the ITAP offence as the basis of his Bill in the event he were to be allocated parliamentary time. The backing of the group gave him wider support than the average Private Member's Bill would enjoy, and by the time the Bill became the subject of firm agreement he had support from a broad cross-section of members of both Houses, and indeed from the government.

The Department of Culture, Media and Sport (DCMS) agreed to draft the Bill for Allen. Here was opportunity to draw upon the Department's legal and cultural heritage expertise, particularly in the form of David Gaimster, who had been seconded to the DCMS from the British Museum to help deal with the issues surrounding illicit antiquities which ITAP had exposed. Gaimster had worked with Roger Bland (secretary to ITAP) at the British Museum. Thus it was that the drafters and main supporters of the Bill – Gaimster and the DCMS, Allen and Renfrew – were linked through the network of contacts constituted by ITAP to those in the antiquities market who were to be regulated, represented particularly by two prominent dealers who sat on ITAP, James Ede and Anthony Browne.

Allen describes matters thus:

[S]o there are lots of people who know each other and are all being helpful on the archaeology side and they were having quite helpful dialogue with the dealer side, which is James Ede and Anthony Browne, because ITAP brought them together. So, politically what this meant is that although there were some quite difficult negotiations in getting to a Bill that was acceptable to both sides, it meant that it wasn't coming from the archaeologists and therefore you didn't have the dealers wound up to try and block it, which would have been one of the possible dangers, in that it was coming from a consensus of all sides.

Allen's view of his remit was therefore to 'get a bill that was acceptable to both sides' and he describes the outcome as 'coming from a consensus of all sides'. This is very much the regulation by compromise, influence and negotiation referred to above in the example of the asbestos industry in which the subject industry plays a key role in its own regulatory design.

Once the bill was tabled Allen received visits from dealers, and their lawyers. He describes his role in these meetings as mediating between the dealers and the DCMS lawyers who drafted the legislation. The dealers would propose amendments, and he would relay these to the DCMS to see if they could be accepted. Like Norman Palmer's role in ITAP Allen's 'was a political job: to try to make sure we did all stay together... to try to make sure we had agreement all the way through'. Although the negotiations could properly be characterised at this point as political discussion over the question of 'how much' regulation, they took the form of legal discussion over 'what might be wrong' with the Bill. As with the US automobile industry, substantive

questions of regulation thus became formal questions of law, as the trade lobby endeavoured to find ‘difficulties’ in the legislation as drafted and through the identification of these difficulties negotiate the replacement of those operative provisions of the Bill which had some bite with provisions considerably less harmful to the trade. The success of the translation of group interests into legal theory is reflected in the comments of Richard Allen after the event. The dealers, he says, were ‘extraordinarily helpful’.

The Bill encountered the standard opposition levelled at Private Member’s Bills by an obstructive core of Conservative MPs who tend to oppose all such proposals on the broad platform that the UK needs less, not more, laws, and also from those who do what they can to wreck legislation seen as government Bills in disguise. The main tactic here in respect of Private Member’s Bills is to ‘talk them out’ by instrumentally extending the debate on preceding items so that the Bill simply runs out of time on the day and needs to be re-scheduled. Given the pressure on Parliamentary time, this does not have to happen more than a very few times before the Bill has to be dropped altogether. Renfrew was ‘absolutely critical’ at this stage, lambasting his fellow Tories for their employment of such tactics in respect of what he perceived to be so worthy a cause, and as a result again of this one man’s activism, the Bill got its time. In the process of debate, however, other parliamentary voices, clearly representative of the market, played a role in ameliorating any ‘criminal’ sting the Bill might acquire. Two of the Lords active in the antiquities market – Lord Brooke of Sutton Mandeville (President of the British Antique Dealers Association and president of the British Art Market Federation) and Lord Stewartby (a coin collector for 60 years and former Chair of the Treasure Trove Reviewing Committee) - while claiming to

support the broad purpose of the Bill were driven primarily by market interests; ‘... it is vital,’ Lord Brooke argued, ‘that we maintain a balanced and reasonable regulatory environment here if we are to prevent this thriving market from disappearing abroad.’ (Lord Brooke, Hansard: 12 Sept 2003, Column 543).

During the Bill’s passage through the Reading stages, the US and its ‘coalition of the willing’ invaded Iraq, prompting the widely-reported looting of the Baghdad museum (Gumbel and Keys 2003; Bogdanos 2005). The criminal offence contained in the Bill had of course been in the pipeline for over two years at this point, while the Bill itself had been in process for many months. Although its operative provisions were applicable to museum theft it was only peripherally concerned with this type of crime, having been designed in the main to combat archaeological destruction. Still, as the Baghdad museum became front-page news around the world the government stepped up its support for the Bill and Tessa Jowell, then Minister for the Arts, began publicly to tout the Bill as a government response to the matter (e.g. Hansard: 7 May 2003, Column 128W).

Whereas prior to this point, government support for the Bill had been subject to ‘some delicacy’, after the Baghdad museum looting Allen found he had a stronger hand in his negotiations with the dealers, government support for his Bill now being ‘public and explicit’. Even so, once the dealers had commissioned counsel to ‘go through the bill with a fine tooth comb’ and had begun proposing amendments, all but ‘one or two’ of these amendments were accepted by Allen and the DCMS. Even with government support, the capricious path of a low-ranking Private Member’s Bill is such that the spectre of possible disruption is ever-present. Had the ‘working

relationship between dealers and archaeologists' that ITAP represented not been in place, the dealers 'might have been winding MPs up to propose amendments in a hostile fashion, which would have effectively wrecked the bill'. This threat of unsettling the delicate balance on which the successful high-wire act of such a Bill depends underwrote the climate in which the Bill's terms were formed, necessitating the creation of a context of collaboration rather than control. In this context 'the dealers... were very helpful and cooperative' and Allen described his role in getting the Bill through 'as making sure we kept it cooperative and didn't allow it to become a "bashing the dealer" Bill'.

Trade members and their legal representatives have therefore been influential at all stages in the legislative process: from the inception of the Bill in the ITAP proposal, which represented agreement on 'a general principle', although not on the detail of the legislation; through its drafting where influence was maintained on that very detail; to its ultimate final form and beyond. The influence of the market is nowhere more explicit than in the DCMS guidance documents which have been distributed to dealers to assist them in interpreting the meaning of the Act and its potential impact on the trade:

The Act does not necessarily oblige dealers to take steps to ascertain provenance or to exercise due diligence to avoid committing the offence. Knowledge or belief and dishonesty must be proved by the prosecution... Any increase in costs to legitimate business, therefore, is likely to be minimal (Home Office Department for Culture Media and Sport 2004: 1).

Discussion: power, politics and performative regulation

The case of the 2003 Act provides an opportunity to suggest some directions towards updating the classic literature on the sociology of law to reflect contemporary political-legislative trends. If theories of regulation can in rough fashion be split between ‘public interest’ and ‘private interest’ theories (Tomasic 1985; Morgan and Yeung 2007), where the former see regulation as a consensus-modeled attempt to attend to the common good and the latter see it as a conflict-modeled contest of particular interest groups, our data firmly support the latter framework. We have attended above to some mapping out of the particular form the various interests involved in the process we have studied have taken, and we will conclude here by exploring some of the theoretical implications for conflict models of society generally, and private interest theories of regulation in particular.

Three decades ago, Carson suggested that laws which appeared in theory inimical to powerful interests were in practice often either not enforced, or indeed designed to be ineffective (Carson 1974). The 2003 Act seems to live up to both of these standards. It has not yet been enforced, and our study maps the process of the exertion of influence by the trade in contributing to the design of its ineffective central provision. Within this broad-brush statement of legislation ‘designed to be ineffective’ however, we can uncover in the history of the 2003 Act several contextual forces which contribute to this process of design.

Perhaps most obviously, the precarious nature of a Private Member’s Bill played a major role in the dilution of the control which was to emerge. In respect of this legislative process, where ‘the key thing is not to get bogged down’, where the

‘atmosphere’ at the reading stages has to be ‘correct’ for the Bill to progress, and something as apparently innocuous as ‘proposing amendments’ can be sufficient to ‘wreck’ a bill by ‘talking it out’, the scene is set for weak regulation characterised by ‘compromise’ (these, again, are all Richard Allen’s words).

Compromise was also evident prior to the legislative stage, both explicitly (in terms of the perceived remit of ITAP) and less obviously. To capture the latter we invoke Lukes’ conception of three-dimensional power, which in its third dimension achieves through the promulgation of ideology what it might otherwise only secure by more blunt mechanisms. It is clear that the value placed by ‘regulators’ on market interests - even a market as elite and arcane as the antiquities market - is high. In the course of attempting to introduce legislation designed to protect archaeological and historical knowledge, market interests have been protected through both the consultative and legislative processes. The insinuation of trade interests in the consultative stages of the Bill, through representation on ITAP, was openly solicited by those charged with designing a regulatory framework to address dealing in looted antiquities.

The language of explicit compromise used by many of our key informants provides considerable support for Chambliss’s ‘dialectical perspective’ of lawmaking, which sees law as attempting to resolve pressing conflicts that emerge in society (Chambliss and Seidman 1982). Through our data we see this dialectical process as situated in a ‘structuralist’ view of law which in the critical literature has traditionally been expressed in a view of regulation as an instrument of a state concerned primarily with maintaining social stability, particularly in terms of the long-term survival of the extant socio-economic system, and often at the immediate expense of the less

powerful (Collins 1984; Lynch, Michalowski and Groves 2000). Effective trade regulation is seen in this model as a subordination by the state of ‘the immediate interests of particular businesses to the long-term interests of capital as a whole’ (Whyte 2004: 144).

While there may be much to commend this view, it tends to such a level of functionalist abstraction that it skates over the political micro-processes we have examined above. Attribution of a self-preservation desire to ‘the state’, or its concern with the long-term interests of ‘capital’ does not give enough attention to the political party process, and to individual political careerist interests as one important group of interests in the model of social and regulatory ‘conflict’.

Our study suggests that any analysis of the dialectical process of lawmaking in contemporary society requires an exploration of this micro-level of individual desire which drives a political concern with resolving social conflict. It may be quite accurate to say that this ultimately gives rise to macro-social historical patterns of concern with the longevity of extant institutional structures, as well as in a state’s apparent concern to self-preservation which creates regulatory controls over business as a product of attending to state or system legitimacy in the eyes of non-corporate public interests. Within this theoretical position, however, we find a meso level of analysis consisting of cultures of political practice and organisational and professional norms. Still further ‘down’, we reach the micro level where we collected our data. Here, grand impressions of system maintenance are transformed into individual political decisions and the personal pursuit of self-interest.

At this level, the particular dialectical pressure manifested by a drive to conflict resolution appears considerably more short-termist than a substantive concern with system longevity. It is simply a matter of longevity of political office, and thus manifests in a desire to 'keep a lid' on social conflict until the current political cycle runs its course. Bluntly, there is no suggestion in any of our data from the main players in this particular regulatory debate that the government had any serious desire to staunch the flow of illicit antiquities into England and Wales. What individual ministers emerge from our data as desiring is the impression during their time in office of movement in the level of control of the trade rather than actual control: enough committee discussion and legislative paper-shuffling to repel accusations of cultural insensitivity or passive acquiescence in a criminal market. Alan Howarth, under public pressure from Lord Renfrew, our leading activist, set up the committee infrastructure within which a compromise solution could be thrashed out between trade and activist interests. Tessa Jowell eagerly 'adopted' the emerging legislation when it suited her publicity mandate, the government having previously abandoned the fate of ITAP's legislative recommendations to the lottery of Private Members' interests. This is what we mean by 'regulation as performativity'.

There are (at least) two meanings of performativity we are working with here: one is the relatively straightforward critical suggestion that an act, in our case political regulation, is primarily about performance rather than about substance, and is in this sense fake or superficial. The second meaning is more technical: this is the suggestion, most evident in Judith Butler's Foucauldian use of the term (e.g. 1997), that performative acts are constitutive, insofar as discourse has the power to create objects. We certainly adhere to the first sense of performativity in our suggestion that

regulation satisfies performative functions in contemporary political debate. In order to examine how far we agree with the performativity of regulation in the second sense, we need to ask what objects it is that are so created?

One answer ties the second meaning into the first: the object created here is the appearance of social consensus. Performative regulation as a dialectical response to social contradictions such as the current value dispute causing conflict between trade and activist interests in the antiquities market does not attempt to resolve substantively the matter in conflict. Rather than concerning itself with the substance of the conflict it focuses on the people in whom the conflict appears to be manifested. We can say ‘appears to be’ as the issue of the destruction of cultural heritage is one in which there is a great silent majority public interest, although the issue only engages the active campaigning of a relatively small archaeological constituency. The question for the performative regulator is therefore not ‘how can we solve this social problem’, but ‘how can we suppress the explicit dissensus that this social problem has brought into public view’? This is not problem-solving, then, but ‘people-solving’; it has become quite common in business to ask ‘how do I make this problem go away?’ and this ambiguous approach to conflict resolution seems close to our observation of performative regulation in the present case study.

The more profound answer, however, ties the second meaning of performative regulation into the theory of regulation as facilitative for powerful constituencies. Here, the object created is a regulatory structure which sets the running, as it were, for future debates around control. In the dialectical model of law-making, where compromise is written into the rationale for the creation of legal instruments, and

power imbalances offer differential access to the means of framing those instruments, regulation plays the performative function of allowing linguistically adept legal and policy sophistry in argumentation by interest groups and their legal and political representatives to influence the conceptual policy terrain on which battles to resolve conflict are fought. The dealers' support for the legislation was strategic, a response to an emerging crisis in which the market faced the prospect of increased regulation, and which presented them with the opportunity to be involved in the process of their own regulation in order to neutralise the possibility of alternative, more hostile regulation.

The object created in this process is regulation which allows government to satisfy its performative desire in the first sense of the term, and delivers a legal structure that allows those 'regulated' to continue to do precisely what they were doing in the first place. The creation of this legal structure that outlaws certain forms of behaviour, at the same time creates a zone of legitimate behaviour outside its boundaries – a structural performativity in the second sense which serves to legitimate all transactions in looted antiquities in the UK that cannot be proven to satisfy the requirements of the offence. As we have said, so far this is all of them. The performative process of becoming subject to a criminal law has been rather a pleasant one for dealers in looted antiquities.

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