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## The Cultural Property Laws of Japan: Social, Political, and Legal Influences

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## THE CULTURAL PROPERTY LAWS OF JAPAN: SOCIAL, POLITICAL, AND LEGAL INFLUENCES

Geoffrey R. Scott<sup>†</sup>

*Abstract:* Japan's Law for the Protection of Cultural Properties has been heralded as one of the most sophisticated and complete statutes of its kind and has been viewed as a model for other countries considering means to protect their ethnographic and cultural treasures. This Article examines the social, cultural, political, and legal influences antecedent to the promulgation of the statute and discusses the complexities inherent in composing legislation of this sort. The specific Japanese legislative and administrative efforts undertaken to protect national treasures prior to promulgation of the statute, and the political environment contemporaneous with its passage, are compiled, analyzed, and provided to the western audience. Perhaps of greater significance, however, the influence of the West, and particularly the United States and its citizens, upon the Japanese efforts to protect cultural property is examined through the use of archival U.S. Government documents of the Arts and Monuments Division of the Supreme Commander Allied Powers composed during the occupation of Japan. Finally, from a pragmatic perspective, this Article analyzes and explains the legal reasons why it is currently difficult for Japan to join in the international efforts of the United Nations Educational Scientific and Cultural Organization ("UNESCO") and International Institute for the Unification of Private Laws ("UNIDROIT") in the global protection of cultural treasures, the strong domestic protection of such properties notwithstanding.

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## I. INTRODUCTION

Japan's Law for the Protection of Cultural Properties has often been heralded as one of the most sophisticated and complete attempts of its kind. Initially promulgated on May 30, 1950, it became effective on August 29, 1950.<sup>1</sup> Although amended in limited part, it retains its original and essential

<sup>1</sup> Bunkazai Hogo-hō [Law For The Protection of Cultural Properties], Cultural Affairs Protection Department, Agency for Cultural Affairs, (1950) (Japan) (most recent English translation published Oct. 1996). For a brief overview of the Law, see also BARBARA E. THORNBURY, THE FOLK PERFORMING ARTS: TRADITIONAL CULTURE IN CONTEMPORARY JAPAN 55 (1997), which provides:

Since the passage of the Cultural Properties Protection Law (*Bunkazai Hogo-hō*) in 1950, the word "cultural property" (*bunkazai*) has come to be frequently encountered in a range of places and circumstances: at historical sites, in museums, in the pages of programs

statutory integrity. The statute is of more than national import and influence. In testimony to its statutory merit, commentators have referenced the effort as an influential model for the legislation of other countries.<sup>2</sup> The statute did not, however, arise spontaneously. Rather, it has a long and venerable social, political, and legal history.<sup>3</sup> It finds its proximate catalyzing influence in the occupation of Japan by Allied Forces from 1945 through 1952, and its more remote antecedents in the culturally revolutionary Meiji Period. To truly appreciate the significance of the grand statutory effort and to properly assess its paradigmatic value, it is imperative that one become acquainted with the social, cultural, political, and legal antecedents and the context in which the statute arose. In breach of this approach, the law may actually serve as nothing more than a collection of symbols on a page to be infused with the contemporary ethnocentricity of the individual reader. Should this occur, there would follow the substantial risk that inaccurate interpretations, improper inferences, and unfortunate missteps might follow.<sup>4</sup>

Unfortunately, little is actually available, particularly in the West, that illuminates the milieu surrounding the statute and its promulgation, and an effort to compile such information is no easy task. Much of the direct, relevant information has been essentially inaccessible to persons in the West who have chosen to comment on the protection of cultural properties. This is the result of

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distributed at folk performing arts events. Designation as Bunkazai signifies official recognition of cultural importance, with selections being made at the national, prefectural, and local government levels on the recommendation of scholars and specialists. Bunkazai are the focus of official efforts to protect and conserve Japan's cultural heritage.

The law, as it stands now, identifies five major classes of cultural properties. They are: tangible cultural properties (*yukei bunkazai*), which include paintings and sculptures; intangible cultural properties (*mukei bunkazai*), comprising theater, music, and applied arts; folk cultural properties (*minzoku bunkazai*), among which are the folk performing arts; monuments (*kinenbutsu*), a broad category that includes manmade and natural sites as well as plants and animals; and traditional building groups (*dentoteki kenzobutsugun*).

On the national level, the provisions of the law are carried out by the Agency for Cultural Affairs within the Ministry of Education. The agency works with the Council for the Protection of Cultural Properties and the committees that annually select the nationally designated important cultural properties in each category.

*Id.* at 55-56; see also CULTURAL PROPERTIES LAW, 2 KODANSHA ENCYCLOPEDIA OF JAPAN 8 (1983).

<sup>2</sup> Halina Niec, *Legislative Models of Protection of Cultural Property*, 27 HASTINGS L.J. 1089 (1976).

<sup>3</sup> Yoshiaki Shimizu, *Japan in American Museums—But Which Japan?*, 83 ART BULL. 123 (2001).

<sup>4</sup> Such misunderstanding seems to have occurred in the limited analytical literature that exists on the subject. See generally Chester H. Liebs, *Listings of Tangible Cultural Properties: Expanded Recognition For Historic Buildings in Japan*, 7 PAC. RIM LAW & POL'Y J. 679 (1998); C. FRANKLIN SAYRE, *CULTURAL PROPERTY LAWS IN INDIA AND JAPAN* 851 (1986). These articles provide a cursory review of the protection of cultural properties. They are the only two articles that appear to address the subject. Both articles and news reports of the day indicate that the fire at Horyu-ji was the event that precipitated the passage of the Law. Also, interviews with Ministry of Culture officials in Tokyo indicate a perspective that the United States had little influence in the passage of the Law. Neither view seems complete, as will be discussed herein.

several phenomena. First, a great deal of the original primary material, as well as the contemporary supporting administrative documentation, is solely in Japanese.<sup>5</sup> The Agency for Cultural Affairs, a Division of Japan's Department for Education, is the administrative organ charged with the responsibility of overseeing the cultural property law. While the Agency does offer an excellent website in English,<sup>6</sup> it is limited to expressing general policies and setting forth budgetary allocations. The Agency will provide, upon request either directly to its offices or indirectly through its diplomatic representatives, hard copies of a limited number of documents. The available documents include an overview of Japan's policies for the protection of cultural properties as well as a copy of the current cultural property law.<sup>7</sup> In large part, however, the available documents are substantially duplicative of the website.

Second, the historical and contextual documentation is scattered in diverse archival locations and is not generally organized in a way that offers easy access to scholars. Third, a great amount of experiential information resides only in the memories of the participants. Many are deceased and left no record of their experiences. Others followed disciplines other than the law, including art history, and failed to report on legally significant considerations. These scholars, with their understandably academic predispositions, made selective decisions, colored by these predispositions, about what was important to report. As a consequence, commentary in the subject area has invited historical speculation and interpolation, and much data relevant to a legal understanding has not heretofore been available.<sup>8</sup> Fourth, while scholars in art history have intuitively sensed and frequently acknowledged the importance of a contextual legal analysis, they have either perceived themselves as lacking the necessary legal perspective or perhaps, more importantly, have expressed the viewpoint that, should they undertake the relevant inquiries, they might be found offensively indelicate by their Japanese patrons. The feared result is that avenues relevant to their professional investigation in art could be closed to them.

This Article is the first in a series that addresses the Japanese experience

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<sup>5</sup> BUNKAZAI HOHO TEIYO (Bunkacho ed. 1973). See also BUNKAZAI HOGO HO TO TOUROKU SEIDO NO KAISETSU.

<sup>6</sup> Agency for Cultural Affairs, at <http://www.bunka.go.jp> (last visited Feb. 28, 2003).

<sup>7</sup> From time to time, the Japanese National Commission for Protection of Cultural Properties has also published documents of assistance in the area of understanding cultural properties protection. While helpful in understanding the various laws and policies, the available documents, unfortunately, are not always kept current. An example of a document that provides a good historical overview and a copy of the 1950 statutes, as unamended, is Administration for Protection of Cultural Properties in Japan, National Commission for Protection of Cultural Properties (1962 NCPCP Tokyo, Japan).

<sup>8</sup> Sherman Lee, *My Work in Japan: Arts and Monuments, 1946-1948*, in THE CONFUSION ERA, ART AND CULTURE OF JAPAN DURING THE ALLIED OCCUPATION, 1945-1952, at 91 (Mark Sandler ed., 1997).

with respect to the treatment of its cultural treasures, as well as in other countries that have taken significant steps in protecting such property. This Article attempts to (1) discuss the dynamic social, cultural, and political antecedents that precipitated Japan's cultural property laws before the surrender of Japan to Allied forces in 1945; (2) explain and analyze the legal and legislative antecedents to the current law through 1945; (3) describe and analyze the political and legal dynamics of the Occupation of Japan from 1945 that led to the promulgation of the law in 1950; and (4) discuss the events specifically proximate to the promulgation of the 1950 law as well as the role played by the Allied Forces in its composition and passage. In this context, the considerable influence that the United States had on the composition and passage of the statute may be surprising to some, given the lack of comprehensive protection for its own cultural and ethnographic treasures.<sup>9</sup>

## II. THE CULTURAL, POLITICAL, AND SOCIAL MILIEU OF JAPAN THROUGH 1945 AND ITS EFFECT UPON THE PROTECTION OF CULTURAL PROPERTY—A MOVE FROM INSULARITY TOWARD WESTERNIZATION AND NATIONALISM

### A. *The Early Threat to Japan's Power and Autonomy and Japan's Chosen Response of Insularity*

To understand the Japanese treatment of cultural property, it is important to consider trends in Japanese history that influenced its national self-image. For centuries prior to the Meiji Period, Japan had assumed a policy of isolationism. This posture was a response of the then feudal government to what it perceived as the ambitions of European aggrandizement. The late fourteenth and early fifteenth centuries were a time of ambivalent Japanese leadership. While interested in foreign trade so long as it held the promise of riches and power, Japanese authorities were also confronted with threats to their supremacy by the ambitions of their foreign trading partners. These challenges took the form not only of the direct demands of merchants who threatened to withdraw trade if they were not given adequate control of the engines of commerce, but also the indirect influence of Christianity upon the indigenous population.

In that regard, Hideyoshi, a sixteenth century political master of Japan,

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<sup>9</sup> For an excellent review of U.S. cultural property laws see, Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U.L. REV. 559 (1995); Marilyn Phelan, *A Synopsis of the Laws Protecting Our Cultural Heritage*, 28 NEW ENGLAND L. REV. 63 (1993).

came to perceive foreign traders as imperialistic and land hungry.<sup>10</sup> He also viewed the missionaries' interest as presenting a threat to his security.<sup>11</sup> As a consequence, he issued a decree in 1587 prohibiting the dissemination of Christian tenets.<sup>12</sup> His reserved perspective was further inculcated by the San Felipe affair of 1596.<sup>13</sup> Commentary concerning the affair observes a precipitating event:

Infuriated by the officious and high-handed treatment of the officials who had confiscated the cargo of the Spanish galleon, a member of the crew boasted defiantly that Spain's method of empire building consisted of sending out missionaries and traders to new lands followed by troops who rapidly conquered and annexed them to her vast empire.<sup>14</sup>

Attempts thereafter to separate the advantages of trade from the disadvantages of religious interference and the competitive rivalry of missionary groups were deemed unsuccessful and the Tokugawa Shogunate ultimately banned Christianity in 1612.<sup>15</sup> As a corollary, converts were ordered to renounce their

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<sup>10</sup> CHITOSHI YANAGA, *JAPAN SINCE PERRY* 6 (1949).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> See W. G. BEASLEY, *THE JAPANESE EXPERIENCE 147* (1999), which provides:

The first Christian missionaries to arrive in Japan were three Jesuits, of whom one was Francis Xavier, brought to Kagoshima in a Chinese junk in 1549 . . . . In 1563, in what was to prove a key event in the history of Christianity in Japan, the converted Omura Sumitada, daimyo of part of Hizen in the northwest of that island. He allowed them to settle in Nagasaki in 1571; ordered compulsory conversion of the population in his domain in 1574; and put Nagasaki under Jesuit jurisdiction in 1580 . . . .

This success owed as much to the religion's commercial as its doctrinal appeal. The Kyushu daimyo, anxious to protect their share of the trade with China, had taken note of the respect in which Portuguese captains held the Jesuits. It appeared to them that to tolerate Christianity, or to show it favor, was a way of attracting Portuguese ships to Kyushu ports . . . .

The Kyushu campaign gave Hideyoshi his first personal knowledge of affairs in that region, including those related to Christianity. As overlord, he objected to the administrative role of the Jesuits in Nagasaki, was alarmed by their interventions in local politics and was offended by tales of their intolerance to other religions . . . .

On 24 July 1587, as soon as the Satsuma campaign ended, Hideyoshi issued a decree ordering Christian Priests to leave Japan . . . . In another decree the previous day, he had banned the practice of mass conversion . . . . Starting in 1593, however, Dominican and Augustinian friars from Manila began to arrive in Japan. Confident of Spanish protection, they preached openly, in disregard of Hideyoshi's orders . . . . Annoyed, Hideyoshi gave the foreigners a sharp reminder of his wishes. In February 1597, twenty-six Christians, including three Jesuits and six Franciscans, were crucified in Nagasaki. It was the opening

faith.<sup>16</sup> In 1636, individuals and ships were prohibited from going abroad.<sup>17</sup> Further, as it had proved impossible to separate the influences of commercial activity from spiritual evangelism, particularly that of the Portuguese at Nagasaki, all Europeans except the Dutch were expelled from Japan in 1639.<sup>18</sup> From that point, for almost 200 years, the doors of Japan were closed to outsiders.

The countries of the West, however, had other desires. Following the Revolutionary War, for example, the United States desperately needed to resuscitate its exhausted economy. Whaling in the north Pacific, the developing fur trade in the West, and increasing interest in trade with China drew America's attention.<sup>19</sup> The success of the industrial revolution required that new markets for goods be developed. Trade with the East promised one means by which to quench the thirst for economic expansion.<sup>20</sup>

The first actual attempt to open relations with Japan was taken by the private firm of Olyphant and Co. of Ohio in 1837.<sup>21</sup> Seven Japanese sailors shipwrecked in Macau were given refuge on the company's ship, the *Morrison*, and the company seized the opportunity to try to repatriate the men and simultaneously open negotiations for trade. Upon arrival in Japan, however, the Shogunate refused to deal with the company and opened fire on the ship.<sup>22</sup>

Economic and political interest in Japan continued unabated and President Fillmore, upon the urging of his advisors, set out to conclude a commercial treaty with Japan. In pursuit of this end, Commodore Matthew

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move in what was to become a full scale persecution under the Tokugawa.

*Id.* at 147-49. See also CONRAD SCHIROKAUER, A BRIEF HISTORY OF CHINESE AND JAPANESE CIVILIZATIONS 314 (2d ed. 1989).

The Japanese saw Christianity as potentially subversive, not only of the political order, but of the basic social structure, for it challenged accepted values and beliefs . . . . Its association with European expansionism posed a threat from abroad . . . . Thus the motivation for the government's suppression of Christianity was secular not religious.

*Id.* at 319.

<sup>16</sup> YANAGA, *supra* note 10, at 8.

<sup>17</sup> *Id.*

<sup>18</sup> SCHIROKAUER, *supra* note 15, at 8, provides:

Because of the practical impossibility of drawing a line between religious and commercial activities, particularly as carried on by the Portuguese at Nagasaki, the authorities came to the conclusion that it was best to exclude all Europeans except the Dutch, who alone had not shown any interest in the propagation of Christianity.

<sup>19</sup> See, e.g., YANAGA, *supra* note 10, at 11-13.

<sup>20</sup> *Id.* at 12-19.

<sup>21</sup> *Id.*

<sup>22</sup> HUGH CORTAZZI, THE JAPANESE ACHIEVEMENT 176 (1990).



Perry was appointed in 1852 as a special envoy to the country for the purpose of communicating the interest of the United States.<sup>23</sup> At the direction of the President, Acting Secretary of War Charles M. Conrad issued instructions to Perry that included the following observations:

Recent events—the navigation of the ocean by steam, the acquisition and rapid settlement by this country of a vast territory on the Pacific, the discovery of Gold in that region, the rapid communication established across the Isthmus which separates the two oceans—have practically brought the two countries of the east in closer proximity to our own; although the consequences of these events have scarcely begun to be felt, the intercourse between them has already greatly increased and no limits can be assigned to its future extension.<sup>24</sup>

During the summer of 1853, Commodore Perry arrived with his “Black Ships” in Edo Bay near Uraga with a missive from President Fillmore. It firmly called for an agreement providing for fair treatment of shipwrecked seamen, the opening of ports, and commercial intercourse between the countries.<sup>25</sup> Upon his individual initiative, Perry added a personal message to the effect that a failure to receive the peaceful overtures would occasion a forceful U.S. response.<sup>26</sup>

Despite having been informed by Dutch King William II of the impending arrival of the American expedition, the Japanese exhibited surprise and panic upon Perry’s arrival.<sup>27</sup> Presented with responses purportedly designed to delay or discourage delivery of President Fillmore’s message to the Shogun, Perry presented a show of force to effect his mission.<sup>28</sup> The Shogunate capitulated, received the message, and requested time for deliberation.<sup>29</sup>

Meanwhile, Russia had become aware of the interests of the United States, and, in the fall of 1853, dispatched an emissary, Admiral Putiatin, for the purpose of concluding a trade treaty with Japan. Although Putiatin was forced to depart Japan prior to effecting a treaty, the information of his presence

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<sup>23</sup> YANAGA, *supra* note 10, at 18.

<sup>24</sup> TYLER DENNETT, AMERICANS IN EASTERN ASIA 262-63 (1922).

<sup>25</sup> CORTAZZI, *supra* note 22, at 176.

<sup>26</sup> *Id.*

<sup>27</sup> For a Japanese historical view of the arrival of Perry and other important events, see Shunsuke Kamei, *The Sacred Land of Liberty: Images of America in Nineteenth Century Japan*, in MUTUAL IMAGES: ESSAYS IN AMERICAN-JAPANESE RELATIONS 55 (Akira Iriye ed., 1975).

<sup>28</sup> YANAGA, *supra* note 10, at 18.

<sup>29</sup> CORTAZZI, *supra* note 22, at 176.

precipitated Perry's early return.<sup>30</sup> In March 1854, the Treaty of Kanagawa was secured.<sup>31</sup> It called for amity and friendship between Japan and the United States, as well as the opening of the ports of Shimoda, Hakodate, and Nagasaki.<sup>32</sup> It made no specific mention, however, of commercial intercourse between the countries. The Shogunate was weakened in its resolve by these events, which proved to be an entering wedge to the opening of Japan to the West.<sup>33</sup>

### B. *The Door Begins to Open*

In accord with the Treaty of Kanagawa, the United States was entitled to diplomatic relations with Japan. In 1856, it sent Townsend Harris as its U.S. Consul-General to the port of Shimoda. Harris was finally admitted to the Shogun's Castle at Edo in October 1857. Serendipitously, Hotta Masayoshi had been appointed the Senior Minister for Foreign Affairs for the Shogunate at about that time. Hotta proved receptive to the overtures of Harris and attempted to secure the Imperial sanction for an appropriate trade treaty. Unfortunately, the anti-foreign and anti-Shogunate sentiment within the Imperial Court proved too much to overcome. While Hotta was able to secure a pro forma approval of a treaty by the Emperor Komei, the emperor let it be known that he had been compelled against his will to accede to its terms.<sup>34</sup> Hotta returned to Edo and was told to reconsider the policy.<sup>35</sup> In an attempt to respond to the now difficult problem of unresolved diplomatic relations, Ii Naosuke, a pro-trade member of the daimyo, was appointed Senior Minister by the Shogun Iesada.<sup>36</sup>

Meanwhile, news of the Treaty of Tientsin between China, Britain, and France reached Harris and he immediately relayed the information to the Shogun. Harris also took the opportunity to share with Shogun representatives his opinion that Britain and France would soon be pressuring Japan to open its ports. He simultaneously promised the aid of the United States in moderating any demands they might make on condition that Japan sign a trade treaty with the United States.<sup>37</sup>

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<sup>30</sup> Perry had acquiesced to the request of the Shogunate for time to deliberate and had withdrawn to the China Sea. For an excellent survey of the event of the period, see YANAGA, *supra* note 10, at 20.

<sup>31</sup> CORTAZZI, *supra* note 22, at 177.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 176.

<sup>34</sup> CORTAZZI, *supra* note 22, at 178.

<sup>35</sup> *Id.* at 178; YANAGA, *supra* note 10, at 24.

<sup>36</sup> See generally YANAGA, *supra* note 10; see also CORTAZZI, *supra* note 22.

<sup>37</sup> In fact, Article II of the Treaty, as ultimately adopted, states that the "president of the United States at the request of the Japanese government will act as a friendly mediator in such matters of difference as may arise

With the threat of imminent European intervention apparently imminent, on June 20, 1858, Ii Naosuke signed the American-Japanese Treaty of Commerce of 1858, without awaiting the actual approval of the emperor.<sup>38</sup> As a result, the 200-year seclusion of Japan abruptly came to an end.<sup>39</sup> The Treaty with the United States had been obtained, however, without traditional Imperial sanction and both Naosuke and the Treaty were soundly renounced by the daimyo, the samurai, and royalists.<sup>40</sup> Coincidentally, there arose the need to select a successor to the sitting Shogun who had fallen ill. Iemochi, the thirteen-year-old nephew of the Shogun, was chosen as the fourteenth Shogun.<sup>41</sup> Royalists and anti-foreign forces also gathered to denounce this action.<sup>42</sup> A violent purge of those opposing forces was mounted by Naosuke. In retaliation, on March 24, 1860, a band of anti-foreign samurai from Mito and Satsuma intercepted and assassinated Naosuke, while he was on his way to Edo Castle.<sup>43</sup>

In the ensuing years, and as a result of the growing dissatisfaction of the samurai and ronin, general acts of violence erupted in Japan directed against foreigners and sympathetic Japanese officials.<sup>44</sup> In fact, when Shogun Iemochi

between the Government of Japan and any European Power." YANAGA, *supra* note 10, at 26.

<sup>38</sup> YANAGA, *supra* note 10, at 25.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 39.

<sup>41</sup> *Id.* at 40.

<sup>42</sup> *Id.*

<sup>43</sup> CORTAZZI, *supra* note 22, at 179.

<sup>44</sup> For a summary of the political dynamics and consequences preceding the Restoration, see WALTER W. MCLAREN, *A POLITICAL HISTORY OF JAPAN DURING THE MEIJI ERA 1867-1912* (1916).

The history of the Imperial house from the twelfth century onwards presents an almost unbroken record of misfortune. Emperors were assassinated, deposed, retired, and their power was always overshadowed by that of some military upstart . . . .

Another development, which followed close upon the rise of military feudalism, was the changed status of the people. By the Taikwa reforms the free citizens of the kingdom were divided into the ruling and the supporting classes. The proportion between the ruling caste and the unprivileged orders, as distinguished from the slaves, was something like 1 to 200, the former constituting about one-half per cent. of the free people. The unfree or slaves amounted to about 4 or 5 per cent. Of the total population which numbered in 700 A.D. about 3,000,000 or 3,500,000 people. From these figures it would appear that the main body of the nation was composed of a peasantry employed in the cultivation of the soil, of which they owned and occupied small but equal holdings, for which they paid taxes to the sovereign in rice, silk, and textile products . . . . But with the growth of military feudalism a startling change took place in their status. The ownership of land passed out of their hands by the process of alienation or commendation to the feudal lords . . . . Except for the small number of peasants who became members of the warrior class in the beginning, the free citizens of Taikwa were reduced to a condition of serfdom . . . . Some notable exceptions there were, of course, such as that of Hideyoshi, the son of a wood-cutter, who by virtue of his great military genius worked his way up under Oda Nobunaga, finally succeeding to that great chieftain's position under the title of Taikosama. As a general rule, the peasants became serfs attached to the soil of the feif, supporting by their labor on the land the military

traveled to Kyoto in the spring of 1863, the capital was saturated with anti-foreign sentiment.<sup>45</sup> Despite considerable efforts, he was unable to rally moderate forces, and, as a result, lost considerable prestige.

In the fall of 1866, the Shogun Iemochi suffered an untimely yet natural death at Osaka Castle.<sup>46</sup> Keiki, an advisor of Iemochi, thereafter assumed the position of the fifteenth Shogun in January 1867.<sup>47</sup> Within a month, Emperor Komei also passed away and his fifteen-year-old heir, Emperor Mutsuhito, better known by his reign name of Meiji, succeeded him.<sup>48</sup> At the same time, plans were mounting to overthrow the Shogunate. Yamanouchi Toyonobu, the former daimyo of Tosa, approached the Shogun Keiki and requested that he surrender his power to the emperor for the sake of national unity.<sup>49</sup> A part of the recommendation was that a council of daimyo be formed with Keiki as chairman. On November 9, 1867, the Shogun announced his decision to yield.<sup>50</sup> Emperor Mutsuhito accepted, and 265 years of Tokugawa rule and seven centuries of feudalism came to an end.<sup>51</sup> The Meiji Period catapulted into existence, and a force of dynamic change with its attendant influence upon the protection of cultural property was born.

and ruling class. That such was the outcome of the process was proved by the census reports issued shortly after the Restoration. Out of a population of some 31,000,000 in 1870, the ruling class was composed of about 280 Daimyo families and 400,000 samurai households, in addition to the 159 families of Court nobles, in all not more than 2,000,000 people . . . .

But the transformation of the political society of Japan through the rise of a feudal order . . . does not serve to explain the growing hatred of the Western clans for the Shogunate in the period preceding the Restoration. In feudalism anarchy is the ordinary rule. Every chieftain's hand is raised against his neighbour, and might to hold what is possessed is seconded by covetous desire to seize what is another's . . . . There was in the never-ending strife of feudalism in Japan something of the zest for the game . . . .

. . . .

On its political side the Restoration was the product of a reaction, based on superstition and fable in the guise of history, as well as on genuine scientific truth, against the duarchy implied by the existence of the Shogunate . . . .

It would perhaps be fair to say that without the decline of the virility of the Shogunate by a process of internal disintegration, and a synchronous increase of the military power of such clans as Satsuma, Choshu, Tosa and Hizen . . . a successful issue to the anti-Shogunate revolution would have been impossible . . . . The Daimyo were only nominal rulers of their clans; the real authority did not even lie with the karo, the members of the clan council, but with the yonin, the business men of the fief.

*Id.* at 24-37.

<sup>45</sup> YANAGA, *supra* note 10, at 42.

<sup>46</sup> *Id.* at 43.

<sup>47</sup> *Id.* at 45.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> See generally YANAGA, *supra* note 10; CORTAZZI, *supra* note 22.

Emperor Meiji set a tone for his reign by issuing the Restoration Rescript in January 1868,<sup>52</sup> and in the spring of that year announced the Charter Oath of Five Articles.<sup>53</sup> The latter document called for the modernization and westernization of virtually every aspect of national life. The singular purpose of the overall strategy was to place Japan in a position where it might assume its rightful place in the strong family of nations. The Five Articles were as follows:

1. Deliberative assemblies shall be established and all matters decided by public opinion.
2. The whole nation shall unite in carrying out the administration of affairs of state.
3. Every person shall be given the opportunity to pursue a calling of his choice.
4. Absurd customs and practices of the past shall be discarded and justice shall be based upon the laws of heaven and earth.
5. Wisdom and knowledge shall be sought all over the world in order to establish firmly the foundation of the Empire.<sup>54</sup>

Through repeated expressions of power and influence it had become clear that Japan was no strategic match for European power. Japan, however, aspired to be a world power and desired an equal footing with the countries of the West. In December 1871, a Japanese diplomatic mission was sent to the United States and Europe for the express purpose of gaining knowledge of the world beyond Japan.<sup>55</sup> Additionally, the mission attempted to set a tone that might lead to an improvement of treaty relations with the United States. Little amelioration of the treaty provisions were, in fact, secured. However, Japan became acutely aware that it would be forced to acquire an understanding of western learning and custom if it were to be able to compete successfully.<sup>56</sup> As a result, a trend began in Japan to assimilate western civilization. The hope and expectation was that, were the country to assume the mantle of western civilization, it would be permitted to deal with the world powers of the day as an equal partner. This realization ultimately led to the dramatic reforms of the Meiji Period.

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<sup>52</sup> YANAGA, *supra* note 10, at 45.

<sup>53</sup> CORTAZZI, *supra* note 22, at 185.

<sup>54</sup> YANAGA, *supra* note 10, at 48; CORTAZZI, *supra* note 22, at 185.

<sup>55</sup> CORTAZZI, *supra* note 22, at 187.

<sup>56</sup> *Id.*

## C. *The Meiji Period*

### 1. *The Effect on the Legal Tradition*

Japan's first introduction to foreign law was the volume entitled *A Treatise on Western Public Law*.<sup>57</sup> Authored by Tsuda Mamichi and published in 1868, the first year of the Meiji Period, the text was based upon notes taken while he had attended lectures at the University of Leyden.<sup>58</sup> In 1876, Tokyo University College of Law, the successor to the Kaisei Gakko, was established.<sup>59</sup> It would later become the Imperial University of Tokyo.<sup>60</sup> Instruction at the University College was initially limited to Anglo-American private law subjects including contracts and torts. A second law school, that of the Department of Justice, opened its doors the same year and offered training in the French civil law tradition with a focus on civil and commercial law. The professors at the various institutions were from Britain, France, and the United States, and lectures were usually given in English or French.<sup>61</sup> In 1886, the Imperial University of Tokyo was founded and its initial curriculum comprised three distinct fields of study in English, French, and German law.<sup>62</sup> It was not until after the promulgation of the Japanese Constitution of 1889 that attention would turn to the teaching of public law subjects.

The movement toward westernization had taken hold among the governmental legal institutions of the day as well.<sup>63</sup> When first constructing

<sup>57</sup> YANAGA, *supra* note 10, at 78.

<sup>58</sup> *Id.* See generally 10 JAPANESE CULTURE IN THE MEIJI ERA, OUTLINE OF JAPANESE HISTORY 345 (Naoteru Uo & Richard Lane eds., 1958) [hereinafter OUTLINE OF JAPANESE HISTORY]; W. G. BEASLEY, THE RISE OF MODERN JAPAN 91 (1999).

<sup>59</sup> HIDEO TANAKA, THE JAPANESE LEGAL SYSTEM 179 (Hideo Tanaka ed., 1976). English law had been taught at the Kaisei Gakko in Tokyo. According to Tanaka, the institution passed through a number of incarnations. *Id.* From 1877 (or some authors suggest 1876) to 1886 it was called the University of Tokyo or The Tokyo University. Thereafter it was known, in succession as the Imperial University and Tokyo Imperial University. Finally, after World War II, the name University of Tokyo was revived.

<sup>60</sup> COUNT SHIGENOBU OKUMA, II, FIFTY YEARS OF NEW JAPAN 166 (1909).

<sup>61</sup> From early Meiji times there had been a law school attached to the Ministry of Justice in which French law was taught. Two or three private law schools also taught French law. Bioissonade, who came to Japan in November 1873 and began to teach French law in 1874, was an outstanding figure. TANAKA, *supra* note 59, at 178.

<sup>62</sup> YANAGA, *supra* note 10, at 79.

<sup>63</sup> W. G. Beasley, *Foreword* to PAUL HENG-CHAO CH'EN, THE FORMATION OF THE EARLY MEIJI LEGAL ORDER, THE JAPANESE CODE OF 1871 AND ITS CHINESE FOUNDATION (1981) [hereinafter CH'EN]:

There was . . . one crucial factor making for the introduction of Western law in this period, namely, Japan's wish to revise the unequal treaties imposed upon her by the powers in 1858. One feature of these treaties was the requirement that in Japan, as in China, foreign residents should be subject to the law of their own countries, administered in consular courts. To put Japan's relations with the West on a footing of equality would involve terminating this arrangement. Yet, given Japan's inability to insist upon change, in view of the great

their new legal system, the Japanese were influenced by the French civil law system, and—pursuant to that interest—an initiative was commenced in 1870 to translate the French Civil Code into Japanese.<sup>64</sup> An advisor and French legal expert, Emile Gustave Boissanade de Fontarabie, was asked to consult in composing the Civil Code and was charged in 1877 with drafting the first Criminal Code and Code of Criminal Procedure.<sup>65</sup> The Criminal Code was adopted in 1880 with the intent that it would become effective in 1882.<sup>66</sup> The Criminal Code remains the foundation of Japanese criminal law to this day.<sup>67</sup> Boissanade had also been consulted in 1881 with regard to the drafting of a Civil Code.

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disparity of strength between herself and the powers, this could only be done with Western acquiescence. To secure it would necessitate bringing the country's law, penal system and judicial organization into sufficient line with Western practice to make them acceptable to foreigners . . . Eventually, the nature of the law changed, too. In 1882 a criminal code was introduced, based on that of France, heralding a shift of emphasis that was ultimately to make the traditional, both Chinese and Japanese, secondary to the modern and Western.

*Id.* at x-xi. Ch'en also notes throughout his book that the impact of the Chinese legal tradition was dominant until the end of 1881 when it was replaced by a variety of European traditions. *Id.* at xx; see also HIROSHI ODA, JAPANESE LAW (2d ed. 1999) providing:

There was another reason to develop a modern system of law. The Shogunate had no choice but to sign the treaties with foreign countries at the end of its reign. These treaties had imposed unequal terms on Japan, such as judicial immunity for foreigners, primarily because the Japanese legal system was thought to be insufficiently developed to be applied to them. Japanese rulers considered it necessary to modernize the legal system in order to convince foreign countries that there was no problem in acknowledging Japanese jurisdiction over foreigners in Japan.

The emperor's government initially resorted to Chinese law . . . However, the . . . Chinese codes proved to be obsolete and unsuitable for a nation aspiring to achieve equal status with European countries in its economical and military strength. It was only natural that political leaders turned to Europe for a better model.

*Id.* at 26.

<sup>64</sup> See generally TANAKA, *supra* note 59, at 163; see also ODA, *supra* note 63, at 24.

In fact, despite its long isolationist policy, some European political and legal ideas were already known to the Japanese under the Tokigawa Shogunate through the Dutch . . . However, it was the French rather than Dutch law which first influenced Japanese law. France was considered to have the most developed codified legal system when the emperor's government started looking for a model in the 1870's. The first Minister of Justice, Shinpei Etoh, was particularly in favor of French law, and had French codes translated into Japanese. Two advisers from France, George Boussquet and Gustave Boissanade, helped the Japanese understand the French system.

*Id.* at 27. See also CH'EN, *supra* note 63, at 22.

<sup>65</sup> ODA, *supra* note 63, at 27.

<sup>66</sup> *Id.*

<sup>67</sup> See *id.*

As far back as 1869 the Government began to form a Civil Code; but, though the Code Napoleon was taken as a model, the delicate task of adapting it to the customs and sentiments of the country did not advance with rapidity. In the meantime a rough sketch of a Criminal Code was drawn up and promulgated in 1870, only to be largely modified after two years, and again a year later, by additions which for the first time showed evident marks of foreign influence. In this code, which has assumed its present form since 1888, one notices that French ideas form a prominent part. The Civil Code would have been largely French, had it not been for a sudden admiration in the later eighties for a newly issued *Motiven* and *Protocol* of the German *Bürgerliches Gesetz*, and hence a large part of our *Mimpo* (Civil Code) as well as our *Shōhō* (Commercial Code) show German influence.<sup>68</sup>

The tide of national systematic influence changed, however, and it was not long before the French legal tradition was de-emphasized in favor of the German civil tradition.<sup>69</sup> Ito Hirobumi, an influential legal scholar, had traveled to Europe in the spring of 1882 to study in Germany and Austria.<sup>70</sup> He was reportedly very impressed by his experiences and also by the fact that Germany had won a recent great victory over France.<sup>71</sup> A Code of Civil Procedure was ultimately drafted in 1884 by a German advisor and professor, Herman Roessler.<sup>72</sup> Roessler was also appointed the advisor to the Committee for the Drafting of the Constitution. Boissanade's Civil Code was not adopted until 1888.<sup>73</sup> A disagreement as to approach had grown between proponents of English and French Law and those of German perspectives, and it was only when an accommodation founded upon German legal principles was

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<sup>68</sup> OKUMA, *supra* note 60, at 471-72.

<sup>69</sup> See ODA, *supra* note 63, at 27.

This period of French influence did not last long. There was a gradual shift towards German law in the 1880's. The fall of Etoh was not the only cause of this shift; it was the difference between the political systems of these countries which really mattered . . . . The German constitutional monarchy suited Japanese requirements, since the Kaiser was relatively free from Parliamentary control. Moreover, Germany was in the process of enacting its own codes and therefore had the most recent codified laws. The adoption of the Constitution based on the German system was the final move away from French and towards German law.

*Id.*

<sup>70</sup> OUTLINE OF JAPANESE HISTORY, *supra* note 58, at 345.

<sup>71</sup> *Id.*

<sup>72</sup> ODA, *supra* note 63, at 24.

<sup>73</sup> *Id.*



incorporated into the law that it was actually made effective in 1898.<sup>74</sup> German law had truly gained popularity and influence, and it eventually became the prime template for the then new law of Japan. As commentators have observed:

German law gradually occupied the controlling position in the world of jurisprudence. In the field of private law as well, French law, which had been dominant, declined as a result of theoretical controversies. English law met the same fate. German law gained supremacy in both public and private law, and what may be called a period based on German law came into existence.<sup>75</sup>

A contemporary consequence of this struggle is that Japan is considered a country with a civil law tradition. This historic decision has proved to be of great significance to the current posture of Japan within the world community with respect to the international protection of cultural property. Due to their conceptions of private property,<sup>76</sup> most civil law countries, including Japan,

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<sup>74</sup> *Id.* at 27.

<sup>75</sup> OUTLINE OF JAPANESE HISTORY, *supra* note 58, at 346.

<sup>76</sup> The common law tradition has generally taken the position that a thief cannot pass good legal title to a successor. Therefore, in a contest between the original owner of property and a successor in interest through the thief, the original owner is favored unless the action is affected by the running of a statute of limitations. On the other hand, the civil law tradition accepts that in some circumstances a thief can pass good title to a bona fide purchaser for value. In these countries it is possible for a bona fide successor to a thief to prevail over the claim of an innocent and original owner. Conventions and arrangements, such as UNESCO and UNIDROIT, tend to favor the return of cultural property to the original owner as opposed to retention by a bona fide purchaser, thereby presenting a conflict to civil law countries between domestic law and required international treatment. As a consequence, few civil law countries find either treaty acceptable.

Following is a translation of the comments of Mr. Kiyoshi Saito, Unit Chief, Traditional Culture Division, Cultural Properties Protection Department, Agency for Cultural Affairs taken from a conversation in Tokyo in August 2000 relating to the subject:

Mr. Matsuura, Chairman of UNESCO, was advocating that Japan become a signatory of the 1970 Convention. Some advocates from around the country argue that Japan should ratify the Convention. The Ministry of Foreign Affairs is one such advocate. However, the government has chosen not to ratify it because the Convention technically interferes with the Japanese law, not because they do not want to support it. Especially in the area of stolen items, the Japanese law stands in the totally opposite position from the Convention. Under the Convention, the true owner would prevail over a bona fide purchaser of stolen art if he had no knowledge of the theft. Under the Japanese law, on the other hand, the bona fide purchaser would prevail over the true owner. This contradiction is the major reason why Japan did not become a signatory.

In addition, it would take a lot of effort on the part of the Japanese government to find ways to amend the existing Japanese law. In fact, some administrative agencies such as MITI (Ministry of International Trade and Industry), The Ministry of Finance and the Agency of Cultural Affairs, those that would be in charge of enforcement of the Convention if ratified, argue that they would not be able to practically enforce the law.

have found it difficult to become signatories to international regimes like the United Nations Educational Scientific and Cultural Organization (“UNESCO”) Convention on the Means of Prohibiting and Preventing the Illicit Import, Exports and Transfer of Ownership of Cultural Property or to the International Institute for the Unification of Private Laws (“UNIDROIT”) Convention on Stolen or Illegally Exported Cultural Objects, 1995.<sup>77</sup> Therefore, the nineteenth century jurisprudential decision and the resulting favorable treatment granted to bona fide purchasers have had consequences extending into the twenty-first century.

## 2. *The Revolution of Westernization in Art and Culture*

### a. *The Decline of Indigenous Art*

After the fall of the Tokugawa government in 1867, and under the policies of the Meiji Era, revenues were yielded to the crown, samurai were left without livelihood, merchants had difficulty enforcing claims and consequently lost their trades, and farmers were crushed by taxes.<sup>78</sup>

At such a time, Art was bound to be entirely neglected, and in consequence precious works of Art and valuable paintings were prized no more than rubbish. Even when peace and quietness ensued, the people were too occupied with their immediate concerns and too busy adopting the material culture of the West, to attend to anything like Art.<sup>79</sup>

Consequently, the ground was fertile for a developing perspective, particularly among those living in urban areas, that everything Japanese was inferior. Improvement was sought in every aspect of culture, and improvement denoted westernization. This was expressed through virtually every medium from the choice of hairstyles to lifestyles. For example, beef, a commodity previously regarded as unfit for human consumption, became highly prized, and

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Interview with Kiyoshi Saito, Unit Chief, Traditional Culture Div., Cultural Properties Protection Dep't, Agency for Cultural Aff., in Tokyo, Japan (Aug. 2002). See generally RALPH E. LERNER & JUDITH BRESLER, ART LAW, THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS AND ARTISTS 201, 545 (1998). See also, *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990).

<sup>77</sup> YANAGA, *supra* note 10, at 78-79; see also DONALD SHIVELY, THE JAPANIZATION OF MIDDLE MEIJI, TRADITION AND MODERNIZATION IN JAPANESE CULTURE 90 (1971); LYNDAL V. PROTT & PATRICK J. O'KEEFE, HANDBOOK OF NATIONAL REGULATIONS CONCERNING THE EXPORT OF CULTURAL PROPERTY (1988).

<sup>78</sup> OKUMA, *supra* note 60, at 341-42.

<sup>79</sup> *Id.* at 342.

intermarriage of Japanese and Occidentals was strongly advocated as a means of improving Japanese racial stock.<sup>80</sup> Western haircuts, jewelry, dress, and even umbrellas became the rage.<sup>81</sup>

It was, however, arguably in the arts and the visually expressive elements of culture and tradition that the revolution was most evident.<sup>82</sup> Japanese aesthetics suffered greatly in the service of the national quest to become a world power.

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<sup>80</sup> YANAGA, *supra* note 10, at 97.

<sup>81</sup> SHIVELY, *supra* note 77, at 82; *see also*, MARILYN IVY, DISCOURSES OF THE VANISHING, MODERNITY, PHANTASM, JAPAN (1995). As Naoki Sakai points out, in an essay on modernity and its critique in prewar Japan:

Perhaps the most crucial point the (Japanese) philosophers of world history did not realize was that Japan did not stand outside the West. Even in its particularism, Japan was already implicated in the ubiquitous West, so that neither historically nor geopolitically could Japan be seen as the outside of the West. This means that, in order to criticize the West in relation to Japan, one has necessarily to begin with a critique of Japan. Likewise, the critique of Japan necessarily entails the radical critique of the West.

*Id.* at 8. Although referencing the period before 1945, these volumes contain considerable insight into the bonds between East and West that bears notice. *See also* BEASLEY, *supra* note 58, at 90-91. *See* OKUMA, *supra* note 60, at 444 for a view that it would, in fact, be a mistake to assume that Japanese nationalism and occidentalism were in full opposition. *See also* IVY, *supra* note 81, at 18-19 for a view that the trends in history that are noticed may not, in fact, reflect the sentiment of the people. She provides:

Japanese culture industries and institutions have tended to locate these practices of voice among the folk, the abiding people, the everyday Japanese folks who have existed outside history because their existence is not archival; that is, they are not dependent on history . . . The notion of tradition itself already refers to unmediated cultural transmission, and transmission through the voice is the exemplary means of knowledge production within the familial community of nation-culture.

*Id.* at 18-19.

<sup>82</sup> Toshio Watanabe, *Josiah Conder's Rokumeikan, Architecture and National Representation in Meiji Japan*, 1996 ART J. 21 (1996) provides:

A national museum, military barracks, and government offices were other examples of buildings urgently needed by the new administration.

There were also ideological reasons behind these needs. Internally, for the Japanese themselves, these new buildings were to embody the authority of a central government that aimed to rule far more directly than had the previous Tokugawa government. Large imposing buildings would impress upon the Japanese people the power and stability of the new regime. To build a modern nation, modern buildings were needed. Externally, for foreigners, these buildings would show that Japan was not a backward nation but a country worthy of being treated as an equal among other developed nations. A national museum would confirm that the nation had a history of high culture and was not an upstart in such matters . . . The significant point is that this ideology demanded that these public buildings be built in Western style.

*Id.*

In Tokyo it was proposed that the pine trees surrounding the Imperial Palace be cut down; in other places there were attempts to tear down famous historic buildings and temples so that the lumber and metal might be sold as scrap, and even the famous five-storied pagoda at Kofukuji in Nara was almost sold for only a few yen by the priests. Things Japanese were considered worthless in the face of the unbelievable popularity of imported foreign goods. Native paintings and art objects were sold for a song, and many priceless treasures were practically given to foreigners.<sup>83</sup>

Renowned Japanese visual artists were also adversely affected. Many became impoverished and were forced to seek work outside of their disciplines. For example, the influence of the hereditary artistic family of Kano was considerably diluted when their stipends were terminated, and Kano Hogai was forced to abandon painting due to lack of interest in his work. Artists were forced to pursue more mundane tasks to make a living. Hogai turned, unsuccessfully, to silk raising and to drawing designs for a pottery factory.<sup>84</sup> Hashimoto Gaho, a painter and another casualty of this change in national perspective, became a drafting instructor at the Naval training school and served as a stable groom.<sup>85</sup> The official artists of the Tosa school were relieved of their responsibilities.<sup>86</sup>

The effects were not limited, however, to the traditional fine arts. Craftsman also suffered a similar fate. Their traditional markets disappeared, and the higher the quality of their wares, the less demand there was for them.<sup>87</sup> The new market was for “hamamono”—crafts for export. Efficiency in production rather than quality became the concern of government.

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<sup>83</sup> YANAGA, *supra* note 10, at 211.

<sup>84</sup> *Id.* at 211-12.

<sup>85</sup> SHIVELY, *supra* note 77, at 206; *see also* OKUMA, *supra* note 60, at 344-45, providing:

As to the Kano family, which were once in a most flourishing state, monopolizing the patronage of the feudal government as well as of the clan lords and being their hereditary artists, they were nearly ruined . . . So, the school cannot be said to survive. As for the Tosa school, its decadence has been still more thorough and . . . it has gone totally out of fashion. This school, which first originated in depicting the ancient Court life . . . has left no more than a trace in a few modern historical paintings.

*Id.*

<sup>86</sup> YANAGA, *supra* note 10, at 212; OKUMA, *supra* note 60, at 342, 344. Various schools of art had been and were formed to follow the style of recognized artists. For a discussion of the various schools and influences, *see* OKUMA, *supra* note 60, at 341.

<sup>87</sup> 7 JAPANESE CULTURE IN THE MEIJI ERA, JAPANESE ARTS AND CRAFTS IN THE MEIJI ERA 109 (Naoteru Uyeno & Richard Lane eds., 1958) [hereinafter ARTS AND CRAFTS].

The special characteristics of Japanese crafts had always lain in their production by hand, in small quantities, and with emphasis on quality. For exports, however, once a market was found it was necessary to provide uniform goods in whatever amount could be absorbed. The different Japanese crafts responded variously to these requirements: among dyers and potters the change was marked; but lacquer- and metal-workers were most often unable—or unwilling—to adapt their art to mass production.<sup>88</sup>

Even to this day, some revered artists and craftsmen find it difficult to make a living within their traditional discipline. For example, one living national treasure in the area of woodworking recently found himself laboring to make pool cues for a multinational corporation while another national treasure in calligraphy has been decorating kimonos for a California art dealer.<sup>89</sup>

*b. The Rise of Western Influence*

Western art had first been introduced by the Dutch and had received a rather cool reception. Upon the opening of the country, however, interest surged, and in response the Imperial Engineering College was formed in 1876 and included an art department. The first instructors in the department were the Italian artists Edoardo Chiossone and Antonio Fontanesi (painting) and Vincenzo Ragusa (sculpture), and the focus was upon the study of western artistic technique.<sup>90</sup> Symbolic of the national trend toward westernization, the government adopted a formal policy of dispatching the traditional Japanese brush in favor of the European pencil for use in drawing classes at the elementary education level.<sup>91</sup> The later retrenchment of this policy, taken upon the initiative of Okakura Kakuzo, was to be a significant watershed in the nationalistic art movement.

Erwin Baelz, a German physician who had been invited to teach

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<sup>88</sup> *Id.* at 110.

<sup>89</sup> Interview with Dane Owen, Owner of Shibui, in Santa Fe, New Mexico (June 7, 2002).

<sup>90</sup> See BEASLEY, *supra* note 58, at 90.

There was an important visual side to the Japanese learning process, as one would expect, since images are usually easier to comprehend than words. Western art was taught in a special government school from 1876. Though it had long since influenced a number of notable Japanese artists, there is irony in the fact that it became fashionable just when Japan's own art forms were having their greatest impact in Europe.

*Id.* <sup>91</sup> SHIVELY, *supra* note 77, at 115.

medicine in Tokyo in 1876, commented upon the Japanese repudiation of its traditions:

In the 1870's at the outset of the modern era, Japan went through a strange period in which she felt contempt for her own native achievements. Their own history, their own religions, their own art, did not seem to the Japanese to be worth talking about and were even regarded as matters to be ashamed of.<sup>92</sup>

D. *A Growing Trend of Nationalism and The Leadership of Fenollosa and Okakura*

Even as the desire to modernize and westernize began to influence Japanese life, some began to feel that Japan was losing its traditional elements even as it westernized.

The rage for westernization, which led at times to indiscriminate borrowing of all things of western influence, seemed to sweep over and submerge traditional elements during the first two decades of the Meiji period. Then, in about 1887, a riptide of counter-reaction broke the surface. This was the response of both conservative thinkers and also of young progressives to those innovations, which they found too extreme and too rapid, which they feared would effect such a thorough transformation of the Japanese people that they would lose those unique qualities which set them apart from the peoples of other countries.<sup>93</sup>

In this context two men—an American and a Japanese—emerged to spearhead a movement to preserve and resurrect traditional Japanese culture.

1. *Fenollosa Enters Upon the Scene*

As part of the general effort to increase Japanese knowledge of the West, American and European scholars were invited to participate in academic and government affairs as teachers and advisors.<sup>94</sup> It was through this initiative to

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 77.

<sup>94</sup> See BEASLEY, *supra* note 58, at 88, providing:

bring western scholars to Japan, however, that several of the leading figures responsible for stimulating the national awareness of Japanese artistic and cultural achievement entered upon the scene. Professor Edward Morse, a self-taught New England Professor of Zoology who had been affiliated with the Peabody Academy of Science in Salem, Massachusetts, accepted an invitation to teach at the Imperial University in Tokyo.<sup>95</sup> During his tenure, Morse developed a profound respect for the culture of Japan and for its artifacts, and is "credited with inspiring the Japanese effort to preserve their national treasures by controlling their sale to foreigners."<sup>96</sup> His greatest contribution, however, was likely the role he played in encouraging Professor Ernest F. Fenollosa of Boston to come to Japan in 1878 to teach philosophy at the University.<sup>97</sup>

While in residence in Tokyo, Fenollosa began to study painting under the tutelage of Kano Eitoku, an artist of national reputation. Fenollosa was captivated by indigenous Japanese art and soon became one of its strongest and most vocal supporters. Coincidentally, in 1878, a group named Ryuchikai was formed for the distinct purpose of promoting the preservation and advancement of Japanese art and expression. In 1882, Fenollosa presented a lecture before

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The learning process also included the hiring of foreign experts and advisors to serve Japan. The Bakufu had employed about 200 such persons in its closing years, apart from military missions. In the Meiji period as a whole (1868-1912) there may have been as many as 4,000 yatoi, as they were called, of whom a little over 2,000 can be identified by name, job, and national origin. About half of those identifiable came from Britain in the early years, dropping to a third later. France, Germany and the United States each provided on average one-fifth or a little less. The French proportion declining over time, the German and American ones rising . . . . In most cases it was assumed that they would play a part in training Japanese to succeed them, though this was not their principal task.

A minority were advisors, attached to a variety of government ministries as specialists in Western ways of doing things. Many of these were lawyers. All were on tightly drawn contracts, the terms for which were set out in 1870; were put unequivocally under the control of Japanese officials; and were dismissed as soon as there were Japanese people competent to replace them. They received salaries very much higher than those of any equivalent citizen of the country in which they worked . . . . [T]hey were machines of reform . . . .

*Id.*

<sup>95</sup> WARREN COHEN, *EAST ASIAN ART AND AMERICAN CULTURE* 23 (1992).

<sup>96</sup> *Id.* at 26. Robert A. Rosenstone, *Learning from Those Imitative Japanese: Another side of the American Experience in the Mikado's Empire*, 85 AM. HISTORICAL REV. 572 (1980):

No matter what their roles . . . virtually all Americans saw themselves as teachers of Western ways. Usually they arrived . . . feeling almost hopeless about how long it would require to civilize such barbarians. This attitude often gave way to the revelation that overtook Morse in Tokyo: a foreigner, after remaining a few months in Japan, slowly begins to realize that, whereas he thought he could teach the Japanese everything, he finds, to his amazement and chagrin, that those virtues or attributes which, under the name of humanity are the burden of our moral teaching at home, the Japanese seem to be born with.

*Id.* at 578.

<sup>97</sup> COHEN, *supra* note 95, at 27; SHIVELY, *supra* note 77, at 115.

the Ryuchikai entitled "An Explanation of Truth in Art."<sup>98</sup> In the presentation he praised the superiority of Japanese visual art over the mimicry of the West.<sup>99</sup>

He urged Japan to return to its roots and promoted the establishment of an art movement emphasizing national traditions, culture and history. Serendipitously, Fukuoka Takachika, the Minister of Culture, and Sano Tsunetami, a governmental official responsible for setting art policy and a drafter of the Charter Oath, were present at the lecture and struck by the message.<sup>100</sup> The speech was eventually translated into Japanese, and was widely distributed and favorably received.<sup>101</sup> In sum, Fenollosa's view was that, "in a spirit of mutual sympathy and insight, . . . artists and educators should select the best elements of the two (East and West) and thus build an art of the future."<sup>102</sup> It has been reported that this lecture had a significant impact on the revival of interest in Japanese tradition.<sup>103</sup>

For those Japanese whose sense of national identity had been seriously undermined by the all-out Westernization of the early Meiji years, Fenollosa's formula suggested a means of restoring Japan's importance that focused not only on Japanese exclusiveness, i.e., the unique Japanese spiritual heritage, but provided that spiritual heritage with a central role in shaping the cultural history of the modern world.<sup>104</sup>

In order that the goal of a national appreciation of Japanese art be realized, Fenollosa offered a three-point program:

1. The establishment of a school of fine art;
2. The encouragement and assistance of artists;
3. The development of the appreciation of art through exhibition.<sup>105</sup>

The reaction to Europeanism was beginning to gain a strong hand on

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<sup>98</sup> Watanabe, *supra* note 82, at 27 ("Ernest Fenollosa's famous lecture *Bijutsu shinsetsu* (The True Meaning of Art), published in 1882, was the first serious debate on the concept of art in Japan").

<sup>99</sup> See Fred G. Notehelfer, *On Idealism and Realism in the Thought of Okakura Tenshin*, 16 J. JAPANESE STUDIES 309, 321 (1990).

<sup>100</sup> SHIVELY, *supra* note 77, at 210.

<sup>101</sup> *Id.*

<sup>102</sup> *The Coming Fusion of East and West*, Harpers, XCVIII (1898) 115-22, quoted in SHIVELY, *supra* note 77, at 205.

<sup>103</sup> SHIVELY, *supra* note 77, at 115.

<sup>104</sup> Notehelfer, *supra* note 99, at 322.

<sup>105</sup> YANAGA, *supra* note 10, at 212.



other fronts, as well. Symbolically, the Imperial College Department of Art closed its doors in 1883.

One reason that led to the abolition of the Art Department in the Imperial Engineering College was the rise of the nationalistic movement in Art . . . . [F]or as the real value of native Art, neglected for so long a time, came to be again recognized through the enthusiastic appreciation of foreigners, the awakening reacted on Western Art . . . the Government Painting Exhibition stopped accepting Western paintings . . . .<sup>106</sup>

2. *Okakura Follows*

While at the University, Fenollosa became acquainted with a young man named Okakura Kakuzo (a.k.a. Okakura Tenshin).<sup>107</sup> Together the pair were destined to become the leading force in the movement to protect the cultural property of Japan. Okakura had attended Fenollosa’s classes in philosophy and had also served as his interpreter. Following his graduation in 1880, Okakura joined the music research section of the Ministry of Education, and, in 1881, Okakura was transferred to the art section,<sup>108</sup> a move that would prove to be of significance to the protection of cultural properties.<sup>109</sup> Thereafter, Okakura embarked upon the lifelong task of elevating the sensibilities of the Japanese

<sup>106</sup> OKUMA, *supra* note 60, at 349.

<sup>107</sup> Notehelper, *supra* note 99, at 320.

<sup>108</sup> *Id.* at 319-20.

<sup>109</sup> An interesting and perhaps ironic note is Okakura Kakuzo’s ambivalent relationship with the West due to his upbringing. As Noterhelper notes:

Starting at the age of six or seven, Kakuzo’ began his English studies . . . .

. . . .

Some Japanese scholars such as Irokawa Daikichi have emphasized that Okakura could not only write flawless English but that he also thought in English . . . . [I]t suffices here to underscore that Okakura’s early training was almost entirely in English . . . .

Indeed, one of the few childhood memories that Kakuzo passed on about his father was a trip to Tokyo on which he was allowed to accompany him in 1870. The journey appears to have started joyously but ended in embarrassment. Crossing into Tokyo from Kawasaki, the elder Okakura discovered to his consternation that his son could not read a single Japanese character on the signboards posted at the city limits.

Okakura did not suffer from the prevalent Japanese inferiority complex to the West . . . Okakura suffered inversely from an inferiority complex toward Japan, the Japanese language and the Japanese portion of his identity.

Notehelper, *supra* note 99, at 315-16.

people and bureaucracy to value the Japanese tradition and its cultural treasures.<sup>110</sup> As Okakura described in his book, *The Ideals of the East With Special Reference to the Art of Japan*:

Japan is a museum of Asiatic civilization; and yet more than a museum because the singular genius of the race leads it to dwell on all phases of the ideals of the past, in the spirit of living Adwaitism, which welcomes the new without losing the old.<sup>111</sup>

Due to this perspective, Okakura has been deemed the symbolic, if not actual, leader of the movement to retain classical Japanese elements in art.<sup>112</sup>

Eventually Okakura became the head of the Institute of Fine Art, and in that capacity, felt at liberty to issue a report in 1890 positing his views on the future of Japanese art. The report set forth six fundamental principles:

First, while guarding the old traditions and attempting to create a new art, the artist must strive for the expression of his own personality; he will make reference to foreign styles, ancient Far Eastern styles, and to nature itself, but the result must be an assimilation of these elements within the artist's own subconscious.

Second, the ancient techniques must not be lost. For an artist to discard the rich heritage bequeathed him by the masters of the past would simply be to return to primitivity, to start again from scratch; at the same time it must be remembered that study of the ancients is primarily for the purpose of enriching one's own background, never simply for the purpose of imitating them.

Third is the artist's spirit: If the artist is not imbued with passion, how is he to move his viewers? If he is not possessed of exalted sentiments, how is he to lead his viewers above and beyond the actual confines of the paintings?

Fourth is technique. However keen the artist's spirit, without a mastery of technique he must fail to accomplish his purpose. Yet technique must always be subordinated to

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<sup>110</sup> Maruyama Masao, *Fukuzawa, Uchimura, and Okakura, Meiji Intellectuals and Westernization*, 4 DEVELOPING ECONOMIES 594 (1966).

<sup>111</sup> KAKUZO OKAKURA, *THE IDEALS OF THE EAST WITH SPECIAL REFERENCE TO THE ART OF JAPAN* 7-8 (1905).

<sup>112</sup> John M Rosenfield, *Western-Style Painting in the Early Meiji Period and Its Critics*, reprinted in SHIVELY, *supra* note 77, at 181.

originality; and new ideas must be accompanied by new techniques.

Fifth is dignity, nobility—qualities all too often lacking in modern painting. Yet these qualities are not simply a result of education, they must be inherent in the artist's character. An artist must remain a part of the world of men, yet never let his art be degraded by mundane matters.

Sixth is the particular for advances in two fields: historical painting and Ukiyo-e. Landscapes, flowers, Buddhist and Taoist figures—each form has its own ancient technique; and in the field of historical painting also, the Old Tosa scrolls set high standards for us to follow. Yet, though historical paintings are numerous today, they seldom indeed succeed in moving us to sentiments of compassion for the ancients, or admiration for our country; new methods must be found for such paintings. As for Ukiyo-e, many have been the masterpieces produced in the last centuries, but the form has somehow not yet fulfilled itself in the new age. Of course, by “Ukiyo-e” I do not mean simply the usual glamorous depiction of men, women and children; for Ukiyo-e, like the ancient picture scrolls, should also endeavor to be a record of the customs and appearance of the modern age. Indeed, historical painting may be called the Ukiyo-e of the past; and Ukiyo-e, the historical paintings of the modern age. I look for both forms to develop increasingly in the future.<sup>113</sup>

### 3. *Fenollosa and Okakura Collaborate*

Fenollosa and Okakura remained colleagues and, among other activities, served together on the Committee to Study Art Education (sometimes referred to as the Commission for Investigating National Painting),<sup>114</sup> organized by the Ministry of Education. In 1882, the two joined Kuki Ryuichi (an administrator in the Ministry of Education) on a mission to the Kyoto-Nara region to catalogue important cultural and artistic objects.<sup>115</sup> This event has been labeled by renowned scholars as the first of what would become continuing trips of the “Imperial Art Commissioners” intended to search out and identify Japan's national treasures.<sup>116</sup> One of the critical battles of the cultural war was won in

<sup>113</sup> ARTS AND CRAFTS, *supra* note 87, at 56.

<sup>114</sup> OKUMA, *supra* note 60, at 347.

<sup>115</sup> Notehelfer, *supra* note 99, at 324.

<sup>116</sup> *Id.* For a note from Fenollosa on discovery, see *id.* at 324. There were considerable other persons

1885 when, following months of conflict, Fenollosa and Okakura—then members of the Pictorial Research Committee of the Ministry of Education—succeeded in convincing the Ministry of Education to reverse its standing policy of fifteen years and reinstate the use of the traditional brush and ink for drawing in lieu of the western-style pencil.<sup>117</sup> Following this victory, in 1886 Fenollosa resigned his academic post to devote himself to the arts. In that same year, Fenollosa and Okakura were sent to Europe by the government to study the various schemes of art education extant on the European continent.<sup>118</sup> Upon their return, they submitted a report in which they recommended:

Inasmuch as the Western countries were developing to bring out the best in their own national art instead of imitating other countries, the policy of the Japanese government should be to

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influential in the area of the preservation of cultural treasures; however, they do not often receive attention in the popular press. Recognized art historian, Christine Guth, points out that Machida Hisanari, the first director of what was to eventually become the Tokyo National Museum, had early been awakened to the importance of protecting cultural treasures when he was a student in England in 1865 and as a visitor to France in 1867. CHRISTINE GUTH, ART, TEA, AND INDUSTRY, MASUDA TAKASHI AND THE MITSUI CIRCLE (1993). “Machida, influenced no doubt by what he had seen in Europe, was one of the leading advocates of the creation of a national museum that would be a repository for works illustrating the artistic achievements of the past.” *Id.* at 106. Guth also notes that prior surveys had also been conducted and provides insight into the reasons:

Commerce was also a motivating force behind the first government survey of temple and shrine treasures conducted in 1872 under Machida’s direction. Although this undertaking signaled the start of the Meiji government’s effort to identify important cultural property, the survey’s aim was not strictly cultural. The survey team also hoped to locate examples of traditional art that could be sent to the International Exposition scheduled to be held in Vienna the following year as well as models for artists preparing contributions for sale at subsequent fairs.

*Id.* at 107. See also Christine M. E. Guth, *Kokuhō: From Dynastic to Artistic Treasure*, 9 CAHIERS D’EXTRÊME-ASIE 313, 315 (1996-97).

Others also cite the need to supply foreign exhibitions with objects that might place Japan in a favorable and therefore influential light as a stimulus to conservation measures. See Carol Ann Christ, *The Sole Guardians of the Art Inheritance of Asia: Japan and China at the 1904 St. Louis World’s Fair*, 8 POSITIONS 677 (2000):

Between 1855 and 1914 a world’s fair was held nearly every two years. They were grand arenas in which nations established or bolstered their status by demonstrating a strong, centralized government, industrial and economic might, military potency, and a capacity for cultural leadership—all the requisite characteristics of a colonial power of the era.

*Id.* at 677. See also Neil Harris, *All the World a Melting Pot? Japan at American Fairs, 1874-1904*, in MUTUAL IMAGES: ESSAYS IN AMERICAN-JAPANESE RELATIONS 24 (Akira Iriye ed., 1975). For a survey of the subject, see Katherine Kustler, *Early Influences On Japan’s National Treasure Preservation System* (2002) (unpublished masters thesis, University of Washington) (on file with the author).

<sup>117</sup> SHIVELY, *supra* note 77, at 116, 211. OUTLINE OF JAPANESE HISTORY, *supra* note 58, at 308; Notehelfer, *supra* note 99, at 325.

<sup>118</sup> YANAGA, *supra* note 10, at 212.

bring out and develop the good points of Japanese art first, and with this foundation the good features of foreign art might be adopted to good advantage later.<sup>119</sup>

It has also been said that it was during this period that Okakura was first exposed to the efforts of France and Italy to protect their cultural and ethnographic properties. This exposure is considered the stimulus for Okakura to form a similar movement in Japan.<sup>120</sup>

Following their return to Japan, Okakura and Fenollosa joined the staff of the Tokyo Imperial Museum,<sup>121</sup> and Okakura was appointed Chief of the Art Section. In 1888, Okakura and a colleague founded *Kokka* (National Flower), a scholarly journal dedicated to the study of classic art.<sup>122</sup> In February 1889, the Commission for Investigating National Painting, upon which Fenollosa, Okakura, and Kuki had served, became the Tokyo School (Academy) of Fine Art, and Okakura was elevated to the head of the institution in 1890.<sup>123</sup> Initially, the school was fully nationalistic and offered study and training limited to Japanese traditions. It offered no instruction in the western styles.<sup>124</sup> Later, its teachers, including Hashimoto and Hōgai, were able to infuse such Occidental features as perspective, light and heavy coloring, and abstraction into the teaching of the modern Japanese movement.<sup>125</sup> In 1896, Okakura

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<sup>119</sup> *Id.* at 212-13.

<sup>120</sup> Compare Shimizu, *supra* note 3 with GUTH, *supra* note 116, at 107:

Although Japanese officials may have been inspired by British and French efforts to safeguard and register historic monuments and their contents, the 1872 survey was probably patterned after one conducted at the end of the eighteenth century at the order of Tokugawa Regent Matsudaira Sadanobu. For that survey . . . had visited many of the same temples and shrines later visited by the Meiji team.

<sup>121</sup> A group, Seikyosha, began publishing a bi-monthly *Nihonji* dedicated to the preservation of the national essence in April 1888. The mission statement read:

The Japan of today is the same Japan which was founded originally. Accordingly, despite the fact that our activities have become increasingly complex, the major problem confronting us today is still to elect systems of religion, education, art, politics and production appropriate to the ideas and skills of the Japanese people and to the countless external and environmental factors present in the land of Japan.

SHIVELY, *supra* note 77, at 103. One of the founders, Miyake Setsurei, wrote of the importance of maintaining the independence and integrity of Japanese culture and heritage, and advocated that the Imperial Museum in Tokyo confine itself to exhibiting Oriental art.

<sup>122</sup> YANAGA, *supra* note 10, at 213.

<sup>123</sup> SHIVELY, *supra* note 77, at 212.

<sup>124</sup> *Id.* at 201.

<sup>125</sup> OKUMA, *supra* note 60, at 347.

finally agreed to permit training in western methods.<sup>126</sup> Ultimately, however, it was upon the precepts espoused by Fenollosa and Okakura that the institution found its influence, and prospered.

In the meantime, the emperor experienced a change in perspective since the Oath of Five Articles had been issued. As a consequence, on October 30, 1890, the Imperial Rescript on Education was issued, stating “the way here set forth is indeed the teaching bequeathed by Our Imperial Ancestors, to be observed alike by Their Decedents and the subjects, infallible for all ages and true in all places.”<sup>127</sup>

Imperial support of craftsmen grew, and, in June of 1888, eighteen members were nominated to the Imperial Household Office Craft.<sup>128</sup> In September of that same year, Ryuichi Kuki, Director of the Imperial Museum, formed the Temporary All-Japan Treasure Research Bureau in the Department of the Imperial Household. Its members, under the direction of Fenollosa, Okakura, and Hogai, investigated old *objects d’art* in private collections, as well as in shrines and temples, in and around Kyoto, Nara, and other significant locations in Japan.<sup>129</sup> The purpose of the survey was to identify and catalogue important works. This initiative was the origin of the Old Shrines and Temples Preservation Society, which, after a number of incarnations, became the National Treasure Research Committee and finally the Cultural Properties Protection Commission.<sup>130</sup>

During this period Fenollosa and Okakura continued to teach regularly at the School of Fine Arts and at other institutions in Tokyo.<sup>131</sup> In addition, they frequently traveled throughout Japan on behalf of the National Treasures Research Bureau of the Ministry of Education to catalogue and register objects of antiquity.<sup>132</sup> These activities are credited as the stimulus for the passage of The Law for the Preservation of Ancient Shrines and Temples of 1897.

Okakura served as curator of the Imperial Household Museum from 1890-1898. In or about 1893, Okakura helped found the Fine Arts Research Institute that served as the center for documentation and study of Japan’s cultural heritage.<sup>133</sup>

In 1890, Fenollosa returned to the United States and became head of the Oriental Art Department of the Boston Museum of Fine Arts and continued in

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<sup>126</sup> SHIVELY, *supra* note 77, at 202.

<sup>127</sup> *Id.* at 77.

<sup>128</sup> ARTS AND CRAFTS, *supra* note 87, at 119.

<sup>129</sup> *Id.* at 315.

<sup>130</sup> OUTLINE OF JAPANESE HISTORY, *supra* note 58, at 315.

<sup>131</sup> SHIVELY, *supra* note 77, at 212.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 213.

that position until his resignation under a cloud of moral opprobrium in 1897.<sup>134</sup>

Notwithstanding Fenollosa's remarkable influence upon the Japanese art scene, "his importance lay in that he brought new light and new attention upon important art subjects long neglected in Japan and, moreover he moved officialdom to do something concrete about its neglect."<sup>135</sup> Fenollosa died in England in 1908 at the age of fifty-five. He was cremated and his ashes were transported to Japan where he was buried in the Buddhist cemetery at Mei-dera, the location of the temple at which Fenollosa had been inducted into the Buddhist faith.

Okakura's life, too, became caught up in personal controversy and he was forced to resign his position at the School of Fine Arts on March 28, 1898. Some faculty had circulated a petition calling for his dismissal due, apparently, to what was conceived to be his despotic administration. In addition, he had managed to offend a number of influential conservatives, and they sought his removal. Finally, Okakura had engaged in a scandalous affair with the wife of Kuki, the colleague with whom he and Fenollosa had joined in 1892 to serve as Imperial Art Commissioners. In a state of some embarrassment he departed the School of Fine Arts along with seventeen sympathetic faculty and started the Nihon-Bijutsu-in, The Japan Art Institute (Academy). Okakura also traveled extensively, and in 1910 was appointed Curator of Chinese and Japanese Art at the Boston Museum.<sup>136</sup>

#### 4. *The Movement After Fenollosa and Okakura*

Following the departure of Fenollosa and Okakura, the movement toward aesthetic nationalism lost concentrated focus. It is not that their disciples lacked passion and commitment, but rather they lacked a dominant figurehead around whom they might rally. The pressures of industrialization and modernization led to a continued deterioration of some indigenous artistic expression. During the period between the two World Wars, it was the folk-craft or Mingei Movement that inherited the spiritual legacy of Fenollosa and

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<sup>134</sup> *Id.* at 215; see CORTAZZI, *supra* note 22, at 205. Fenollosa was divorced by his first wife, a Salem born woman of social standing and he married another woman who had been on the staff of the museum. *Id.*

<sup>135</sup> ARTS AND CRAFTS, *supra* note 87, at 22. However, as noted in GUTH, *supra* note 116, at 113:

Clearly Fenollosa, far from teaching the Japanese people to know their own art, as Mary Fenollosa would later claim in her introduction to *Epochs of Chinese and Japanese Art*, was totally dependent on Japanese dealers and connoisseurs for both his information and his acquisitions.

<sup>136</sup> While ARTS AND CRAFTS, *supra* note 87, at 66, notes the year as 1904, Notehelfer, *supra* note 99, at 347, indicates the year as 1906.

Okakura. Led by Yanagi Soetsu, the movement strove to stimulate an appreciation for the beauty of common objects.<sup>137</sup> It was westerners, however, who had stimulated the awareness of Yanagi. Befriended by Bernard Leach, an English potter, he had come to appreciate utilitarian objects crafted during the Edo Period. As Leach, a co-founder of the movement noted:

I have had a sense of doubt on one main issue—the relationship between the conscious artist and the comparatively unconscious craftsman. Yanagi's constantly reiterated theme concerns the exceeding difficulties experienced in attaining a like purity and wholeness by the artist. He says our arts and crafts are in a diseased condition—with that I agree—but he turns to the artist-craftsman to act as the pilot in this dilemma because of his greater awareness, thereby indicating the power that has come to conscious man through the evolution of intellect.<sup>138</sup>

The Mingei Movement has been credited with reinvigorating many of the traditional crafts including pottery, textiles, ceramics, and printmaking. It is in this sentiment that the respect for craftsmen and, likely, the awards and recognition given them finds its origins.

Among the principal critical controversies of the period, the conflict between Western methods and styles, and traditional crafts, of course loomed large. At the same time, the conflict between utility and decorativeness, commercialized manufacture and patrician, artistic crafts, was also a vital concern of the critics as well as the artisans. Toward the end of the Meiji Period a strong movement also appeared aiming at establishing the crafts as a pure art form, quite separate from their functional use.<sup>139</sup>

What had begun for Japan in 1868 as an effort to mount a program of westernization to better compete in the world economy concluded in the pre-World War II years with an awakening of appreciation for Japanese tradition. Perhaps most importantly to the preservation of cultural property in Japan were the catalyzing activities of Okakura and Fenollosa in attempting to identify, classify, and register cultural treasures. Their simple goal was that such valuable expressions not be sold and exported but that they assume and

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<sup>137</sup> CORTAZZI, *supra* note 22, at 247.

<sup>138</sup> *Id.* at 347.

<sup>139</sup> ARTS AND CRAFTS, *supra* note 87, at 116.



maintain a revered place in the cultural history of Japan. Their efforts were the direct stimuli that awakened the Japanese people to the value of their cultural property and led to the promulgation of the numerous laws protecting that asset.<sup>140</sup>

### III. LEGISLATIVE ANTECEDENTS TO JAPAN'S LAW FOR THE PROTECTION OF CULTURAL PROPERTY

Three discrete Japanese laws are often identified as the antecedents to the 1950 effort. They are: (1) the Law For The Preservation of Historic Sites, Scenic Spots and Natural History Preserves Number 44 of 1919; (2) the National Treasures Preservation Law Number 17 of 1929; and (3) the Law For The Preservation of Important Art Objects Number 43 of 1933.

Unfortunately, there is a dearth of information, at least in the West, that identifies the terms, policies, and principles of these statutes as well as the other legislative and administrative efforts made in Japan to protect cultural property. Following is a brief survey of the myriad initiatives taken to that end by various branches of Japanese Government.

The formal administration of cultural properties was established during the Meiji Period and commenced as a nationalistic response towards efforts to westernize Japan. The first administrative action of significant note was the *Daijokan Fukoku*, the Preservation of Ancient Artifacts (Preservation of Antiques and Ancient Goods, Cabinet Announcement 1871). The *Daigaku*, forerunner to the *Mombusho* (The Ministry of Education), ordered the designation and protection of thirty-one categories of cultural artifacts. The categories of items to be protected included such diverse items as ceremonial articles, weapons, gems and precious stones, calligraphy and painting, carpentry, musical instruments, household furnishings, garments, tea ceremony utensils, games, and dolls. The underlying purpose of the order was to stimulate in owners an appreciation for cultural artifacts within their charge, to promote respect for the objects, and to prevent the properties from being casually sold or misplaced. This Order of the Grand Administration Office of May 23, 1871 specifically articulated the spirit of the regulation:

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<sup>140</sup> See COHEN, *supra* note 95, at 43; Christine M.E. Guth, *Japan 1868-1945: Architecture and National Identity*, 55 ART J. 18 (1996); *Interpellation on the Preservation of National Treasures and Important Art Objects*, ASAHI SHIMBUN, Sept. 9, 1947 (remarks by Tatsuo Morito) (on file with author); Minutes of the Proceedings in the House of Representatives, The 1st Sess. of the National Diet, Oct. 1, 1947 (Tatsuo Morita's reply to Shigeyoshi Fukuda of the Cultural Affairs Committee) (on file with author) [hereinafter Minutes from the 1st Session of the National Diet].

Against deplorable loss or damage of antiquities that are significant examples of changing systems and customs of ages in the course of time, such antiquities must be preserved in all districts for future generations.<sup>141</sup>

Later in 1874, in a continuing effort to provide protection to ancient objects, the Daijokan issued Law Number 59. It required the report and registration of shell mounds and ancient tombs. That was followed by Law Number 3 in 1880. Issued by Kunaisho, (the Imperial Household Agency), it obligated any private landowner who discovered an ancient tomb upon his land to register it with the Agency. It further restricted the excavation of ancient tombs by any person. In 1888, the Imperial Household, through exercise of its inherent power,<sup>142</sup> created a Department for the Investigation of Cultural Assets. It was through this vehicle that Okakura and Kuki were able to identify, inventory, and register approximately 215,000 ancient books, paintings, sculptures, and other cultural properties.<sup>143</sup>

The Meiji Government enacted *Koshaji Hozonho*, the Law for the Preservation of Ancient Shrines and Temples, in 1897.<sup>144</sup> Insofar as the *Koshaji Hozonho* had created a program of registry, designation, maintenance, and subsidy, it has been considered the prototype for the current cultural property law. This law was founded upon the information elicited by the investigations of Okakura.<sup>145</sup> Naimusho (the Agency of Domestic Affairs) was charged with administration of the new law, and the former cultural assets responsibilities of Kunaisho were surrendered to and consolidated within the Agency. Under the new scheme, the Agency's authority extended not only to the structure of shrines and temples, but also to cultural treasures found within them, and the Minister of Domestic Affairs was empowered to designate certain properties and structures as national treasures. The Shrines and Temples Law charged the owners of any designated entities with their conservation and protection, and it created an elemental system by which to regulate subsidies for their maintenance and repair. In 1913, the administration of the Ancient Shrines and Temples Law was transferred to the Department of Religion of the *Mombusho*, the Ministry of Education.

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<sup>141</sup> The National Treasures Preservation Law (Mar. 28, 1929), Law No. 17, Imperial Ordinance No. 203, in § V (Preservation of National Treasures) of the 1938 Edition of GENKO HŌREI SHURAN, cited in Interdepartmental Committee for the Acquisition of Foreign Publication, SCAP (on file with author).

<sup>142</sup> Interview with Hiroko T. McDermott, Art History Scholar, Cambridge Univ. (June 10, 2002).

<sup>143</sup> Bunkazai hogo-hō to tōroku seido no kaisetsu [Commentary on the Law for the Protection of Cultural Properties and the Registration System], translated by Sawaka Nagano, Esquire, Tokyo, Japan.

<sup>144</sup> GUTH, *supra* note 116, at 163.

<sup>145</sup> See *id.* at 162.

Land development in general, and the building of railroads and factories in particular, stimulated the 1919 passage of Law Number 44 ("Law 44"). Law 44 provided for the Preservation of Historic Sites, Scenic Spots And Natural Preserves. It empowered the Minister of Home Affairs to designate properties subject to the law, prohibit or limit certain activities in the area of the properties, prevent modification of the sites unless sanctioned by the prefectural governor, and undertake excavation or removal of obstacles from the site or the surrounding area when such would facilitate the investigation of the site. The statute also provided for reparations to private individuals who suffered damage as a result of any excavation, and designated as criminal the wrongful disturbance of the site. The penalty for violation of the law was imprisonment for not less than six months or a fine of not less than ¥100. Finally, certain provisions of the Law regarding the Preservation of Ancient Temples and Shrines that were inconsistent with Law 44 were repealed. Subsequently, Law Number 81 of 1928, entitled Control of Matters Relating to Preservation of Historic Sites, Scenic Spots and Natural History Preserves, transferred administration of Law 44 from Naimusho to the Department of Religion of the *Mombusho* (the Ministry of Education).<sup>146</sup> This began the formal consolidation of the administration and enforcement of cultural property concerns within the Ministry of Education.

On March 28, 1929, at the beginning of the Showa Era, the most comprehensive law to protect cultural property to that date was passed. Known as Law 17, the National Treasures Preservation Law abolished and superseded the Koshaji Hozonho of 1897.<sup>147</sup> Law 17 became effective July 1, 1929, in accord with Imperial Ordinance Number 209 of 1929.<sup>148</sup> By its terms it incorporated the essential substance of the prior Temples and Shrines Act into its provisions and also expanded the scope of the prior act so as to include any

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<sup>146</sup> Preservation of National Treasures, Law No. 17, Annex (2) (1929) (Japan), in SCAP Civil Info. and Educ. Sec., Report of Conference with Mombusho Rep. (Jan. 22, 1947) (on file with author).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*; see GUTH, *supra* note 116, at 191:

Despite opposition from collectors who feared that restricting the right to dispose freely of objects in their collection would hurt the art market, in 1929 the government enacted the Law for the Protection of National Treasures. This new law led to the registration of many works of art long esteemed by collectors but previously ignored by the government. Works newly classified as National Treasures ranged from *The Tale of Genji* scroll belonging to Masuda to works by literati painters like Taiga and Yosa Buson. Under the provisions of the law, private owners of National Treasures were guaranteed subsidies for restoration or repairs, just as temples and shrines were, but unlike the latter they were entitled, upon approval from the Ministry of Education, to sell or use their treasures as collateral for loans. The new law also explicitly prohibited the export of National Treasures, and in so doing finally achieved the very goal that Masuda and fellow industrialist collectors had claimed to seek.

structure, treasure, or object of historical significance, including objects of fine art. Unlike prior governmental efforts, the new law covered all property whether it was owned by the national government, municipal governments, or by private persons. By supplementary rule, it was deemed that Law 17 would regard objects that had heretofore been qualified as buildings or national treasures under the Temples and Shrines Act as objects automatically designated as national treasures.

Article 1 of Law 17 empowered the Minister of Education to refer the identified forms of property to the National Treasures Preservation Committee ("NTPC").<sup>149</sup> The NTPC was a special administrative agency formed under the law to address the formal protection of cultural properties. The referral led to subject properties being designated as national treasures. Once an object was so designated, control over it by the government was plenary. The treasure could not be exported, nor could its ownership change, without approval of the competent minister.<sup>150</sup> Further, no change in condition or alteration of the object could be effected without prior approval of the minister.<sup>151</sup> The only exception was for maintenance or repair.<sup>152</sup> Should the minister desire to grant approval for transfer, export, or change of condition of a designated object, he was required to refer his recommendation to the Preservation Committee for review.<sup>153</sup> Private ownership interests in properties designated as national treasures were further curtailed through a requirement found in Article 7. That provision imposed a duty upon the owners to put their properties on exhibit at the Imperial, government, and public museums at certain times during each year in accord with the discretionary judgment of the minister.<sup>154</sup> Limited subsidies to assist with maintenance and care of the properties were, however, provided to compliant owners as a reciprocal gesture and Article 9 limited compensation was made available in the event that the objects were lost or damaged during the course of display, except under conditions of *force majeure*.<sup>155</sup>

Detailed reporting requirements were imposed upon owners and

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<sup>149</sup> Regulations for the Enforcement of Law Regarding Preservation of National Treasures, art. I (1929) (Japan), in SCAP Civil Info. and Educ. Sec., Report of Conference with Mombusho Rep. (Jan. 22, 1947) (on file with author).

<sup>150</sup> Abstract, Interdepartmental Committee for the Acquisition of Foreign Publications, The National Treasures Preservation Law (1936) (Japan) (on file with author).

<sup>151</sup> *Id.* art. 4.1.1.

<sup>152</sup> *Id.* art. 4.

<sup>153</sup> *Id.* art. 5 ("Society for preservation of National Treasures").

<sup>154</sup> Members of Arts and Monuments opposed any practice that would diminish the role of private property under the Japanese Constitution and place control in the government.

<sup>155</sup> Civil Info. and Educ. Sec., Research and Info. Div., Japanese Cultural Resources General Report No. 3, at 9 (Feb. 1, 1946).

custodians pursuant to regulations passed to support administration of the 1929 law. In addition, criminal sanctions were included in Law 17 to better assure compliance with its terms. These included:

1. Any person found removing or exporting a national treasure without proper approval was subject to not more than five years of penal servitude or a fine not exceeding ¥2,000 (Article 20);
2. Any person found destroying, damaging, or concealing national treasures was subject to not more than 5 years' penal servitude or a fine not exceeding ¥500 (Article 21);
3. Any change in location of a national treasure without prior permission of the proper minister could make the actor subject to a fine of not less than ¥500 (Article 22);
4. Failure to notify of changes of ownership, punishable by a fine of not less than ¥100 (Article 23).<sup>156</sup>

While the National Treasures Law provided some protection for properties designated pursuant to its terms, the Japanese Government became aware during the several years following its enactment that numerous and important fine art objects or objects of significant cultural value, other than those designated as national treasures, were departing its shores at an increasing rate. It concluded that this alarming state of affairs was injurious to the interests of the Japanese people.<sup>157</sup> In response to this concern, Law Number 43 of April 1, 1933, the Law on the Preservation of Important Art Objects (or in some translations Essential Art Objects), was drafted and codified.<sup>158</sup> Pursuant to this law, historically and aesthetically valuable and important art objects, other than those designated as national treasures, were prohibited from exportation or transfer without express permission of the Minister of Education. By definition, objects made by contemporary artists, those that were made within fifty years of the desired exportation, or those that were the subject of importation within one year of the desired exportation, were not to be

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<sup>156</sup> See *id.*; Abstract, Interdepartmental Committee for the Acquisition of Foreign Publications, *supra* note 150.

<sup>157</sup> Arimitsu Jiro, Chief of Preservation Section, Religious Bureau Ministry of Education (1934) (handwritten manuscript) (on file with author).

<sup>158</sup> 7 GENKO HÖREI SHURAN 1067, Regarding the Preservation of Essential Objects (1938), *cited in* Interdepartmental Committee for the Acquisition of Foreign Publication, SCAP (on file with author); Civil Info. and Educ. Sec., Research and Info. Div., *supra* note 155; see also Civil Info. and Educ. Sec., Research and Info. Div., *supra* note 155, app. IV.

considered subject to the law.<sup>159</sup> In the event that a request for export or transfer was made, the minister was to respond within one year from the date the application was submitted, or the object would be designated a cultural treasure and become subject to the National Treasures Preservation Law.<sup>160</sup> Should any persons transfer or export an object without proper authorization, they would be subject to imprisonment for not more than three years or to a fine of no more than ¥1000. The regulations for enforcement of Law 43 were made effective through the Ministry of Education Order Number 10 of April 1, 1933.<sup>161</sup> It listed paintings, sculptures, buildings, documents, ceremonial books, historical records, swords, arts and crafts, and archeological materials as objects subject to the law.<sup>162</sup>

The 1933 law was deemed an administrative success, and the tide of loss was stemmed. While the prospective effect of the law was formally abolished by the Law for the Protection of Cultural Properties of 1950, it still possesses limited consequences. In accord with Article 116 of the 1950 Law, objects designated under the 1933 law remain subject to the transfer and export restraints of the current law. Although the administrative operations of the Ministry of Education were reduced and simplified during the years of Japan's involvement in hostilities with the West, the agency continued to actively designate cultural properties until 1943. That year, it ceased all cataloging operations, instead focusing its attention upon the removal and safe storage of cultural treasures so as to protect them from the ravages of war.

In October 1945, the Ministry of Education resumed its designation activities. This was, again, in response to an apparent increase in the exportation of cultural goods. In addition, the Ministry assumed the responsibility for investigating the condition of structures that were reported to be in disrepair. In 1948 it began implementing a five-year reconstruction plan. Part IV of this Article specifically addresses the activities regarding the protection of cultural properties during the years of occupation.<sup>163</sup>

One should not assume, however, that activity in the subject area of the protection of cultural properties was limited to the legislation discussed. There were a considerable number of additional and important laws, imperial edicts, rules, and regulations that were, and continue to be, relevant to the subject. A full appreciation for the breadth and depth of governmental activity can only be

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<sup>159</sup> 7 GENKO HÖREI SHURAN 1068-1, Enforcement of the Laws Regarding the Preservation of Essential Objects, art. 1 (1938), cited in Interdepartmental Committee for the Acquisition of Foreign Publication, SCAP (on file with author).

<sup>160</sup> *Id.* art. 3.

<sup>161</sup> *Id.* pmb1.

<sup>162</sup> *Id.*

<sup>163</sup> See Bunkazai hogo-hō to tōroku seido no kaisetsu, *supra* note 143.

had by acknowledging them. A comprehensive list of the activity is provided in Appendix I to this Article.<sup>164</sup>

#### IV. THE PERIOD OF OCCUPATION—ITS INFLUENCE ON THE CULTURAL PROPERTY PROTECTION ACT OF 1950

Upon surrender of the Japanese in 1945 following the hostilities in the Pacific, the Supreme Commander for the Allied Powers ("SCAP") was placed into power over the region pursuant to an international agreement among the governments of the United States, China, the United Kingdom, and the Union of Soviet Socialist Republics. General Douglas MacArthur was selected to exercise what was, in fact, a dual command role in that initiative. He served the Allied nations of the Far East Commission ("FEC") as the Supreme Commander and was the Commander-in-Chief, Far East on behalf of the United States.

The FEC was the high policy-making body. It was convened in Washington, and it comprised representatives of thirteen nations. These included China, the United Kingdom, the United States, the Union of Soviet Socialist Republics, France, the Netherlands, Canada, Australia, New Zealand, India, Pakistan, Burma, and the Philippines. The FEC formulated the policies, principles and standards necessary to accomplish the terms of surrender. It had no authority over military operations, but rather transmitted its decisions to SCAP through the United States Joint Chiefs of Staff. These decisions were in the form of directives that were prepared by the United States. Also in place in Tokyo was the Allied Council for Japan, consisting of four Allied members, with General MacArthur as its Chair. The purpose of the Council was to provide advice and counsel to SCAP on the implementation of control of Japan.<sup>165</sup> Cultural matters in the organizational structure of the General Headquarters, of SCAP were within the province of the Civil Information and Education Section ("CIE"). This staff section, one of eighteen, was activated by General Order Number 193 of 22 September 1945, and was responsible to the Supreme Commander, General George MacArthur, through the office of the Chief of Staff.<sup>166</sup> The policies, which directed the work of CIE, were determined by SCAP under authority granted by basic post-surrender

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<sup>164</sup> Civil Info. and Educ. Sec., Research and Info. Div., Japanese Cultural Resources General Report No. 3 (Feb. 1, 1946) (on file with author).

<sup>165</sup> For Basic Occupation Policies see GENERAL HEADQUARTERS SUPREME COMMANDER FOR THE ALLIED POWERS AND FAR EAST COMMAND (SCAP), SELECTED DATA ON THE OCCUPATION OF JAPAN 3 (U.S. Gov't, 1950) [hereinafter SELECTED DATA]. For organizational charts of the SCAP and its various divisions, see *id.* at 134. See also BEASLEY, *supra* note 58, at 214.

<sup>166</sup> SELECTED DATA, *supra* note 165, at 8.

documents and directives as founded upon decisions of the Far Eastern Commission.<sup>167</sup> Specifically, CIE “had the job of formulating policies in public education, religion, and other sociological problems of Japan.”<sup>168</sup>

The Cultural Resource Division of CIE was merged in 1947 with the Religion Division to become the Religion and Cultural Resources Division. Through its sub-group, the Arts and Monuments Branch (“A&M”) (often referred to as a Division in the literature), it was specifically responsible for:

initiation and recommendations regarding management and finance of numerous projects for the protection, preservation, restitution, salvage, or other disposition of works of art, antiquities, cultural treasures, museums, archival repositories, historic and scenic sites, and historical and natural monuments.<sup>169</sup>

The official posture on the protection of cultural and ethnographic property during the occupation was articulated by General MacArthur as “historical, cultural and religious objects and installations (including several Imperial Palaces) will be carefully protected and preserved.”<sup>170</sup> A press release from the U.S. Department of State of August 16, 1946, also reflected this seminal policy. It stated that:

The immediate postwar problem consists of the reconstitution of the artistic and historical heritage of occupied countries . . . . The protection of art in time of war is based upon the universally accepted principle that cultural property is inviolable . . . . The artistic and historic treasures of a nation are regarded as that Nation’s patrimony, and the great public collections of the world as an international heritage. It is the preservation of this irreplaceable cultural heritage of all nations that is recognized, today, as an international responsibility.<sup>171</sup>

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<sup>167</sup> THE GENERAL HEADQUARTERS SUPREME COMMANDER FOR THE ALLIED POWERS, MISSIONS AND ACCOMPLISHMENTS IN SELECTED FIELDS 1 (U.S. Gov’t, Jan. 1, 1950) [hereinafter MISSIONS].

<sup>168</sup> DAVID WATERHOUSE, JAPANESE ART UNDER THE OCCUPATION, THE OCCUPATION OF JAPAN: ARTS AND CULTURE 206 (1988).

<sup>169</sup> MISSIONS, *supra* note 167, at 26 and footnote report of accomplishments. This was also the charge of General Order No. 27, dated June 3, 1946, to CIE. *Id.*

<sup>170</sup> Summary of Press Reports, Imperial Household Collections and Reparations, Supreme Commander for the Allied Powers (Undated) (on file with author).

<sup>171</sup> Press Release, U.S. Dep’t of State, The Conservation of Cultural Property (Aug. 16, 1946) Memorandum from Howard C. Hollis, Chief, Arts and Monuments Division, to Chief, Civil Information and Education Section, General Headquarters, Supreme Commander for the Allied Powers, at 2 (Sept. 5, 1946) (on file with author).



In order to accomplish the end with which it was charged, A&M was denoted as liaison between the various Japanese governmental agencies responsible for promoting similar policies.<sup>172</sup> It was, in fact, through A&M and its staff that the actual policies for the preservation of cultural properties were conceived and carried out.

As a consequence, in order to develop a genuine understanding of the events leading to, and the influences culminating in, the 1950 Law for the Protection of Cultural Properties, consider the following: (1) the identity of the principals who were on the staff of A&M and their sensitivity to the art of Japan, their perspectives on the importance of cultural property and its protection, and the identifiable sources from which they might have drawn their views; and (2) the positive actions actually taken by the Branch during the occupation, how such actions were legally characterized, and the influence that they had upon the formulation of Japanese policy.

A. *The A&M Branch and Its Personnel*

An advisory committee of U.S. officers, including Lt. Commander George L. Stout, U.S. Naval Reserve, the conservator of the Fogg Art Museum at Harvard, and Laurence Sickman, curator of Oriental Art at the Nelson Art Gallery in Kansas City, called for the formation of the Arts and Monuments Division even prior to the formal surrender of Japan to the Allied Forces.<sup>173</sup> The Arts and Monuments Division that had been operating in the European theater is claimed to have been their inspiration.<sup>174</sup> Lieutenant (later Captain) W. D. Popham initially assumed the position of Chief of A&M. In a memorandum to the Secretary of War dated August 29, 1945, from the Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas, Popham articulated the early policy of A&M:

The occupying army is cognizant of the fact that the age-old cultural and artistic monuments in the lands to be occupied are a part of the cultural heritage of all peoples, and it is a fundamental policy of this army to protect and preserve in every way possible these monuments. Furthermore, it will be our policy to co-operate with the Imperial Japanese Government insofar as possible to assist in the restoration and repair of all recognized works of

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<sup>172</sup> SELECTED DATA, *supra* note 165, at 154.

<sup>173</sup> Lee, *supra* note 8, at 91.

<sup>174</sup> *Id.*

artistic and historic value. . . .<sup>175</sup>

Lt. Commander George L. Stout later replaced Popham as the Branch developed a civilian complexion. The staffing under Stout included Popham, an influential scholar of curatorial arts by the name of Langdon Warner, and other scholars who had associations with the Fogg Museum. The latter group included Sickman and James Marshall Plumer.<sup>176</sup> Of particular note was the participation of Langdon Warner.<sup>177</sup> Mr. Warner was a professor at Harvard and a head of Oriental Art at the Fogg Museum. He has been considered the "Dean of Oriental Art" in the United States and had been the teacher and mentor of many of the curators of Oriental art in museums of that day. Perhaps

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<sup>175</sup> Memorandum from W.D. Popham, Chief, Arts and Monuments Section, to Secretary of War (Aug. 29, 1945) (on file with author).

<sup>176</sup> WATERHOUSE, *supra* note 168, at 206.

<sup>177</sup> A letter from Arts and Monuments (signed by GLS), to the Special Advisor, Feb. 12, 1946, notes:

#1. Mr. Langdon Warner of Harvard University was requested as an expert consultant in Arts and Monuments for a period of 30-90 days by message from SCAP to Warsec (ZA 12336) dated 2 January 1946.

#2 In order to establish an understanding as to the activities of the expert consultant during his tour of duty at this headquarters, the following suggestions are offered:

(a) Review of the working file of sites and collections listed by the division for special protection, with the aim of fixing priorities according to the risks involved.

....

(c) Consideration of the advisability of seeking the establishment of an advisory body on matters of arts and monuments, in the Japanese government. Formation of such a body to correlate the activities of the five ministries which carry some responsibility for cultural property has been suggested. Advisability of having such a body is open to question and merits study by an expert.

(d) Investigation of the current status of private collections. About 350 such collections the more important in Japan, have been studied from available records and data and is held for revision in the working files of the division. Official sources, however, are not informed as to the present content of all collections or war damage sustained on location in emergency depositories.

....

(g) Inquiry as to whether or not the work of temporary artists in Japan is being encouraged or discouraged by governmental action and attitude. Complaints from artists and craftsmen have come to this division to the effect controls of supplies, of commissions, and the exhibiting facilities is still held, undercover, by a monopoly which had functioned as a bureau established by the government in 1945 as a kind of propaganda control. Although this division has not been charged with the responsibility of making recommendations on this matter it is one which concerns the conduct of the occupation.

Letter from Arts and Monuments, to the Special Advisor (Feb. 12, 1946) (on file with author). A response, signed by DRN, on February 14, 1946, concurs with suggested activities of expert consultant.

most importantly, he was perceived by the Japanese population as a sympathetic expert in indigenous art generally, and as a benefactor of Japanese culture in particular.<sup>178</sup> As characterized in 1947 by Morito, the Minister of Education, Warner was widely known for his appreciation of Japanese cultural property, and he made frequent remarks supportive of the preservation effort.<sup>179</sup>

Warner was also credited by the Japanese with having saved the cities of Kyoto and Nara from destruction through his impassioned pleas to the Allied forces.<sup>180</sup>

Significantly, Warner's original interest in Oriental art had been cultivated through an acquaintance with Okakura Tenshin when both were employed at the Boston Museum.<sup>181</sup> Warner had assumed the position of Assistant Chief of the Oriental Section of the Museum at a very young age and at a time when Okakura was the Chief of the office. Okakura served as his mentor, and it was to a great extent through him that Warner gained his knowledge and understanding of Japanese art.<sup>182</sup> Warner also credited Okakura as having made possible his first pilgrimage to Japan.<sup>183</sup> On that trip, near the

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<sup>178</sup> There were, in fact, efforts by the Japanese to honor Warner that were discouraged by SCAP. See Letter from J.M. Plumer, Fine Arts Advisor, to Dr. George McClellan (July 13, 1949) (on file with author) (stating that "it has come to my attention just as I am leaving for Zoi that there is a movement afoot to erect a memorial bronze bust of Langdon Warner in Kyoto. There should be discouragement of this activity.")

<sup>179</sup> Translation, Transcript of Education Minister Morito's Reply to Interpellation in Diet on Export and Loss of National Treasures (Sept. 18, 1947) (on file with author) [hereinafter Transcript of Education Minister Morito's Reply]; Minutes of the Proceedings from the 1st Session of the National Diet, *supra* note 140 (transcript of Mr. Shigeyoshi Fukuda's comments on behalf of the Cultural Affairs Committee).

<sup>180</sup> Transcript of Education Minister Morito's Reply, *supra* note 179, providing:

America had been developing their rationality even while fighting. A certain committee was formed for bombing Japan. I have heard that Dr. Warner was invited as the authority on Japanese art to make and submit a complete list of Japanese objects, in detail. Now, almost all of the cities in Japan were completely bombed, but the ones that were left alone were not touched, just as it was in Dr. Warner's plan that was followed by men of reason and conscience in the American Force. Everyone knows that the cities of art, Kyoto and Nara, did not suffer from one bomb, surviving the war unharmed.

*Accord* WATERHOUSE, *supra* note 168, at 216.

<sup>181</sup> Minutes Transcript of Education Minister Morito's Reply, *supra* note 179, providing:

As you all may know, Dr. Warner had assumed the seat of assistant chief of the Oriental Section of the Boston Museum while quite young. Under the guidance of Tenshin Okakura who was at the time the chief of the section, he attained knowledge and understanding to an enormous extent. You also know that when Tenshin Okakura returned to Japan, Dr. Warner later followed; stayed in Kangakuin (Todaiji Temple), Nara, where he devoted himself to studies of Tempye sculptures, later made visits to all parts of Orient, and was the head of the Oriental Section of the Harvard Museum until recently.

<sup>182</sup> See GUTH, *supra* note 116 and accompanying text.

<sup>183</sup> Press Confab 1, Radiopress Special (Apr. 19, 1946) (on file with author) (complete Report of Press Conference by Mr. Langdon Warner, Dean of American Lecturers on Far Eastern Art, and author of well-

close of the Russo-Japanese War in about 1906, Warner visited Nara. According to Professor Umehara of the Kyoto Imperial University:

Tenshin's card in hand, he (Warner) tapped at the door of the old Ni-iro Chunosuke, who was then the president of Nara Art Institute, and became his pupil. His outfit consisted of kimono and geta. His diet consisted of bean soup and cooked rice dipped in green tea, frugal pattern of Japanese life. And his daily routine was pilgrimage of all ancient temples. He has a kin-ship to ex-President Roosevelt, and his hair seemed to never have been tended or cut. He did not seem to mind cheap boarding houses to live in. He likes children and curios, never worries about punctuality and appointment, he does not care for anything formal, and he has shy, artistic and scholastic inclinations.<sup>184</sup>

Warner was also directly acquainted with Fenollosa, having worked in the Boston Museum while he was there. Finally, he often spoke of Dr. Morse and described having attended many of his lectures and having followed much of his work.<sup>185</sup> Through Warner, the direct line of influence of Fenollosa and Okakura was imported into the philosophies of A&M and put into action. In September 1946, Howard C. Hollis, Curator of the Cleveland Museum of Art, succeeded Stout as Chief of A&M. It was upon the advice of Warner that Hollis was selected.<sup>186</sup> Hollis had worked directly under Warner at the Fogg Museum at Harvard University from 1928 through 1929, and it had been upon Warner's recommendation that Hollis had been initially employed by the Cleveland Museum of Art.

Also on the A&M staff in 1947 were Sherman E. Lee, Advisor on Collections, and two Occupation inspectors, Charles F. Gallagher and Popham. Lee, a former assistant to Hollis in Cleveland during 1940-41 and Curator of Oriental Art at the Detroit Institute of Arts, had been specifically asked by Hollis to accompany him.<sup>187</sup> Upon the departure of Hollis in 1947, Lee assumed the post of Acting Chief of A&M with Gallagher and Popham

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known books on Japanese art). Serving temporarily as advisor to Arts and Monuments Division of Civilian Information and Education, Field Fellow of the Fogg Museum of Art, Harvard University, where he lectured during the war on Japanese culture to many officers now serving with the occupation force.

<sup>184</sup> *Dr. Warner Arrives in Kyoto Tomorrow*, ASAHI SHIMBUN, May 24, 1946 (translation on file with author).

<sup>185</sup> See *supra* notes 94-97 and accompanying text.

<sup>186</sup> Lee, *supra* note 8, at 91.

<sup>187</sup> Of interesting note, Lee eventually became the Director of the Cleveland Museum of Art (1958-1983), and later on March 13, 2000, his daughter, Katherine Lee Reid assumed the same position.

remaining. Eventually Gallagher became Fine Arts Advisor, and J. M. Plumer remained as a Fine Arts Advisor.

This succession of distinguished scholars, the personal influences that they shared, the empathy each had for the Japanese people and their art as demonstrated by their vocational commitments and personal efforts, and the unbroken intellectual lineage harkening back to Morse, Fenollosa, and Okakura, was the vehicle through which the West in general, and the United States in particular, significantly impacted the cultural property perspectives of Japan.

The picture of the philosophical descent would not be complete, however, without an understanding of the direct effect that SCAP, A&M, and their personnel had upon the policy and composition of the 1950 law.

### *B. The Medium of Influence of SCAP and A&M*

Direct military government was not established in Japan. Rather, SCAP exercised its authority over the Japanese people through their duly organized government.<sup>188</sup> Thus, Japanese cultural property laws were not suspended during the occupation.<sup>189</sup> The Japanese Government, reoriented in accordance

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<sup>188</sup> SELECTED DATA, *supra* note 165, at 1.

<sup>189</sup> Memorandum from GHQ, SCAP, by command of General MacArthur to Commanding General, Eighth Army (Aug. 4, 1947) (on file with author) reads:

1. Japanese Government Agencies are being urged to take steps necessary to assure preservation of cultural property in Kyoto as well as in other regions. Local organizations should be encouraged to take additional preservation measures provided that their operations are in accord with National policies and plans. They should be urged to coordinate their efforts with those of the Japanese Ministry and the National Museum.
2. It is the policy of the Supreme Commander for Allied Powers to refrain from the official participation in the internal affairs of the Japanese Government or private agencies unless there is evidence of contravention or violation of directives, regulations or laws. No action is contemplated with regard to the subject petition. However, officials of the Kyoto National Treasures Association may be informed verbally the Supreme Commander for the Allied Powers has no objection to the activities of the Association as long as they are in accord with existing Japanese Government laws governing cultural property.

*Id.*; *see also*, Internal Memorandum from Charles Gallagher, Asst. Advisor on Fine Arts (Mar. 8, 1948) (on file with author). Gallagher notes having described the Japanese registration system for cultural property to Capt. Ebbitt. *Id.* Gallagher confirmed that many swords were designated as NT or IAO, and instructed Ebbitt to inform his men that they should bring such objects to A&M where they could be informed as to the proper Japanese agency to which they should apply to receive certification that the object was not registered. *Id.*; *see also*, SCAP Check Sheet from CIE to ESS/Fl (Nov. 3, 1947) (on file with author) (discussing export of property from Japan, and giving an explication of the existing Japanese Laws on the subject of cultural property). It notes:

with basic occupation policies, was permitted to exercise normal governmental powers over traditional domestic concerns,<sup>190</sup> and SCAP acknowledged on numerous occasions that the cultural property laws of Japan were within that domain.<sup>191</sup>

Thus, it was through a course of oversight that the policies of SCAP were transmitted to the Japanese Government through formal written directives called SCAPIN.<sup>192</sup> Japanese compliance was checked by SCAP, and considerable intervention by SCAP Staff Sections was often deemed necessary

Technically, national treasures or important art objects may be exported, but the exportation requires legal action by the Minister of Education with the advice of the Committee for the Preservation of National Treasures and the Committee for the Preservation of Important Art Objects. Without their concurrence, no national treasure or important art object may be exported for sale legally.

It should also be noted that while the Supreme Commander legally has the authority to authorize the exportation of Japanese national treasures, such authorization is extremely unlikely and, it is felt, this right would be better as an assumed right, not stated in writing.

*Id.*

<sup>190</sup> See ODA, *supra* note 63, at 31, providing:

The Allied forces recommended five major reforms in 1945: equality of men and women, encouragement of trade unions, liberalization and democratization of education, liberation from autocratic rule, and democratization of the economy . . . .

These measures signified a radical change of the then existing political, economic, and social system and almost amounted to a revolution. Civilian experts and advisers who accompanied the military from the United States played a significant role in shaping these reform policies.

The reform measures were embodied in the Constitution enacted in 1946. This Constitution, which remains in effect today, has introduced significant changes in the political and social system of Japan . . . .

The Constitution and most of the other laws enacted during the occupation had been strongly influenced by US law . . . . This was only natural, since legal advisers to the SCAP were primarily Americans; some of them keen "New Dealers." On the other hand, most major codes which dated back to the pre-war period remained intact . . . .

Proposals to amend the Constitution which was ostensible imposed by the Americans have never gained popular support.

*Id.*

<sup>191</sup> Letter from Charles F. Gallagher, Fine Arts Advisor, to F. Huygen (Aug. 25, 1948) (on file with author):

#7 This is a black lie. To begin with, SCAP absolutely forbids the purchase of registered objects by allied personnel and it would be impossible for them to get them through customs without a statement from the Ministry of Education to the effect that they are not registered. Further, it is not merely a question of the seller need not report that he sold it, but the buyer must under the present law report, and no matter who he is the sale of a registered object will come under scrutiny, other Japanese or allied. This sort of conscious misinformation is extremely dangerous and leaves one to suspect just what objects the writer of these distortions has in mind.

<sup>192</sup> SELECTED DATA, *supra* note 165, at 1-4.

in order to insure that the directives were properly understood and promptly carried out.<sup>193</sup> The apparent need to forcefully compel compliance declined as the years of the occupation passed, and in 1948 and 1949 certain steps were taken to relax occupation controls.<sup>194</sup> As General MacArthur noted in a speech in May 1949, “the character of the occupation has gradually changed from stern rigidity of a military operation to the friendly guidance of a protective force.”<sup>195</sup> In July of that same year, MacArthur noted in a memo to Headquarters Staff:

The necessity for extensive surveillance and execution by the occupation of many special missions relating to the social, cultural, and economic development of Japan no longer exists . . . [And the Japanese Government should] generally be permitted and encouraged to exercise normal powers of government in matters of domestic administration.<sup>196</sup>

It is important to note, however, that A&M concluded that it was necessary to employ a firm hand in guiding the course of the Japanese Government on the subject of cultural property. In general, CIE documents demonstrate a directed mission to reeducate the Japanese concerning the unique value of their culture and to instill in them a sensibility and perspective favoring cultural property that SCAP believed was lacking.<sup>197</sup> While such a position might appear to be paternalistic under different circumstances and having the luxury of politically correct hindsight, one must remember that SCAP was an occupying force dedicated to the preservation of Japanese cultural property through A&M. It must also be kept in mind that SCAP engaged in significant ideological reorientation and censorship.<sup>198</sup>

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<sup>193</sup> ROBERT A. FEAREY, *THE OCCUPATION OF JAPAN SECOND PHASE: 1948-50*, at 10 (1950).

<sup>194</sup> Letter from Colonel R. E. Coughlin, HQ, Shikoku Military Government Region to Commanding General, Eighth Army (Apr. 5, 1948) (on file with author):

It is the opinion of this headquarters that the Arts and Monuments function is definitely and specifically a function of the Japanese Government and that it should be handled entirely by Japanese agencies. It is possible that Military Government should exercise its usual surveillance function, but even this is problematical. In short, Military Government, in exercising the Arts and Monuments function as an active operation, is doing work rightfully belonging to Japanese agencies. In addition, it is believed that the objectives of the Occupation are hardly being actively forwarded by Military Government activity in this field.

*Id.* Notwithstanding the above view, A&M continued its active involvement.

<sup>195</sup> WATERHOUSE, *supra* note 168, at 10.

<sup>196</sup> *Id.* at 11.

<sup>197</sup> See generally *MISSIONS*, *supra* note 167.

<sup>198</sup> See generally *SELECTED DATA*, *supra* note 165. While this topic is generally beyond the scope of this

In addition, A&M was staffed by a dedicated group of men and women philosophically committed to preserving Japanese cultural treasures and promoting Japanese art, and its internal documents demonstrate a genuine passion for this mission. It is significant that the people selected to execute the Allied task were westerners who had dedicated their lives to an appreciation of Japanese art and culture.<sup>199</sup> Finally, there are indications that A&M felt that the existing administrative scheme was inadequate and that the Japanese Government at the time of surrender and in the early days of occupation had been less than cooperative in securing and promoting the protection of its own and other countries' cultural property. Some examples of this state of affairs lie in the regulations of the Ministry of Education affecting the 1929 Law for the Protection of National Treasures, as it required the Ministry to compile a register of such treasures. The Japanese officials reportedly burned this register at the time of surrender.<sup>200</sup> The Ministry was also to have kept records of Important Art Objects pursuant to the 1933 Law. Apparently, execution of that task was lax at best. Some records reportedly did survive with respect to the National Treasures category and these were accessible by A&M. Also, in accord with SCAPIN 1774, the Japanese Government was to inventory objects of art and culture of foreign origin that were in their control. In accord with a report of Gallagher, A&M Fine Arts Advisor to the Chief, Religions and

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article, one might find relevant examples related to cultural property concerns such as the collection and suppression of Japanese war paintings and the censorship of Japanese art depicting nudes. Archives 5848(12), Letter from SCAP, CI&E, to Col. J.P. Buehler, Engineering Office (Aug. 7, 1946) (on file with author) (noting that 151 official Japanese war paintings had been assembled and were in custody in Ueno Park Museum and would be secured and retained); Archives 5848(21), Internal Memorandum from Charles Gallagher, Asst. Advisor on Fine Arts on Sale of Ukiyo-e (Apr. 19, 1948) (on file with author) (noting that paintings were pornographic and indicating that, should the sellers return, it was the authors intention to hold them until they could be arrested).

<sup>199</sup> Memorandum from GHQ, SCAP, CI&E Division, Research Unit, Cultural Resources Research Branch, to Parallel Division 2 (Sept. 18, 1947) (on file with author) (providing translation of a transcript of Education Minister Morito's reply to Interpellation in Diet on Report and Loss of National Treasures):

During his stay Dr. Warner made frequent remarks like the following:

Old art objects are not corpses. We do not look at it because it is old.  
And not because it is rare. Also not because it is beautiful to the eyes.  
The people, the kind of people that produced these, are what we really see  
through these old art objects. It is through these that we strive to know  
what their spiritual lives, their intellectual lives, their daily lives, their  
customs were like.

*Id.*

<sup>200</sup> Preservation of National Treasures, Law No. 17, art. 1 (1929) (Japan), *in* SCAP Civil Info. and Educ. Sec., Report of Conference with Mombusho Rep. (Jan. 22, 1947) (on file with author). Article 1 states, "The Ministry of Education shall provide a Register of National Treasures and register them therein." *Id.* Following Article 1 is a note that reads, "[t]his was burnt by the officials at the time of the surrender." *Id.*



Cultural Resources Division, dated January 19, 1949:

The Japanese Government did not make “an honest effort” to comply with SCAPIN 1774. They were dilatory, evasive, haggled over questions and finally produced two institutions out of a total of some 800 that had objects coming under the definition of SCAPIN 1774. The fact that only four looted items were reported from private collections of individuals (the basis for the directive) is highly suspicious. It is also the firm opinion of the undersigned that there is a great deal of looted property still around, but that much stronger methods than those heretofore taken will be necessary if it is to be uncovered.<sup>201</sup>

Finally, the statutory structure, even before the 1950 Law, was deemed inadequate by A&M. They had initiated an effort, for example, to create a category between those of National Treasures and Important Art Objects. This intermediate category was entitled Important Cultural Property. The hope was to constrict the class of Important Art Objects and make administrative movement of objects between classifications less frequent. The Agency for Cultural Affairs of Japan followed the recommendation.<sup>202</sup> It had views opposed to those of the Japanese Government concerning the government’s relation to the Japanese people and their property. The Japanese people themselves had expressed reservations about the sincerity and initiative of the Japanese Ministry of Education. A news article that appeared on January 28, 1946 stated:

[s]trange to say, the Ministry of Education which was full of formality and bureaucratic egotism has for a long time been nothing but a sort of state organ hindering the elevation of culture and the arts.<sup>203</sup>

A&M also had a reputation for independence and initiative among SCAP organizations. In the words of Langdon Warner, “a GHQ officer told me the other day that Arts and Monuments was known to be the only division that ran

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<sup>201</sup> Memorandum from Charles F. Gallagher, Fine Arts Advisor to Chief, Religious and Cultural Resources Division (Jan. 19, 1949) (on file with author). *See also* Memorandum from Mr. Bunce, CIE to DC/S SCAP (Jan. 26, 1949) (on file with author) (regarding inventories of objects of art of foreign origin and documenting certain looted items that had come to CIE attention).

<sup>202</sup> Lee, *supra* note 8, at 94.

<sup>203</sup> Press Translation No. 1021, GHP, SCAP, Allied Translator and Interpreter Sec., Item 2: Promotion of the Arts (Jan. 30, 1946) (on file with author).

by itself and knew what it was doing.”<sup>204</sup> These and other considerations led to the very active involvement of A&M in the affairs of the Ministry of Culture and with the Diet as it considered and passed the 1950 Law.

### C. *The Business of Arts and Monuments*

In general, the Arts and Monuments branch was responsible for making recommendations and overseeing the management and financing of initiatives for protecting, preserving, restoring, salvaging, and properly disposing of works of art, antiquities, cultural treasures, museums, archival repositories, historical and scenic sites, and historical and natural monuments.<sup>205</sup> In executing that task, A&M was charged with inventorying and inspecting as many cultural sites and objects of art as possible; compiling reports of field visits; attending and reporting on conferences, both private and public; responding to project requests of SCAP; reviewing press releases and commenting on public statements and interviews; reviewing Japanese government documents relating to art and cultural property; composing lists of collection contents; assessing war damage to relevant objects; reviewing field examiner reports; and generally, assisting the Japanese in protecting cultural property and facilitating the display of and access to the objects.<sup>206</sup> The division of labor fell naturally upon the members of the group in accordance with their interests. Popham was a garden designer and architect by profession and preferred the responsibility of inspecting the parks and gardens and remote temples. Gallagher was a generalist, and Lee favored temples and private collections.<sup>207</sup> The members of the branch also attended routine meetings with staff officials, held regular gatherings with appropriate government officials, responded to inquiries about cultural property from private individuals and groups, and formulated advice on pending legislation.<sup>208</sup>

Reporting on the activities of A&M, the Missions and Accomplishments document of General Headquarters (“GHQ”) of SCAP, January 1, 1950, states:

Damage to cultural properties has been investigated, and field inspections have been made of as many as possible of the 15,039 collections, structures, and separate objects registered as National Treasures or Important Art Objects. Twelve of the fourteen

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<sup>204</sup> WATERHOUSE, *supra* note 168, at 206.

<sup>205</sup> MISSIONS, *supra* note 167, at 26.

<sup>206</sup> Lee, *supra* note 8, at 92.

<sup>207</sup> *Id.* at 94.

<sup>208</sup> *Id.*

national parks of Japan have been surveyed and programs have been initiated for the reorganization of their administration and the expansion and improvements of their equipment and facilities for the public benefit. Uses of cultural properties in the reorientation program have been devised, and recommendations have been made concerning the use of the fine arts in familiarizing the Japanese people with the history, institutions and culture of the United States and other democracies.<sup>209</sup>

In the words of Sherman Lee, “[t]he whole experience was exhilarating and educational, unique and cumulative . . . .”<sup>210</sup>

*D. The Factors Calling for a New Japanese Commitment to Protect Cultural Property*

Popular accounts credit the damage to the Kondo (Golden Hall) of the seventeenth century temple complex, Horyuji, and the looting by American and Allied servicemen and GHQ staff as the events that catalyzed the passage of the Law for the Protection of Cultural Properties of 1950. This, however, is an incomplete assessment and a far too simplistic conclusion. There seem to be at least eight precipitating conditions that called for the legislative response. They include:

1. The pressures of the Japanese tax scheme, including the property, estate, and sales taxes;
2. The sale of objects in response to other needs perceived by the indigenous population;
3. The fear of export of cultural property following any form of transfer;
4. Theft;
5. Vandalism affected upon objects and monuments;
6. Risks of fire;
7. The use of objects by occupation forces;
8. Perceived Japanese perspectives, including gender attributions, concerning the place that art should occupy in the life of the Japanese people; and
9. Perceived Japanese perspectives concerning the role that

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<sup>209</sup> MISSIONS, *supra* note 167, at 26.

<sup>210</sup> Lee, *supra* note 8, at 102.

government should play in protecting such goods.

Following is a consideration of the influence that each of the conditions had upon Japan during the period of its review of its cultural property laws. Each of these influences on Japan during its review of its cultural property laws is further examined below.

1. *Taxation, Black-Market Sale and Other Transfer and Exportation Issues*

a. *The Property and Sales Taxes*

In November 1946, the Japanese Government promulgated a property tax; it had a significant negative effect upon the preservation and protection of cultural properties. The subject statute provided that a "Capital Levy shall be imposed on an individual . . . in respect to the whole property he owns at the date of investigation."<sup>211</sup>

The tax was graduated and the rates ranged from zero percent on property valued at less than ¥100,000 to ninety percent on values over ¥15,000,000. The tax was meant to redistribute wealth among the Japanese in an egalitarian manner. In purported promotion of this policy, Chapter 1, Article 2 of the law exempted certain types of property in order to minimize a regressive effect. Daily necessities, such as furniture, utensils, clothing, and other personal property were not subject to the tax.

The lack of exemption for art or cultural properties was noteworthy.<sup>212</sup> Other provisions of the general tax scheme, as gleaned from the discussions of A&M with Marquis Hosokawa, Chairman of the National Treasures Commission, and with the Director of the Imperial Household included:

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<sup>211</sup> Memorandum from Howard C. Hollis, Chief, A&M Division, to Chief, CIE (Sept. 5, 1946) (on file with author) (regarding the Capital Levy Bill). See, Memorandum from GHQ, SCAP, CIE Division, Research Unit, *supra* note 199, at 3:

We are all aware of the property tax that came into effect November 1946. And I hear that among the 1,400 odd owners of national treasures and important art objects, a considerable number of them have either hidden or sold the objects; the Ministry of Education and the society for Preserving National Treasures are standing by helpless.

According to investigation made by the Ministry of Home Affairs, about 800,000 swords were delivered to the Allied Forces as weapons, about 100,000 were permitted to remain as fine art objects, and approximately 100,000 were concealed to escape from the property tax.

*Id.*

<sup>212</sup> Memorandum from Howard C. Hollis, Chief, A&M Division, to Chief, CIE (Sept. 5, 1946) (on file with author) (regarding the Capital Levy Bill). See, Memorandum from GHQ, SCAP, CIE Division, Research Unit, *supra* note 199, at 3.

1. The tax was to be paid in a lump sum.
2. A similar tax was to be levied on museums.
3. There was no exclusion for gifts to museums. In the event that an object was donated to a museum, the tax was to be paid prior to the gift.
4. There was also a sales tax imposition of 80% of the value of the sale, and the tax was imposed upon the total sale value, not just the profit.
5. Property donated to government institutions was exempt from the various taxes.<sup>213</sup>

Prior to this tax scheme there had been no impositions upon art or its sale. The tax law was a dramatic departure from past practice, and it had a significant negative impact upon the protections of cultural property.<sup>214</sup>

The imposition of tax resulted in decertification requests for many treasures and important art objects. In addition, many objects were sold secretly or hidden.<sup>215</sup> A report appeared in the newspaper *Daiichi Shimbun* on November 19, 1946 titled "National Treasures Being Sold in Black-market to Avoid Payment of Property Tax."<sup>216</sup> The story included the following observations:

The protection of national treasures and important works of art is a very important problem for present day Japan in view of promoting cultural property. Despite this [the law] transactions of these articles among private persons are rampant for fear of the imposition of the property tax, and to recover financial difficulties caused by the new Yen . . . .

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<sup>213</sup> Memorandum, Taxation of Collections (Aug. 12, 1946) (on file with author).

<sup>214</sup> Information Memorandum to Parallel Division, Translation of Interpellation, from the Civil Information and Education Section, Analysis and Research Division, Research Unit, Cultural Resources Branch 4 (Sept. 18, 1947) (on file with author) (translation of transcript of Education Minister Morito's reply to interpellation in Diet on export and loss of national treasures).

But I am sorry to say that a lot of traditional fine arts and beautiful natural sites were burned and destroyed by the war. Above all I am afraid that these remaining excellent fine art objects are being hidden or sold secretly as a result of inflation and property taxes.

*Id.*

<sup>215</sup> Minutes from the 1st Session of the National Diet, *supra* note 140.

<sup>216</sup> *National Treasures Being Sold in Black Market to Avoid Payment of Property Tax*, DAICHI SHIMBUN, Nov. 19, 1946 (on file with author).

....

The Government designated national treasures . . . and other articles . . . . The same authorities have been in charge of their protection by providing restrictive regulations on reports of regarding their transfer . . . and [there are] penal clauses for violators . . . .

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In addition to this, the new government has decided to impose a property tax on national treasures and important works of art, which will be enforced shortly. As a result, many people are selling these articles at high prices to the new rich merchants, capitalists, etc., to evade taxation and to earn new currency.<sup>217</sup>

On August 31, 1947, in a comment offered at a meeting of the Lower House of the Diet, Shigeyoshi Fukuda, Speaker for the Lower House of the Diet, observed "It is said that in evading property taxes, the owners of National Treasures and Important Art Objects are hiding or selling them secretly, and even exporting them."<sup>218</sup> With respect to objects being hidden, the newspaper, *Yomiuri Shimbun*, reported on December 9, 1947:

Owners of works of art, who once strove to have their property designated as national treasures, are now trying to disclaim the designation to avoid paying property tax. Hence, valuable works of art designated as national treasures have disappeared and every effort to find them has resulted in failure.

Every owner of old art treasures is doing all he can to keep

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<sup>217</sup> *Id.*

<sup>218</sup> *Meeting of the Lower House of the Diet Opened, Interpellation on the Preservation of National Treasures and Important Art Objects, Question by Shigeyoshi Fukuda, ASAHI SHIMBUN, Aug. 31, 1947 (Sept. 9, 1947) (on file with author). Morito comments:*

The defeated Japan seeks to survive as a cultural state and for this purpose she must first of all have beauty of nature and attractive objects d'art, but much of the natural beauty as well as many artistic treasures of beauty and of long heredity have been, lamentably destroyed or burned out by the war; especially as pointed out by Mr. Fukuda, those objects of art that survived the ravage are in danger of being either hidden away or scattered or carried away on account of the property [sic] tax and inflation.

*See Minutes from the 1st Session of the National Diet, supra note 140.*

his property secret from the public.<sup>219</sup>

In sum, the imposition of taxes had a significant adverse effect on the preservation of cultural property. Numerous objects were reportedly sold, exported or lost in order to avoid the tax.

As a result, efforts were mounted to repeal the tax laws, reduce the rate of taxation, and/or exempt art or cultural property. A&M opposed the tax and supported a scheme of tax relief for artistic properties. It concluded that the tax scheme was inconsistent with the general policy favoring the protection of cultural property and felt that there should be an exception engrafted for such property that would treat it more favorably. Hollis, in a memorandum directed to the Chief of CIE, observed:

It is not understood how the proposed graduated scale of taxation can bring about a more equal distribution of wealth, as it appears that the distribution will be purely totalitarian in principle, with the government appropriating private property.

The heavy tax on ownership and the heavy sales tax will force a flood of donations to the Government institutions, thereby further pauperizing the people and effecting a totalitarian grab for the benefit of the state alone. Moreover, these taxes will bring hardship to those who have been public spirited and not to those who have been secretive. Such taxes will cause further black market operations.<sup>220</sup>

His statement contains certain recurring themes that would be significant in the negotiations leading to the 1950 law. These themes include that the Japanese Government did not, in the eyes of A&M, seem genuinely committed to protect its cultural property; an A&M belief that the Japanese people had a right to protection of their heritage; and that the exercise of certain controls over property, often desired by the government, would interfere with individual rights that were to be protected under the new Japanese Constitution.

Notwithstanding the efforts of A&M, the portions of the law that would have exempted national treasures and important objects of art from taxation were excised.<sup>221</sup> An article in the *Tokyo Shimbun* of February 23, 1951 continued to note the tax problems and the inability to effect change:

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<sup>219</sup> *National Treasures Hidden to Evade Property Tax*, YOMIURI SHIMBUN, Economic Series 2242, ATIS Press Translations No. 489, Dec. 19, 1947 (on file with author).

<sup>220</sup> Press Release, U.S. Dep't of State, The Conservation of Cultural Property, *supra* note 171, at 2-3.

<sup>221</sup> *National Treasures and Tax Exemption*, TOKYO SHIMBUN, Feb. 23, 1951 (on file with author).

Intimidated by taxes, national treasures and important works of art owned by individuals are going underground one after another. It is also feared that some are flowing out overseas. To prevent this a campaign has been launched for exempting these objects from taxation, but the tax authorities are reportedly hardly to be persuaded.<sup>222</sup>

*b. The Estate Tax*

Japan imposed an Estate Tax, and regulations were passed in early 1946 that provided that such taxes could be paid in kind. National Treasures and important works of art could specifically be transferred pursuant to the regulations to satisfy estate obligations. The scheme included a vehicle whereby property transferred in kind would be put up for auction by the government. Some feared that the tax would lead to the loss of cultural property. An August 28, 1946 report in the *Asahi Shimbun* observed:

Those who can buy the works of art offered at auction by the Government will be the blackmarketers [sic] with plenty of cash money on hand, or foreigners buying through Japanese agents . . . if an . . . excellent collection of works of [sic] art be scattered and lost, or treasured articles of civilization be concealed, advocacy of the establishment of a cultural nation will be meaningless. This is the fault of the misled administration of national treasures which we have had up to now.<sup>223</sup>

*c. Sale to Purchase Necessities*

Consistent with prior observations, the prosecution of the war had taken an economic toll on the population of Japan. Food and clothing were in short supply. It was a country on the defensive economically, and its people suffered deficiencies in basic staple goods. As Minister of Education Abe stated on January 30, 1946 in a newspaper interview, "at present there is a tendency to ignore arts because of the iminent [sic] food crisis."<sup>224</sup> A consequence was that owners of National Treasures and important art were selling them in order to

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<sup>222</sup> *Radiation: National Treasures and Tax Exemption*, TOKYO SHIMBUN, Feb. 23, 1951 (on file with author).

<sup>223</sup> *The Estate Tax and National Treasures*, ASAHI SHIMBUN, Aug. 26, 1946 (on file with author).

<sup>224</sup> Memorandum from W.D. Popham, *supra* note 175, at 1.



survive. A June 30, 1946 article in *Stars and Stripes*, "Japs Would Trade Art for Food," illustrates the sale of art for basic needs. The story stated that artists and businessmen were combining efforts by gathering the best of Japan's fine art for export to the United States in return for food.<sup>225</sup> As reported in an editorial that appeared in *Jiji Shimpo* on November 24, 1949, more than four years following the surrender,

[w]hat an ancient family disposes of first when it becomes poor is its family treasures. Treasures sometime become an expedient means which offer them capital with which the family fortune is retrieved [sic] or by which a temporary makeshift means is devised for their living . . . [T]he economic capacity and the people's living . . . must not be left out of consideration.<sup>226</sup>

d. *Theft and Vandalism*

Depredation and abuse of culturally significant property by the affirmative or negligent acts of persons was common. A cartoon that appeared in *Stars and Stripes* on January 25, 1946 is symbolic of one of the problems confronted by any command, but particularly of one in an occupied area. It depicted a private with cupped hands giving another soldier a boost over a fence upon which a sign was posted that boldly said "Off Limits." The caption under the drawing stated: "Quit worrying. We can always say we didn't see the sign."<sup>227</sup>

More serious threats and behaviors were also evident at the time. For example, Kinji Fujikawa, Executive Secretary of the Imperial Household Museum, reported what was considered a minor incident to the Provost

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<sup>225</sup> Inter-Division Memorandum from J.M. Plumer, Fine Arts Advisor, to Chief of the Religions and Cultural Resources Division, Civil Info. and Educ. Sec., SCAP (June 20, 1949) (on file with author).

<sup>226</sup> Editorial, *National Treasures and National Power*, *JJI SHIMPO*, Nov. 24, 1949, at 2 (on file with author).

<sup>227</sup> Schell, *Occupation Outbursts*, *STARS AND STRIPES*, Jan. 25, 1946 (on file with author). The U.S. Military recognized the need to prevent vandalism:

4. Regulation for the Administration of Cultural Structures and Objects.

1. They should take necessary action, on the concurrence of the arts and monuments section, and upon request of the proper Japanese authorities, to place "off limits" to civilian or to any or all service personnel, and to authorize the posting of guards, Military or Civil, as may be needed to prevent unauthorized entry, theft, damage, defacement, sacrilege or improper use of any building or area.

Memorandum from Walter D. Popham, Chief, Arts and Monuments Section, United States Army Forces, Pacific, Military Government Section, to the Chief Military Government Officer (Sept. 1, 1945) (on file with author).

Marshall by letter dated December 4, 1946. In the letter he described the events of November 28, in which a group of three soldiers, evidently of the Allied forces, were discovered trying to open a showcase containing a lacquerware exhibit. According to the report,

[a] soldier with a mark of private first class produced a bunch of keys in a ring, and thrust one of them in the keyhole . . . . The museum guard who was standing near one end of that room called to the soldier . . . . [t]he soldier tried to turn the key which was stuck; . . . The group looked embarrassed . . . . Another of the group who had gilt "U.S." on his collar then tried his hand at the key, and with difficulty succeeded in extracting it.<sup>228</sup>

The soldiers apparently left the museum without having caused any damage. They were not apprehended.

It would be improper to assume, however, that occupying forces posed the only threats. Threats to the security of cultural property came from all quarters. Numerous instances that were not the subject of official reports but indicated possible misconduct by various groups in addition to military personnel also occurred. A very brief survey, provided solely for purpose of illustration, could include:

Possible Thefts:<sup>229</sup>

1. Daigo, Daige-ji: Gojincte was broken into by a soldier from Otsu. Certain small religious objects were purportedly taken, but no other damage was reported.
2. Kamakura, Villa Senksanse: The building was entered forcibly and several small objects were taken.
3. Mt. Mitake, Astronomical Observatory: Possible pilfering by American soldiers.
4. Mt. Heizen, Sakamoto, Enryaku-ji: Several buildings were broken into and minor thefts occurred.
5. Osaka, Osaka Castle: Historical exhibits suspected to have been removed by soldiers.
6. Tokyo, Imperial Household Museum: Small objects

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<sup>228</sup> Letter from Kinji Fujikawa, Executive Secretary, Imperial Household Museum, to Office of the Provost Marshall of Greater Tokyo (Dec. 4, 1946) (on file with author).

<sup>229</sup> Memorandum from Captain, Walter D. Popham, for OIC, Arts and Monuments Division, (June 20, 1946) (on file with author); *Topic of Today: Times When Disasters Overtake National Treasures*, YUKAN ASAHI, July 31, 1950 (on file with author).

reportedly taken from storeroom.

7. Tokyo, Nezu Collection Storehouse: Objects of minor importance removed in trucks.
8. Yushima, Holy Temple: Three bronze images of Korean dogs from the roof were stolen and one was broken into pieces to allegedly sell to an antique dealer for two thousand yen.

Possible Vandalism:<sup>230</sup>

1. Hayama, Imperial Seaside Villa: Report that soldiers entered the building and disturbed the property of a caretaker.
2. Kyoto, Yawata Shrine: A wooden statue of a guardian god was removed from the temple and carried to the Shijo bridge. Wooden headgear and quiver for arrows was broken. Six stone lanterns were slightly damaged by soldiers while they were upon them taking pictures.
3. Nara, Todai-ji Temple: Damage was caused to the figure of a guardian god in front of Daibutsuden.
4. Okayama, Korakuen Garden: Trucks were driven over paths in the garden causing damage.
5. Otsu, Miiders, Onjo-ji: The pagoda was forcibly entered and damage was done to the interior. Other minor buildings were broken into and damaged. Soldiers made improper use of grounds and it was made "off-limits.
6. Tokyo, Shiba Park: Bronze ornaments were removed from lanterns and damage was also observed to a stone carved with numerous Buddhas.

e. *Vagrancy and Fire*

Like food and clothing, shelter is one of life's common necessities. The homeless of Japan frequently inhabited national monuments and treasures in search of shelter. For example, the mausoleum of the second dynasty of Tokugawa Shogun in Zojoji, Shiba, Tokyo, a national treasure, was used as the unauthorized residence of two or three families.<sup>231</sup> The five-storied pagoda in Kanyeiji, Uyeno Park in Tokyo was the sleeping berth of vagabonds.<sup>232</sup> It was

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<sup>230</sup> Memorandum from Captain, Walter D. Popham, for OIC, Arts and Monuments Division, (June 20, 1946) (on file with author); *Topic of Today: Times When Disasters Overtake National Treasures*, YUKAN ASAHI, July 31, 1950 (on file with author).

<sup>231</sup> *National Treasures and National Power*, supra note 226.

<sup>232</sup> *Id.*

not only that the treasures were being used, however. Frequently, they were being abused. It was observed that at Kumamoto Castle, Kyushu jobless men were stripping the floorboards and using them as firewood.<sup>233</sup>

This implicates another significant problem that Japan faced during the occupation, namely, fire. Fire was a tremendous risk since almost all of the necessities of life were composed of or depended upon wood, grass, or paper. Unfortunately, smoking and the lighting of casual fires was commonplace. While precautions were attempted, including prohibiting smoking in locations where shops or stores selling celluloid articles were located and prohibiting the lighting of fires in the neighborhoods of markets,<sup>234</sup> it was difficult to police and control a population that had other pressing matters on its mind. Negligence was a tremendous problem. The Horyuji fire had captured the attention of the press and provided the public with reason for supporting the effort to protect cultural property. The fire was the result of the neglect of the workers at Horyuji. They had failed to monitor and turn off electric cushions used by them, resulting in the conflagration.<sup>235</sup>

In addition, lifestyles were hard to change, as evidenced by a story that appeared in *Jiji Shimpo* on October 9, 1950:

By the stone staircase (at Kiyomizu-do Temple in Ueno) there is a board which says no smoking within 30 meters. Beside it a woman peddler was smoking, and being warned by an inspector, put off the light as calmly as if nothing had been wrong. Behind their back, seeing this scene, a forty year old man in a sack coat struck a match and lit a cigarette. Inspectors are busy. Eight persons were warned in five minutes.<sup>236</sup>

The incident was not an isolated one. At the Toshugo Shrine, match sticks were found to have been scattered everywhere, and, at other shrines, vagabonds were reported as making fires without reserve.<sup>237</sup> Losses began to mount. A November 24, 1949 editorial in *Jiji Shimpo* presented a list of treasures lost or damaged by fire:

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<sup>233</sup> *Id.* at 1.

<sup>234</sup> *No-Smoking Zones to be Set Up in Tokyo*, ASAHI SHIMBUN, Feb. 19, 1950 (on file with author).

<sup>235</sup> *Horyuji Fire Trial Begins*, MAINICHI, Sept. 21, 194 (on file with author). See also Sub-Editorial, *Horyuji Fire*, SHIN YUKAN, Jan. 29, 1949 (on file with author).

<sup>236</sup> *National Treasures Will Easily Catch Fire*, JIJI SHIMPO, Oct. 9, 1950 (on file with author).

<sup>237</sup> *Id.* Niten-mon Gate of the Senso-ji Temple ("Three vagabonds are boiling water sitting on mats at the left corner of the gate. When an inspector approached, a shaggy vagabond said smoothly, I'm fully careful of fire, sir.") *Id.*

Toward the end of February, Tsutsui Gate of Matsuyama Castle in Shikoku, another national treasure was lost by fire . . . though not entirely burned, there are many instances of old castles, temples and shrines, classed as national treasures, that are damaged by fires . . . to such an extent that they may be entirely lost sooner or later. Among the buildings, Matsumoto Castle, Himeji Castle, Matsue Castle, the Hoodo in Byodo-in of Uji, Doshunji of Yamaguchi, Kondo in Chuson-ji of Hiraizumi, various old temples and shrines in Kyoto and vicinity as Tomyoji, to begin with may be counted.<sup>238</sup>

This form of loss, added to others, demanded a coordinated national response.

*f. Use by Allies*

The Allies, in occupation, required space to place offices, store vehicles and equipment, and house staff and dependents. In addition, the incidental use of certain areas and the increased traffic and congestion created thereby often put recognized cultural locations at significant risk. In addition to the interventions that were required as a result of purported thefts and other depredations, there were occasions when authorized actions of SCAP and its staff put treasures at risk. A&M was involved in moderating and mediating these problems. One such event was a proposal of the Engineering Section of SCAP to construct housing for military dependents on the grounds of the Kyoto Shokubutsuen, the Kyoto Botanical Gardens.<sup>239</sup> This was met with significant opposition not only by the Japanese, but also by A&M and the Cultural Resources Research Unit. Weir prepared and presented a lengthy and detailed report outlining the proposed use of the area and offering an alternative. A&M supported the report as part of its effort to preserve cultural property. In a memo of June 13, 1946, Walter Popham noted:

The cultural value of the area should be obvious and I think Mr. Weir has done an excellent job in presenting the facts. I cannot refrain from adding my own protest at the thought of taking over this area and thus destroying not only one of the two worthwhile Botanical gardens in Japan. But also the result of some thirty

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<sup>238</sup> *National Treasures and National Power*, *supra* note 226, at 1.

<sup>239</sup> Memorandum from Captain Walter D. Popham, Chief, Arts and Monuments Section, U.S. Army Forces, Pacific, Military Gov't Sec., to the OIC Arts and Monuments Division 14-15 (June 13, 1946) (on file with author) [hereinafter Popham Memorandum of June 13, 1946].

three years of work, and one of the recognized cultural and scientific institutions of Japan.<sup>240</sup>

g. *The Attitudes of the Population and Government to Art and Cultural Property*

While this Article does not purport to be a psycho-social analysis of the Japanese mind, it is worthwhile to note certain purported attitudinal trends that suggest that cultural property and its care were not the foremost concern. When considering the paucity of the necessities of life during the period of occupation and reconstruction and the resulting priorities, there are substantial indications from the Japanese people themselves that the environment was not particularly sensitive to preservation of art and artifacts. As one author suggested in the *Tokyo Shimbun* on July 4, 1950:

We often have a feeling that we cannot cry too much or resent too much certain matters. We have both feelings at the same time at the loss of the Golden Pavilion. To our regret, we see Japanese everywhere suffering from an abandoned feeling due to defeat in the war, and they handle things very roughly . . . .<sup>241</sup>

Other authors of the period have suggested that Japan was in the midst of a cultural awakening during the period of Occupation, and that it had a difficult time shedding the sleep of aged traditions and perspectives. In general, arts and its artifacts have been considered a culturally effeminate form of expression and, as the promotion of the arts and the protection of cultural properties at a government and institutional level was the province of a generally male dominated structure, it was not placed at a high level in the hierarchy of perceived or acceptable needs. As a consequence, the arts were suffering due

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<sup>240</sup> Popham Memorandum of June 13, 1946, *supra* note 239. See also Memorandum from Captain Walter D. Popham, to the Chief Military Government Officer, Working Instructions for Ken Level Military Government Personnel Relative to Arts and Monuments (Sept. 1, 1945) (on file with author) providing:

5. Regulations for the Military Use or [sic] Occupancy of Cultural Buildings. All Military and Naval personnel are instructed to prevent the military use or billeting of armed forces, in any building of cultural, historic, religious or artistic value, except in cases where no other suitable building is available. There are few if any cases where such buildings should be appropriated since in general, these buildings are unsuited to military usage, and also because of the delicate structure and surroundings, and the fragile character of the decorations, it is impossible to protect such structures from irreparable damage which any sort of military use would cause.

<sup>241</sup> Sub-Editorial, *Look Out for Fire*, TOKYO SHIMBUN, July 4, 1950 (on file with author).

to a gender gulf. As Mr. Rusburo Ihira noted:

In Japan, beauty and daily life are often thought apart. Here is a serious defect in the fabrics of culture . . . . Beauty should not exist apart from our daily life. . . . In Japan, however, the beautiful is insulated from a daily life and this has been especially so since the Meiji Era.

This lack of popularization of art can be attributed to a variety of causes. In the first place, the Japanese have an erroneous idea about beauty. They want to associate beauty with a feministic melancholy and luxury. This notion is as erroneous as the feudalistic concepts that masculine virtue consists of frugality and fortitude only. It is deep rooted . . . . Art has never had a place in the history of the development of culture.<sup>242</sup>

From a third point of view, the general attitude of the population and its average community member was not perceived as naturally consonant with that required to protect cultural property. In this regard, gender was not, apparently, significant. In the words of an editorial in the *Tokyo Shimbun* of November 30, 1949:

It is reported that even the general public can notice Castle Matsumoto warped and leaning to the right. Professor Fujishima of Tokyo University has reportedly said, "The castle will acceleratively (sic) crumble if left as it is." As this is the oldest of important edifices which survive in the form of castles, spontaneous crumbling must have occurred. But as this is as famous as the castles in Matsue and Himeji, we want it to be reinforced somehow or other. It is reported that people who visit this old castle break off branches of trees or carry away broken pieces of the stone wall, resulting in further devastation of the castle. Such acts cannot be called thoughtless.

In fact, most Japanese are said to have extreme indifference in their sense of care for private and public objects. It is true that they have disease such as this. That vagrants make a fire or that men and women pluck grass or flowers in parks or precincts of temples and shrines are good examples. This feeling caused an

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<sup>242</sup> *Beauty Should Not Exist Apart from our Daily Lives*, NIPPON TIMES, June 29, 1946 (on file with author).

accidental fire of the Horyu-ji Kondo, total destruction of the Tsutsui Gate of Castle Matsuyama and a fire of Castle Matsumae. "The cultural goods law bill" is to be presented to the ordinary Diet and an organization is to come into existence for preservation of cultural goods, but the mental attitude of the people comes into question first. For instance a Diet member reportedly said in the Diet, "well, protection of cultural goods! Indeed this is a cultural nation. Shall we protect electric refrigerators also?" If he is making a joke, he is out of due limits, and if he is serious he is stupid. As long as such persons exist, a hundred cultural good preservation committees will be meaningless. The mental attitude of the people is most important.<sup>243</sup>

There is little question that there was a general perception at the time that many treasures had been neglected for long periods, were decaying, and were in significant disrepair. Temples and shrines were considered in despicable condition. Some, like Warner, were not as pessimistic as most. Concerning certain art objects found in Kyoto and Nara, he noted that while preservation conditions of art objects in Nara were good, there was termite infestation and a mildew problem. The Kyoto National Treasures Preservation Association communicated a less optimistic point of view, however, in a petition that it transmitted to Mr. Kotaro Tanaka, Minister of Culture in 1946. It observed:

Although we are sacrificing ourselves as the owners as much as possible for repairing our own national treasures, as we believe such sacrifice is morally duty-bound, it has become almost impossible nowadays for us to continue maintaining them at our own cost because of the inflation prices of commodities so high as beyond our private financial power. Those owners of seriously broken down buildings are those who have lost the opportunity of repairing their own treasures because of their nonqualification as of the recipient of a national subsidy due to their lack of the private paying capability provided in the National Treasure. [sic] Preservation Law. It is almost impossible for them to continue repairing at the existing percentage . . . .<sup>244</sup>

It was common knowledge that the repairs at Horyu-ji were proceeding slowly

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<sup>243</sup> Sub-Editorial, *Protection of Cultural Property*, TOKYO SHIMBUN, Nov. 30, 1949 (on file with author).

<sup>244</sup> Petition from Kyoto National Treasures Preservation Association, to Mr. Kotaro Tanaka, Minister of Education, at 1 (Dec. 2, 1946) (on file with author).



at best, and the state had been helping to defray the cost of those repairs since 1934 by providing a subsidy of ¥ 125,000 per year.<sup>245</sup> It was reported that the annual cost for repair and preservation of national treasures, including images, buildings and paintings would amount to approximately ¥ 100 million. The state appropriation during that same period was only ¥ 15 million. At that time in 1949, it was predicted that thirty to forty percent of national treasures would be lost within four or five years. As one writer observed, “[T]he recent Horyuji fire is not caused by leakage of electricity or a blunder, but rather . . . by the niggardly spirit of a nation . . . .”<sup>246</sup>

In sum, the most significant problems with respect to the protection of cultural property seemed to have, in fact, related to the attitudes of the populace and the lack of adequate economic support provided by government. The prior cultural property laws had been put in place by well-meaning legislators. The resources, however, had not been budgeted to support administration of the laws.

[T]he problem of preserving cultural property is, in the long run, an economic problem. However repeatedly the national preservation system may be revised, effects of changing for the better cannot be expected greatly, unless the economic background is strengthened.<sup>247</sup>

A&M was well aware of this condition, and through repetitive meetings with government officials, including weekly meetings with the *Mombusho*, they expended considerable effort to ameliorate the condition. By 1950, the time had come for a renewed commitment to preservation of cultural property and the Arts and Monuments Branch was a catalyst for this change.

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<sup>245</sup> Report About The Execution of Social Education Programs After the Termination of the War (Undated) (on file with author); see also *Horyuji Fire*, *supra* note 235, providing:

Though it is not clear whether the fire was caused by electricity leakage or by blunder, anyway, there is no doubt that complete measures for prevention were not considered.

This is because no serious efforts were made for the preservation of the national treasures while designating them as national treasures. It is a well-known fact that the repair work on the internationally famous Horyuji was making poor progress.

*Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *National Treasures and National Power*, *supra* note 226.

V. THE 1950 LAW FOR THE PROTECTION OF CULTURAL PROPERTIES AND SPECIFIC ACTIVITIES OF THE ARTS AND MONUMENTS BRANCH OF SCAP

In addition to the high level of daily involvement by A&M in the promotion of the preservation of cultural property, A&M also appears to have been actively involved with, and had intimate knowledge of, the details of the efforts to modify and improve legislation concerning cultural property throughout the period of Occupation. For example, during early attempts to reform the laws, concerns had arisen in *Mombusho* with respect to the classification of goods. A&M had become aware that the categories could be manipulated so as to frustrate the tracking of important art objects. As a result of A&M discussions with the Bunkacho (the Agency for Cultural Affairs of the Ministry of Education), a third category, in addition to National Treasures and Important Art Objects, was added.<sup>248</sup>

A&M archival records contain such informative objects as a 1947 handwritten document presented to A&M entitled "A Private Draft Concerning the Revision of the National Treasure Laws." In that document recommendations were made, and explanations and analysis were offered concerning proposed changes to the National Treasures Act. At the close of the document it explicitly states: "This draft is the purely private draft made by Fujita Tsuneyo and Ooka Minoui." Accompanying the draft is an official SCAP Report on Conference cover sheet signed by Sherman Lee. Among the interesting items noted on the cover sheet are the following:

1. Fujita was a representative of *Mombusho*.
2. The document was presented to A&M at one of the regular weekly conferences it had with *Mombusho* representatives.
3. The "informal and personal" suggestions with regard to a new National Treasures law as proposed by Fujita and Ooka were discussed at the meeting.
4. Fujita agreed with the suggestions of A&M personnel as to the recommended substance of such a law and also agreed to discuss the matter further with other representatives of *Mombusho*.
5. The parties had agreed to continue their discussions.<sup>249</sup>

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<sup>248</sup> Lee, *supra* note 8, at 94.

<sup>249</sup> Report of Conference, in the Arts and Monuments Division Office, Subject: Weekly Conference with Mombusho Representative (Jan. 22, 1947) (on file with author).

From this and other documents, one can readily observe not only the investment that A&M had in a sound cultural property law, but also the significant participation and influence it had in the drafting of the various statutes.

The Ministry of Education did, in fact, prepare a bill for the revision of the National Treasures Law. The highlights of the bill included:

1. A shift of emphasis from ownership as a foundation of preservation as found in the existing law to state control of cultural assets.
2. A clarification of state subsidies for the repair of national treasures.
3. Measures to enable the government to purchase national treasures from temples and shrines if preservation could not be properly carried out.
4. Significant government control over cultural property.
5. The curtailment of the export of cultural treasures.
6. Exemption from taxation of certain transactions concerning cultural property.

A handwritten report entitled "Remarks Apropos of Revisions of the N.T. Law Prepared by the Education Ministry" also appears among A&M records.<sup>250</sup> It is a section-by-section analysis of the bill. Of significant interest, however, are the notes and interlineations that appear to have been made by an unknown reviewer. At the top of the document in large hand printing is the statement: "This must be stopped." Below that statement is bold script stating, "See Sect. 3 Which violates constitution." The comment in the analysis of section 3 explains that it proposed to create a compulsory designation system. A comment to that section observes, "it infringes upon personal rights." Other comments on other sections decry bureaucratic interference and call for the protection of private rights.<sup>251</sup> At the time, the National Museum was also working on a separate plan for the protection of cultural properties. The essence of that plan was to transfer the management of national treasures to the museum.

The drafting of the specific legislation that would become the Law for the Protection of Cultural Properties commenced in earnest in February 1949. There were eleven separate drafts of the bill, and Yuzo Yamamoto, Chairman

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<sup>250</sup> Remarks Apropos of Revisions of the N.T. Law, Prepared by the Education Ministry (Undated) (on file with author).

<sup>251</sup> *Id.*

of the group responsible for the legislation, the Education Committee of the House of Councilors, reported that the group had met no fewer than fifty-five times in the course of its deliberations to listen to and adopt recommendations.<sup>252</sup>

A report in March 1949 identified the comments of certain influential political party leaders and their respective positions on the preservation of national treasures. They provide valuable insight into the political dynamics with which A&M was dealing and also help clarify the issues important to the political leaders who participated in promulgating the legislation. Democratic Party President Inukai stated:

It is most desirable for appropriations for the preservation and repair of national treasures to be increased immediately. At the same time, it is advisable to station as custodians men who have deep cultural appreciation, not men who are interested only in salaries. One good method is to appoint jobless cultural men of localities for this job. Would it be a good idea to permit a lottery sale for the maintenance of national treasures?

Chairman Eisaku Sato of the Democratic-Liberal Political Affairs Research Committee stated:

To fully protect national treasures with a limited budget, reinvestigation of national treasures is necessary. I would like to have national treasures selected carefully by this investigation, and the state protect them with responsibility. Although some quarters advocate state control of national treasures, I think it would be going too far.

Chairman Katakana of the Socialist Party:

Since the fundamental [sic] lies in improving the cultural knowledge of the people, we will strive to get as much cultural appropriations as possible at the Diet. At the same time, the Party will immediately deliberate on concrete problems such as the method of preservation, for prevention measures and probe of responsibility.

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<sup>252</sup> The House of Councilors, *The 7th Session of the National Diet*, OFFICIAL GAZETTE EXTRA 9-10 (Apr. 27, 1950) (on file with author) [hereinafter *The House of Councilors*].

Education Minister Takahashi:

I am planning to dispatch officials directly from the Education Ministry to investigate whether or not national treasures of special importance are adequately preserved. A revised bill is to be presented at the next session of the Diet. Since the Finance Ministry's concern for national treasures has become greater, the problem of appropriation for national treasure preservation is expected to be settled favorably.<sup>253</sup>

On April 19, 1949, Gallagher, Fine Arts Advisor of A&M, sent a memorandum to the Chief of the Religion and Cultural Resources Division.<sup>254</sup> He attached translations of the various drafts of bills that had been provided to him by members of the Education Committee to that memo. His note indicated that the draft of the proposed National Treasures Preservation Law had, in fact, been superseded by a draft of a bill that purported to be a new Cultural Goods Preservation Law. He continued to comment that the two drafts were similar but that the Committee had felt that theater arts and other fields should be included. Thus, they desired to give the initiative a new and more general title. He then opined, "there would seem to be no objection to this, provided a reasonable, common-sense attitude is maintained toward such materials."<sup>255</sup>

A later undated memo from Plumer, Fine Arts Advisor, to the Chief of the Religion and Cultural Resources Division commented upon the proposed Cultural Properties Protection Law.<sup>256</sup> In the memo he acknowledged agreement in principle with Gallagher that the Chief of the Section of A&M should approve the preliminary draft of the law. He also offered certain specific observations, including one that is very telling concerning the need to support individual rights in property. It reads:

In view of the strongly bureaucratic forces now at work in Japan and specifically in the highly centralized control envisioned by this law, it is recommended that the government's recognition of individual rights should be specified by article. Accordingly, to

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<sup>253</sup> Political Parties Reveal Measures for National Treasure Preservation (Mar. 1, 1949) (on file with author).

<sup>254</sup> Memorandum from GHQ, SCAP, CI&E Section Fine Arts Advisor C.F. Gallagher, to Chief, Religions and Cultural Resources Division, Subject: Cultural Goods Preservation Law and Cultural Commission (Apr. 19, 1949) (on file with author).

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

Article 4 that calls for cooperation of the people toward attainment of the purposes of the law, it is held advisable to add, as Art 4 (item 2): “The Government shall respect the property rights of owners of registered cultural property.”<sup>257</sup>

An Inter-Division Memorandum, dated June 20, 1949, and again directed to the Chief, Religion and Cultural Resources Division by J. M. Plumer, Fine Arts Advisor was captioned “Report on Arts and Monuments: Recommendations of Outgoing Advisor in Fine Arts.”<sup>258</sup> In the memo he made observations and offered suggestions on matters that include: the administration of museums; the reconstruction of Horyu-ji, calling it a grave and expensive matter; that the next advisor should visit the site as soon as practicable; that Japanese field examiners attached to A&M were of tremendous value; and that indigenous art scholars should continue to be encouraged. It also provided two comment sections on the various cultural property efforts. The first addressed the National Treasure and Important Art Object Laws. It noted that they:

should be brought up to date and if practical (I consider it so) merged. This suggestion is made as conservatively and strongly as possible—in view of recent attempts to load revisions of these laws with a number of schemes under excuse of “protection of cultural properties, tangible and intangible.”<sup>259</sup>

The second stated:

National Cultural Property Preservation Law (which failed to pass Diet this spring) on retrospect and after conversation with many Japanese professionally qualified to be interested in same, it appears a very fortunate thing it failed. Future attempts to pass this or a similar law should be strongly resisted . . . . Behind Iwamura’s plausible explanations and swiftly deft additions, there lay a real political power grab. This is the very thing that all previous senior Fine Arts Advisors have attempted to prevent. Particularly objectionable were the implications of government interference with private property (pressure for exhibitions, etc)

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<sup>257</sup> Memorandum From Fine Arts Advisor, J. M. Plumer, to Chief, Religions and Cultural Resources Division, Subject: Cultural Properties Protection Law (Undated) (on file with author).

<sup>258</sup> Inter-Division Memorandum from J.M. Plumer, *supra* note 225.

<sup>259</sup> *Id.*

and of government interference with the crafts. It is felt that had that law passed there would have been an entree for subversive elements.<sup>260</sup> (Emphasis in original.)

A bill to amend the legislation providing for the protection of cultural treasures was presented in 1949 to the fifth session of the Diet by the Education Committee of the House of Councilors (The Upper House). The session, however, closed without considering the bill and it was sent to the Lower House. The legislative action on this bill was then suspended. Its aim had been to give strong national protection to cultural objects. Each house then began the task of separately drafting successor bills intending to submit them for consideration at the next session. Sometime in October 1949, committees for both Houses came to an understanding that the Upper Committee would draft a successor bill and incorporate therein the views of the Lower Committee. The following changes were made in the bill over the course of the several months from the date the first bill was prepared in June to the date of the final bill in November:

1. In addition to national treasures and important art and cultural properties, previously excluded categories of objects buried underground, historic sites, scenic spots and natural monuments were included as protected cultural properties. (Articles 2, 56-65 and 68-82)
2. The Technical Consultative Board, previously mentioned as affiliated with the Cultural Property Protection Committee, was given its own recognized stature. (Article 21)
3. The Cultural Properties Protection Committee was given power to enforce surveys and research requests for national treasures and important cultural properties. (Articles 53-54 and 80-81)
4. Owners of cultural properties would receive certain relief from income, inheritance and admittance taxes. (Articles 91-92)

There were several matters that had been present in the draft of the Lower House that were omitted. The omitted items included: (1) Annual monetary grants to private owners for preservation of important cultural properties; and (2) Consultation between the CPPC and local fire chiefs so that proper measures could be taken to protected important cultural properties under the

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<sup>260</sup> *Id.*

Fire Protection Law (Law 186 of 1948).<sup>261</sup>

On November 10, 1949, the Upper Committee completed the draft bill. It had been reasonably expected that the bill would be submitted to the Sixth Special Session of the Diet. However, its consideration was again carried over. The joint bill was finally taken up by the Seventh Session of the Diet in the House of Councilors on April 26, 1959.<sup>262</sup> Committee Chair Yuzo Yamamoto presented the bill to the House. The bill was composed of 131 Articles and was claimed to be “without parallel in the world history.”<sup>263</sup> The highlights of the bill, as described by Mr. Yamamoto were:

1. There were three basic categories of cultural properties protected:
  - A. Tangible Cultural Properties including buildings, art objects, ancient documents, folk custom data all of which have high historical or artistic value.
  - B. Intangible Cultural Properties including dramatic, musical and industrial arts having high historical or artistic value.
  - C. Historic sites, places of scenic beauty and natural monuments.
2. The bill intended to unify the administration of cultural properties under an independent group called the Cultural Properties Protection Committee (“CPCC”). The CPCC would be provided a special advisory group called the Cultural Property Special Council. The National Museum was to be incorporated into the Council so that it might perform its own functions.
3. The bill would provide for subsidies not only to shrines and temples, as had prior Laws, but would also give them to private individuals who possessed cultural properties. In addition, subsidies would be granted for the protection of intangible cultural assets, buried cultural properties, historic sites, places of scenic beauty and natural monuments.
4. The bill was designed to impress upon owners of cultural properties that such are not only their private property but are also a valuable legacy belonging to all people. It made

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<sup>261</sup> Draft Commentary for the Latest Draft of the Cultural Property Protection Bill, translation by Mr. Takata (Dec. 14, 1949) (on file with author).

<sup>262</sup> House of Councilors, *supra* note 252, at 9.

<sup>263</sup> *Id.*



owners liable for preservation as well as obligated them to exhibit the properties.<sup>264</sup>

In the course of presenting the bill, Yamamoto presented the reasons why it was introduced. He offered the following telling summary observations about the state of cultural property in Japan of the day:

Now I shall explain the reason for . . . submission. Since the defeat in the war, the people speak much about the establishment of a "cultural nation." This is a very good idea. But the motto has not been acted up to . . . . In fact, our old cultural properties which were produced by our ancestors in ancient times, have little been attended to as they should be. No effective measures have been taken for their preservation. How can we hope to become a cultural nation by behaving ourselves in that way? Now we Japanese have surprisingly many cultural properties . . . . But since the beginning of the last war, little attention has been paid to their protection, repair or supervision with the result that those invaluable properties have begun to decay or to be destroyed. Some of them have burnt down or are on the verge of utter destruction. Nothing is more deplorable than such a situation. How can we apologize to our ancestors as well as our posterity if we should break or ruin our valuable inheritances. Nay it humiliates us in the eyes of foreign peoples, too. Therefore, the Government, the owners of those properties as well as people in general must cooperate with each other for the protection of important cultural properties . . . . To that end, it is necessary to make a law for establishing a proper culture administration organ.<sup>265</sup>

The Bill passed the House unanimously, and it was formally promulgated on May 30, 1950. It became operative effective on August 29, 1950, by Cabinet Order Number 276 of August 1950. Upon its effective date, certain prior laws, including the National Treasure Law of 1929 and the Law for the Preservation of Historic Sites, Places of Scenic Beauty and Natural Monuments of 1919, were abolished. In accord with Section 116, the Law concerning the Preservation of Important Objects of Art of 1933 continued to have effect with

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<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 9-10.

respect to items designated as included under the prior law up to the date of enforcement of the new Law. In accord with Section 117, prior designations under the 1919 Law were, under chosen circumstances, also deemed to be designations under the new Law.

While A&M did not get all it wanted, it had asserted considerable influence over the course of events leading to promulgation of the Law.<sup>266</sup> Its general mission to assure the protection of cultural property in Japan was accomplished. The Diet, in its concessions, included words virtually identical to the recommendation of Plumer, as previously noted, which required that the government respect private ownership. The concession in Article 4(3) of the passed bill was the one that A&M considered most significant, reading “in execution of this Law, the Government and the local public bodies shall respect the ownership and other property rights of the persons concerned.”

## VI. CONCLUSION

While the United States remains one of the few developed countries that has failed to construct a comprehensive program for the protection of its own cultural properties,<sup>267</sup> it is evident that it has had significant influence in the world community in general, and over Japan during the last 150 years in particular, in safeguarding these treasures. It is ironic that during this same period, little has been accomplished in the United States on a domestic level to protect its own cultural heritage. With the exception of limited statutes directed at repatriation of select Native American artifacts,<sup>268</sup> some general conservation provisions,<sup>269</sup> and the National Stolen Property Act,<sup>270</sup> there has been little effort to construct an effective and comprehensive program for the protection of cultural treasures.<sup>271</sup> The United States remains one of the few developed countries that has failed even to attempt. Perhaps with a renewed understanding of the importance of cultural property and a better awareness of

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<sup>266</sup> See BEASLEY, *supra* note 58, at 224 (discussing the dynamics in place in 1950 and following).

<sup>267</sup> See generally, LYNDEL V. PROTT & PATRICK J. O'KEEFE, HANDBOOK OF NATIONAL REGULATIONS CONCERNING THE EXPORT OF CULTURAL PROPERTY (1988); INTERNATIONAL REGULATIONS CONCERNING THE EXPORT OF CULTURAL PROPERTY: AN UPDATE (2000).

<sup>268</sup> Native American Graves Repatriation Act of 1990, 25 U.S.C. § 3001 (2002); Illegal Trafficking in Native American Human Remains and Cultural Item, 18 U.S.C. § 1170 (2002).

<sup>269</sup> Archeological Resources Protection Act of 1979, 16 U.S.C. § 470aa (2002).

<sup>270</sup> National Stolen Property Act, 18 U.S.C. § 2314 (2002) (transportation of stolen goods); 18 U.S.C. § 2315 (sale or receipt of stolen goods).

<sup>271</sup> Some effort has been made to protect the cultural properties of other countries from entry into the United States through passage of the Convention on Cultural Property Implementation Act of 1983, 19 U.S.C. § 2601 (2002). See also Regulation of Importation of Pre-Columbian Monumental and Architectural Sculpture or Murals, 19 U.S.C. § 2901 (1972).

the role that the United States and the West has played in the larger global community and in Japan, scholars and politicians can join forces with renewed vigor to address the domestic issues surrounding ethnographic treasures.

**APPENDIX I:<sup>272</sup> Compilation of Various Cultural Property Protection Laws of Japan**

- I. GENERAL GOVERNMENTAL LAWS
  1. General Rules for Ministries: Imperial Edict #122, 1893
  2. General Rules for the Minister of Education: Imperial Edict #279, 1898
  3. Rules Regarding Temporary Employees of the Minister of Education: Imperial Edict #293, 1920
  4. Rules Establishing Bureaus of the Minister of Education: Ministry of Education Instructions of 1913
  5. Rules Establishing Bureaus of the Ministry of Finance: Imperial Edict #327, 1924
  6. Pertinent Rules of the Government of Hokkaido: Imperial Edict #150, 1913
  7. Pertinent Rules for Local Officials: Imperial Edict #147, 1926
  
- II. LAWS REGARDING PRESERVATION OF NATURAL TREASURES
  1. Preservation of National Treasures: Law #17, 1929
  2. Rules for Enforcement of Law Regarding Preservation of National Treasures: Imperial Edict #210, 1929
  3. Regulations for the Enforcement of Law Regarding Preservation of National Treasures: Min. of Ed. Regs. #37, 1915
  4. General Rules of the Society for the Preservation of National Treasures: Imperial Edict #211, 1915
  5. Rules for the Proceedings of the Society for the Preservation of National Treasures: Min. of Ed Regs., 1915
  6. Established Regulation of the Min. of Ed. on National Treasures:
    - a. Reports on Religion, National Treasures, Historic Sites, Scenic Spots: #17, 1930
    - b. Repair of National Treasures: #13, 1930
    - c. Dispersing Funds for Preservation and Repair of National Treasures: #91, 1929
    - d. Supply of Tiles for Repair of Protected Structures and National Treasures: #14, 1916
    - e. Notes on Custody of Protected Structures and National

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<sup>272</sup> Report by Ministry of Education regarding Cultural Objects Preservation Laws (Feb. 1, 1946) (on file with author).

- Treasures: #4, 1902
- f. Reports on Custody of Protected Structures and National Treasures, Theft, Loss: #14, 1914
  - g. Reports on Theft and Loss of National Treasures
  - h. Reports on Theft and Loss of National Treasures, Exhibited Without Government Order: #94, 1915
  - i. Notice Boards on Protected Structures Specified by the Shrine and Temple Preservation Law: #15, 1902
  - j. Ministry of Home Affairs Instruction: #15, 1902 on application of National Treasures Preservation Law: #89, 1929
  - k. Subsidy for Preservation of Old Shrines and Temples: #350, 1918

III. LAWS REGARDING PRESERVATION OF REGISTERED IMPORTANT ART OBJECTS

- 1. Law for Preservation of Important Art Objects: #43, 1933
- 2. Regulations for Preservation of Such Art Objects: #10, 1933
- 3. Regulations for the Committee for Investigation of Important Art Objects: #9, 1933
- 4. Regulations for Proceedings of the Committee for Investigation of Important Art Objects: Min. of Ed. Regs., 1933

IV. LAWS REGARDING PRESERVATION OF HISTORIC SITES, SCENIC SPOTS AND NATURAL HISTORY PRESERVES

- 1. Law for Preservation of Historic Sites, Scenic Spots and Natural History Preserves: #44, 1919
- 2. Enforcement of laws for Preservation of Historic Sites, Scenic Spots and Natural History Preserves: #499, 1919
- 3. Regulations for Preservation of Historic Sites, Scenic Spots, Natural History Preserves: #27, 1919
- 4. Regulations for the Investigation Committee of Historic Sites, Scenic Spots, Natural History Preserves: #397, 1936
- 5. Regulations for proceedings of the Committee for the Investigation of Historic Sites, Scenic Spots, Natural History Preserves: Min. of Ed. Regs., 1936
- 6. Classifications of Historic Sites, Scenic Spots, Natural History Preserves: #51, 1920
- 7. Principal sites to be preserved in this classification: Min. of Home Affairs Decision, 1920

8. Certificates of members of the Committee for Investigation of Historic Sites, Scenic Spots, and Natural History Preserves: #209, 1921
9. Items in the Records of Historic Sites, Scenic Spots, Natural History Preserves, Min. of Home Affairs Decision, 1920
10. Established Regulation of the Ministry of Education on Historic Sites, Scenic Spots, and Natural History Preserves:
  - a. Control of Matters Relating to Preservation of Historic Sites, Scenic Spots, Natural History Preserves, 1928
  - b. Reports on preservation of Historic Sites, Scenic Spots, Natural History Preserves, 1922
  - c. Employees stipulated in Art. II of the Law on Preservation of Historic Sites, Scenic Spots, Natural History Preserves, 1922
  - d. Photographs of Historic Sites, Scenic Spots, Natural History Preserves: #48, 1922
  - e. Use of National Parks: #91, 1931
  - f. Administrators of Historic Sites, Scenic Spots, Natural History Spots: #29, 1937
  - g. Institutions for Preservation of Historic Sites, Scenic Spots, Natural History Preserves: #7, 1925, #73, 1936, #7, 1936
  - h. Selection of Natural History Preserves: #8, 1928
  - i. Granting Medals to Japanese Dogs: #26, 1937
  - j. Funds from Historic Sites, Scenic Spots, Natural History Preserves: #1, 1925
  - k. Preservation Laws Applied to Imperial Estates: #5, 1924
  - l. Transfer of Control of Sites: #1, 1923
  - m. National Properties Supervised by the Ministry of Home Affairs as Authorized by the Preservation Laws: #52, 1929
  - n. National Properties Supervised by the Ministry of Education as Authorized by the Preservation Laws: #22, 1929
  - o. Statement of Increase and Decrease of National Properties Authorized as Sites: #842, 1930
  - p. Treatment of National Properties: #162, 1930
  - q. Control of national property belonging to Universities, Colleges, Libraries: Min. of Ed. Regs., 1922
  - r. Differences Between Public and Private Property Control: #99, 1922

## V. MISCELLANEOUS LAWS REFERRING TO PRESERVATION

1. National Treasures
  - a. Preservation of Antiques and Ancient Goods, Cabinet Announcement, 1871
  - b. Preservation of Rituals of Shrines: #159, 1875
  - c. Control of Temple Compounds: #12, 1903
  - d. Application for Use of Such Compounds: #467, 1906
  - e. Regulations on Cutting Trees in Temple and Government Land: #390, 1903
  - f. Transfer of Temple Compounds: #401, 1912
  - g. Preservation of National Treasures: #92, 1929
  - h. Imperial Crest: #23, 1879
  - i. Accounts of Shrine Management: #54, 1926
  - j. Expenses of Investigating Committees: #13, 1921
2. Historic Sites, Scenic Spots, Natural History Preserves
  - a. Report of Discovery of Ancient Tombs: #59, 1874
  - b. Report on Discovery of Ancient Tombs on Private Property: #3, 1880
  - c. Archeological Finds as Materials for Study: #985, 1899
  - d. Archeological Finds Preserved by Prefectures: #221, 1901
  - e. - Do - #222, 1901
  - f. Liaison with Min. of Imperial Household on Excavation of Tombs for Anthropological Study: #410, 1901
  - g. Excavation of Mausolea: #17, 1901
  - h. Mausolea Excavated by Imperial Universities: #1339, 1902
  - i. Moving of Excavated Articles to Universities: #655, 1908
  - j. Handling of Excavated Articles by University Professors: #11, 1908
  - k. Excavation of Mausolea: #2653, 1913
  - l. Excavation of Mausolea by Universities: #127, 1913
  - m. Excavation of Mausolea and Archeological Finds: #2, 1916
  - n. Cost of transport of Archeological Finds: #67, 1920
  - o. Discovery and Excavation of Mausolea: #787, 1934
  - p. Construction of Cable Railways: #22, 1928
  - q. Cutting Trees in Compounds of Shrines and Temples: #235, 1873
  - r. Construction of Monuments at Sites or Mausolea: #115, 1898

- s. Shapes of Monuments Above Described: #18, 1900
  - t. Law for Advertisements: #70, 221, 1911
  - u. National Forest Laws: #85, 1899, #43, 1907
  - v. Town Planning Law: #36, 1919
  - w. Re-Adjustment of Rice Fields Law: #30, 1909
  - x. Laws and Regulations on Hunting: #32, 1918, #28, 1919
  - y. Maintenance and Repair of Roads: #15, 1921
  - z. Income from Trees on Sites: #116, 1900
3. Miscellaneous
- a. Rules Regarding Catalogue of Shrines, Gods, Description, Type of Notices, Transfer, etc. of Shrines: #6, 1913
  - b. Regulations on City Buildings: #438, 1920
  - c. Law of Petition: #105, 1890<sup>273</sup>

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<sup>273</sup> Japanese Cultural Resources, Report No. 3 of the Civil Info. and Educ. Sec., Research and Info. Div. (Feb. 1, 1946) (Index of Rules for Administration of Preservation) (on file with author).



**APPENDIX II:<sup>274</sup> Law for Preservation of Historic Sites, Scenic Spots and Natural History Preserves, Law No. 44 (1919)**

*Article 1*

Those historic sites, scenic spots and natural history preserves to which the present law is to be applied shall be designated by the Minister of Home Affairs.

The prefectural governor may designate a site temporarily, in case it is necessary to do so prior to designation as mentioned above.

*Article 2*

Officials concerned may excavate, remove obstacles, etc. at the site or its surroundings, when it is necessary to the investigation of the historic site, scenic spot, or natural history preserve.

*Article 3*

Any modification of the present conditions of historic sites, scenic spots and natural history preserves, or any act that may have an effect upon its preservation, must be sanctioned by the prefectural governor.

*Article 4*

The Minister of Home Affairs may, in connection with the preservation of historic sites, scenic spots, and natural history preserves, prohibit or limit certain acts, or establish necessary measures within a fixed area.

Any private person who has suffered damage by the preceding order, disposal or act under Article 2 shall receive reparation by the government as is provided by law.

*Article 5*

The Minister of Home Affairs may designate local communities to take charge of historic sites, scenic spots or natural history preserves.

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<sup>274</sup> Law for Preservation of Historic Sites, Scenic Spots and Natural History Preserves, Law No. 44 (1919) (Japan) (on file with author).

Expenses incurred in the administration as stated in the preceding article shall fall on the community concerned. The National Treasury may grant a subsidy for part of the expenses.

*Article 6*

Any one who has acted against the provisions of Article 3, or against the order according to the provisions of Clause 1, Article 4, shall be subject to less than 6 months' imprisonment or detention or fined less than ¥100.

ANNEX

Items necessary for the enforcement of this law shall be decided by Imperial order.

The date of the enforcement of this law shall be decided by Imperial order.

Article 19 of the Law Regarding the Preservation of Ancient Temples and Shrines shall be abolished from the day of the enforcement of the present law.

N.B.

(1) This law shall be enforced from 1 June 1919 by Imperial Edict, No. 261.

(2) The Minister of Home Affairs herein stated shall now mean the minister concerned. However, owing to the transfer of control of business concerning preservation of historic sites, scenic spots and natural history preserves, the Minister of Education shall be the minister concerned from 1 December 1928.

**APPENDIX III:<sup>275</sup> The National Treasures Preservation Law of 1929***Article 1*

Buildings and other highly-priced articles that have historical significance and artistic value shall be designated as national treasures by the responsible minister through the deliberations of the National Treasures Preservation Association.

*Article 2*

When the responsible minister has designated a treasure according to the regulation of the previous article, he shall have the decision published in the official gazette and inform the owner of such an object of the decision.

*Article 3*

No national treasure shall be exported or shipped without the permission of the responsible minister.

*Article 4*

The responsible minister's permission shall be obtained when a national treasure is to be reconditioned, but not when maintenance repairs are to be made.

*Article 5*

When the responsible minister is to issue such permission as stated in the two previous articles, he shall consult with the National Treasures Preservation Association.

*Article 6*

When a national treasure changes ownership, or suffers damage or loss, the owner is ordered to report to the responsible minister.

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<sup>275</sup> The National Treasures Preservation Law (1929) (Japan) (on file with author).

*Article 7*

The owner of a national treasure has the duty of exhibiting his treasure (*kokuhō*) in the Imperial Household Museum or in government or public museums or art gallery for the space of one year, upon command of the responsible ministers except when the article is to be used under a religious celebration law or when it is necessary for official business. When the owner is dissatisfied with the above command, he may appeal the matter.

*Article 8*

The National Treasury shall allow subsidies to those who exhibit their national treasures according to the regulation of the previous article.

*Article 9*

The National Treasury shall compensate the owners of national treasures for ordinary damage or loss while on exhibition, under the regulation of Article 7, except in cases of inevitability. The amount of compensation shall be determined by the responsible minister according to the above regulation, but when the owner is dissatisfied he may appeal the case to an ordinary court.

*Article 10*

When a national treasure changes ownership while on exhibit, the new owner shall succeed to the old ownership rights and privileges under this law.

*Article 11*

The responsible minister shall abolish the designation of a national treasure through the consent of the National Treasures Preservation Association when it is necessary for public benefit or other special reason. The responsible minister shall notify the public of such abolishment, according to the above regulation, through the official gazette and inform the owner of the matter.

*Article 12*

When the owner of a national treasure is a Shinto shrine or a Buddhist temple (including Buddhist hall), the shinto priest of the Shinto shrine (the chief priest of the national shrine, a temple priest of the professional temple or a

manager of village temple), or the superior of a Buddhist temple (a Buddhist-in-charge of a Buddhist hall) shall be the controller of the designated national treasure; or each may select a controller with the permission of the responsible minister.

#### *Article 13*

A national treasure that belongs to a Shinto shrine or a Buddhist temple cannot be disposed, mortgaged, or seized, except with permission of the responsible minister. When the responsible minister is to issue permission according to the above regulation, he shall consult with the National Treasures Preservation Association. Such actions taken without the said permission shall be nullified.

#### *Article 14*

The responsible minister, with the consent of the National Treasures Preservation Association, shall allow subsidies for maintenance repairs of a national treasure that belongs to a Shinto shrine or a Buddhist temple. When necessary, such subsidies may be given for the national treasures that belong to other than Shinto shrines or Buddhist temples, according to the above regulation.

#### *Article 15*

Subsidies shall be given according to the amounts estimated for maintenance repairs, but the surplus balance after exact expenses shall be returned.

#### *Article 16*

The amount of annual budget for the said subsidies or supplementary allowances from the National Treasury shall be from ¥150,000 to ¥200,000. Provision may be made within the fixed budget for additional temporary subsidies or supplementary allowances, when necessary.

#### *Article 17*

Matters pertaining to the system and extent of rights of the National Treasures Preservation Association, besides this law, shall be determined by

Imperial ordinance.

*Article 18*

Matters pertaining to the control of national treasures that belong to Shinto shrines or Buddhist temples shall be determined by orders.

*Article 19*

Matters pertaining to the national treasures that belong to the Government shall be determined by special Imperial ordinance.

*Article 20*

When a national treasure is exported or shipped out of the country without the permission of the responsible minister, the violator shall be imprisoned no more than five years or fined no more than ¥5,000.

*Article 21*

Anyone who damages, injures or hides a national treasure shall be imprisoned no more than five years or fined no more than ¥500. Any owner who damages, injures or hides his national treasure shall be imprisoned no more than two years or fined no more than ¥200.

*Article 22*

When anyone reconditions a national treasure without permission, against the regulation of Article 4, he shall be fined no more than ¥500.

*Article 23*

Anyone who does not report against the regulation of Article 6, shall be fined no more than ¥500.

*Article 24*

When a national treasure on exhibit is damaged or lost through the negligence of the owner or of the controller of a national treasure that belongs to a Shinto shrine or Buddhist temple, the owner or the controller shall be fined

no more than ¥500.

*Article 25*

Regulation Articles 206 and 208 of the Noncontestable Procedures Law shall be applied for the procedures of fining those violating this law.

ADDITIONAL REGULATIONS

- [1] The dates of enforcement of this law shall be determined by Imperial ordinance.
- [2] The old Shrines and Temples Preservation Law shall be abolished.
- [3] Specially protected buildings and articles that are qualified as national treasures under the old Shrines and Temples Preservation Law shall be defined as designated national treasures under this law. The preservation funds that were given under the old Shrines and Temples Preservation Law shall also be defined as the subsidies given under this law. (Imperial Ordinance No. 209 or 1929 shall be enforced from 1 July 1929).

**APPENDIX IV:<sup>276</sup> Law for Preservation of Important Art Objects,  
Law No. 43 (1933)**

*Article 1*

Anybody who wants to export or remove objects excluding national treasures which are considered important from the viewpoint of history or fine arts, must have the sanction of the minister concerned. However, the same rule may not be applied to works done by living artists or which are less than fifty years old, or have been imported within a year.

*Article 2*

Those objects which require permission for their export or removal shall be designated by the minister concerned, announced in the official gazette, and such action shall be reported to their owner.

Those who obtain ownership to such objects as a result of sale, exchange or gift after the notice of designation has been published, shall be presumed to have known that such objects are so designated.

*Article 3*

In case the minister concerned does not give such sanction to the object as stated in Article 1, he shall designate it as national treasure under Article 1 of the Law Regarding the Preservation of National Treasures within one year, or cancel the designation under the preceding article.

*Article 4*

Matters concerning authorization, cancellation, and report in the change in owner of the objects authorized by Article 2 shall be decided by Imperial order.

*Article 5*

Anybody who has exported or removed an object designated under Article 2 shall be subject to less than three years' penal servitude or impairment or fined

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<sup>276</sup> Law for Preservation of Important Art Objects, Law No. 43 (1933) (Japan) (on file with author).



less than ¥1,000.

#### ADDENDA

The law shall be in force from the day of its publication.