

# ● WHOSE HERITAGE IS IT? UNDERSTANDING THE SCOPE OF LAWS IN PROTECTION OF CULTURAL PROPERTY SINCE COLONIAL TIMES



**Dr Navjeet Sidhu Kundal\***

**Dr. Aditi Mann\*\***

## **Abstract**

*India, as a nation, has a rich cultural history spanning for thousands of years. Since ancient times, there have been several dynasties which have carved out their empire in various parts of the country. Besides gaining political influence, there have also been large scale construction activities which occurred primarily in last thousand years. This has included construction and beautification of temples, thereby, giving boost to art and craft. As reminiscence of this rich cultural heritage, many antiquities have been, and continue to be, discovered from various parts of the country. Largely, however, these antiquities are undocumented, making them easy target for anti-social elements. With the focus on case-studies, this paper intends to understand the legislations which have been formulated for protection of the antiquities.*

## **Introduction**

Since India's independence, there have seen many instances where valuable antiquities were smuggled out of the country. Recently, there has been a trend where the transaction of these antiquities symbolises the 'Memorandum of Understanding', an extension of friendly alliance between the two countries. There are several organisations which have dedicatedly worked for the recovery of the stolen and lost antiquities. India Pride Project, for example, is one such association<sup>1</sup>. It was only because of their timely documentation that many images / sculptures were recovered.

However, not every transaction of the antiquities is as peaceful. Davis, in his paper<sup>2</sup>, mentions how the Hindu god Shiva himself had to appear as plaintiff before the Queen's Bench in London and file a suit for return of his stolen property. Quoting the newspaper Sunday Times of London, February 21, 1988 with headline "Suing Shiva Dismays Dealers", Davis emphasized on how it was reported.

The case was a bizarre enough event in itself. It was brought by the Lord Shiva against the Metropolitan Police and the Bumper Development Corporation of Albert, Canada, for the return of an eleventh century bronze dancing figure of the god. Since he could not

\*Associate Professor, VSLLS, VIPS, GGSIP University, Delhi

\*\*Assistant Professor, VSLLS, VIPS, GGSIP University, Delhi

<sup>1</sup>In August 2018, a 12th century bronze sculpture of Buddha was recovered by the same organization from UK which was stolen from the Archaeological Museum in Nalanda in 1961.

<sup>2</sup>Richard H. Davis, Temples, Deities, and the Law, in Hinduism and Law, ed. by TIMOTHY LUBIN, DONALD R. DAVIS, JR., AND JAYANTH K. KRISHNAN 195-206 (Cambridge University Press, Delhi, 2010).

actually appear, Shiva was represented by the Indian government and, on paper, by the Shiva Lingam, a cylindrical stone phallus, the deity's main physical manifestation in any Shiva temple-although the phallus was not produced in court.

Davis argued that Shiva's actions here provided an opportunity "for exploring the intricate and conflictual interrelations of medieval South Indian temple practices, the classical Indian legal discourse of the Dharmaśāstra tradition, and the efforts of British and Indian jurists of the Colonial period to articulate appropriate legal principles to govern Hindu religious institutions". Interestingly, Davis points out how in medieval South India, the inscriptions mention that the central images or icons of Hindu temples are living deities and owner of the property. These inscriptions thus, become legal documents as piece of evidence<sup>3</sup>.

In another similar case mentioned by Arlt and Folan<sup>4</sup>, the authors provided documentary evidence on a sculpture titled "Worshippers of the Buddha" which was excavated from the stupa near the Buddhist site in Andhra Pradesh, Chandavaram and was stolen from the site museum in 2001 which was, later, illegally exported from India. This case brought to light the role of an art dealer in relation to temple robberies and illicit trade in cultural property. Apparently, the dealer sold twenty-two works to National Gallery of Australia between years 2002-2011 for a huge amount of money. This specific piece was bought by the same museum in 2005 and was displayed in the Indian art gallery in 2006<sup>5</sup>. The author mentioned how the entanglement in the controversy tarnished the Gallery's reputation and strained the relationship of the two countries. Later, a smooth voluntary repatriation of the sculpture was approved by the Australian authorities even prior to a request from Government of India. The image was then sent to the National Museum of India, Delhi.

It is pertinent to note that many sculptures are still under danger because of either ignorance of laws or rather lack of it. The evolution of law in India regarding the conservation of historical heritage can be traced back to colonial period. In the early nineteenth century, during the time of East India Company's rule, Bengal Regulation and the Madras Regulation were introduced<sup>6</sup>. Throughout the early phase of British rule, up to 1860s, the trend was to carry off the antiquities to England where they would be housed in either British Museum or India Museum, both located in London. Sir Alexander Cunningham, the first Director-General of Archaeological Survey of India in

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<sup>3</sup>Cited from R. Davis, *Temples, Deities, and the Law*, 195. For an extended account of the case see, Davis, *Lives of India Images*, 59.

<sup>4</sup>Arlt and Folan, *Research and Restitution: The National Gallery of Australia's repatriation of a sculpture from the Buddhist site of Chanavaram*, *JOURNAL OF ART MARKET STUDIES*, 2 (2018). (8th May, 2019) <http://www.fokum-jams.org>; DOI 10.23690/jams.v2i2.43.

<sup>5</sup>During this time National Gallery of Australia considered that there is sufficient evidence to point out that the sculpture was legally exported as the historical objects were allowed to be sent out of India with a license before the Antiquities and Art Treasures Act of 1972 was formulated. It accepted that the documents presented revealed that the sculpture was exported from India in 1969 before the act was passed. Later, in her address the Susan Cennan after reviewing the process concluded that "The NGA was the victim of well-planned fraud by Art of the Past. These events illustrate the need to rely on sources of information other than a dealer, even if ostensibly reputable..." Cited from Arlt and Folan, "Research and Restitution," 14, 2 *J ART MKT, STDS* (2018).

<sup>6</sup>For more details, read, Aditi Mann, *Conservation Through Legislation*, 47 (1) *INDIAN HISTORICAL REVIEW*, 115-129 (2020).



1861, also had no qualms in shifting the sculptures to London, which were found from Yusufzai district. He opined that good casts could be made for the Calcutta and Lahore museums. Large number of items displayed in British Museum came from Cunningham's private collection. He believed in the ability of private collection by a knowledgeable collector as a means of preservation and conservation<sup>7</sup>.

The Department of Archaeology also took legislative measures in this regard and passed an act in 1863 giving the Government of India the sanction to protect and preserve buildings noteworthy for their historical and architectural value. Similarly, 'The Treasure Trove Act' of 1878 gave authority to the government to claim any treasure exceeding ten rupees value. The term "treasure" meant 'anything of any value hidden in the soil, or anything affixed thereto'<sup>8</sup>. This Act was definitely the most important of all legislative enactments, it endowed the government of India and the provincial governments with "indefeasible rights" to acquire all objects of archaeological interest, providing a detailed definition of what was classified as "treasure" and "what constituted its value"<sup>9</sup>. The Act further stated that a stern punitive action in the form of imprisonment for a term of a year or fine or both will be undertaken if: the finder failed to give notice of any treasure; modifies or attempts to alter such treasure by concealing the identity. However, the definition of the treasure could not be applied to those individual sculptures and fragments which were discovered by the natives and later established either at a religious shrine or in their houses.

A new era in the conservation process of heritage began with the promulgation of 'The Ancient Monuments Preservation Act, 1904'. Lord Curzon (1899-1905) who was the viceroy during this time gave priority to restoration of buildings. Lord Curzon, in his address on the Ancient Monuments Bill, suggested that he believed it was the duty of the Imperial Government to restore the heritage<sup>10</sup>. The main objective of this Act was: to safeguard the proper upkeep and repair of ancient buildings in private ownership except those which were used for sacred purposes; to prevent the excavation of sites of historic interest by ignorant and unauthorized persons; 'to secure control over traffic in antiquities and to acquire ownership, where necessary and possible, of monuments and objects of archaeological and historical interest'.

Curzon had a very clear approach about the antiquities lying scattered around the monuments and nearby areas. He believed it is better to set the antiquities in site-museums (museums to be set on site itself) rather than shifting them to cities. Going back to the Ancient Monuments Preservation Act of 1904, it had certain flaws. It has been pointed out that the origins of the Act could be traced to a campaign which was going on in Europe for a uniform code for preservation of monuments in England and in Western Europe by the Society for the Protection of Ancient Buildings (SPAB) established in 1877<sup>11</sup>. It has also been argued that this Society had been pressurizing

<sup>7</sup>U.SINGH, THE DISCOVERY OF ANCIENT INDIA, 353 (Permanent Black, Delhi, 2004).

<sup>8</sup>'Indian Treasure Trove Act, 1878' online at [www.asi.nic.in/pdf\\_data/9.pdf](http://www.asi.nic.in/pdf_data/9.pdf), accessed on 21-11-2018.

<sup>9</sup>TAPATI GUHA THAKURTA, MONUMENTS, OBJECTS AND HISTORIES, 56 (Permanent Black, Delhi, 2004).

<sup>10</sup>Nayanjot Lahiri, 'Coming to Grips with India's Ancient Past: John Marshall's Early Years as Lord Curzon's Director General of Archaeology in India: Part I,' SOUTH ASIAN STUDIES Vol. 14, No. 1, 1998.

<sup>11</sup>It was an initiative of William Morris who formed the society also known as Anti-Scrape Society. The SPAB was rooted in the Arts and Crafts movement, and came to a stand for a particular notion of aesthetics which held

ASI for framing similar codes and laws for the conservation and preservation of Indian sites<sup>12</sup>. Thus, the aim of the society to focus on specific cultural concerns of nineteenth-century Europe, was conveyed to India and the Archaeological Survey of India was made responsible for its implementation<sup>13</sup>. John Marshall, who was the then Director-General of ASI, following the state-driven policies of monument preservation, came up with a code, "The Conservation Manual" published in 1924<sup>14</sup>. He, among other issues, had difficulty in framing a single, coherent set of rules and practices for the conservation of ancient structures in India as the "political, religious and traditional considerations and a variety of local conditions render it impossible to lay down any general rule which shall be applicable to all cases". His conservation guidelines revealed the "tension implicit in combining, on one hand, a specific notion of preserving ancient buildings in their state of decay in order to preserve their 'historic' character, and on the other, an energetic, state-driven policy that only a colonial state could apply to ensure that this was done properly." Interestingly, his manual made a clear distinction between "dead" and "living" monuments and laid the guidelines for handling each category.

Lahiri, in her work argues that during British times, Indians were not incorporated as active collaborators in heritage preservation. The preservation of monuments, as a formal policy, was controlled by the government. Initially, the work was distributed between the central government and provincial governments, but after the Act of 1935 was passed, it was almost entirely controlled by the central government<sup>15</sup>.

The next legislation in this direction was known as the 'Antiquities Export Control Act'. This Act was promulgated in 1947, and supplemented the Act of 1904. The Act of 1947 was significant as it clearly defined what all objects fall under the category of 'Antiquity'<sup>16</sup>. It laid down general rules and regulations provided for the regulation of the export of antiquities. Under this Act, the Director-General was the license issuing

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that the value of historic buildings lay in their age, in the continuity of material over time, and that the aesthetics of old structures was to be found in their age. For details on the founding of this society see, Chris Miele, "Conservation and the Enemies of Progress?" in ed. CHRIS MIELE, FROM WILLIAM MORRIS: BUILDING CONSERVATION AND THE ARTS AND CRAFTS CULT OF AUTHENTICITY 1877-1939, 1-29 (Yale University Press, New Haven, 2005).

<sup>12</sup>HP Ray, Legislation and the Study of the Past: The Archaeological Survey of India and Challenges of the Present.' Paper presented at the symposium on "Masters" and "Indigenous": Digging the Others' Past, (Lausanne University, 2016).

<sup>13</sup>For the conflicting ideas emerging between SPAB and Marshall, and a discussion on Marshall's manual see, Indra Sengupta, A Conservation Code for the Colony: John Marshall's Conservation Manual and Monument Preservation Between India and Europe: in ed. MICHAEL FALSER AND MONICA JUNEJA ARCHAEOLOGIZING' HERITAGE?(21-37) (Springer Heidelberg University 2010).

<sup>14</sup>Prior to the publication of this manual, Marshall wrote a pamphlet called "Conservation of Ancient Monuments: General Principles for the Guidance of those Entrusted with the Custody of an Execution and Repairs to Ancient Monuments". In this pamphlet Marshall stressed that priority should be given to preservation over restoration. See. John Marshall, with the same title, (GOVERNMENT PRESS SHIMLA 1906).

<sup>15</sup>Nayanjot Lahiri. Monumental Follies INDIA INTERNATIONAL CENTRE QUARTERLY, 33,(2007).

<sup>16</sup>"Antiquity" includes -i) any coin, sculpture, manuscripts, epigraph, or other work of art or craftsmanship, ii) any article, object or thing detached from a building or cave, iii) any article, object or thing illustrative of science, art, era literature, religion, customs, morals or politics in bygone ages, iv) any article, object or thing declared by the Central Government by notification in the official Gazette to be an antiquity for the purposes of this act.



authority and was empowered to decide whether any object, article, or thing is or is not an antiquity and his decision was final.

In 1951, 'The Ancient and Historical Monuments and Archeological Sites and Remains (Declaration of National Importance) Act' was enacted. Under this Act, all the ancient and historical monuments and archaeological sites and remains which earlier were protected under 'The Ancient Monuments Preservation Act', 1904 were re-announced as monuments and archaeological sites of national importance. Another four hundred and fifty monuments and sites of Part 'B' States were also added<sup>17</sup>. Later, some more archaeological sites and monuments were declared as of national importance under Section 126 of the States Reorganization Act, 1956. In 1958, 'The Ancient Monuments and Archeological Sites and Remains Act' was enacted, for providing better and effective preservation of the archaeological remains and monuments. This Act provided for the protection and preservation of ancient and historical monuments and archaeological excavations and for the protection of sculptures, carvings, and other similar objects. Later, this Act repealed the Act of 1951.

In 1970, the United Nations Educational, Scientific and Cultural Organization (UNESCO) held a Convention which emphasized on the means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. It was a vital international agreement that stimulated tightening of legal and ethical collecting standards. Article 7 of this Convention stated that its purpose was to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the States concerned, provided that such property is documented as appearing in the inventory of that institution<sup>18</sup>.

This clause narrowed the scope of the convention since it mentioned that the antiquity needs to be documented in the inventory. There were many images across the country which have never been catalogued or reported, especially the ones which were under worship and, thus, easily became prey to thieves who sold them to international smugglers and dealers.

In India, next came the 'Antiquities and Art Treasures Act, 1972', which was enacted for effective control over the moveable cultural property consisting of antiquities and art treasures<sup>19</sup>. This Act, eventually, repealed the Act of 1947. It clearly stated that the reason for its introduction was that the provisions contained in the previous Act were not sufficient. In order to preserve the art treasures and antiquities, there was a dire need to make a comprehensive law to regulate the patterns of exports in order to prevent smuggling and fraudulent dealings. The Act provided for the appointment of registering and licensing officers by the Central Government who would grant authorization to any person who wishes to possess or deal in antiquities. However, the licensees were required to maintain registers, records and photographs for periodic inspection by the

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<sup>17</sup>The Indian Constitution of 1950 classified at that time three main types of states and territories. Part B states were former princely states or a group of princely states that includes Assam, Bihar, Bombay, Madhya Pradesh, Bihar, Orissa, Punjab, Uttar Pradesh and West Bengal.

<sup>18</sup>(11-11-2018) <https://eca.state.gov/files/bureau/unesco01>.

<sup>19</sup>(28-11-2018) <http://www.indiaculture.nic.in>.

licensing or any gazette officer of the government. Nevertheless, the absolute power was still in the hands of the Central government to withdraw the permission and then, to solely deal in the business of antiquities.

Even though this Act was introduced nearly fifty years ago to curb the illegal activities, there have been incidents where trafficking of antiquities is still rampant. Recently, a case of 1981 was heard by the Delhi High Court when an appeal was made by Central Bureau of Investigation (CBI) after the defendant was acquitted by the lower Court (Tis Hazari Court, Delhi). The case, in brief, was that Dr. D. Mitra, Director-General of Archaeological Survey of India, New Delhi informed CBI about the alleged theft and an attempt to smuggle out eighteen antique stone objects and terracotta figurines. On the basis of this information, a case was registered in August 1981, u/s 411 of IPC 25(1)r/w 3&25(2)r/w 14(3) of the Antiquities & Art Treasure Act, 1972 against the accused Shreekant Jain. The case involved theft of idol of Goddess Durga from an old temple of Takashakeshwar Mahadeva in Allahabad by few people who then smuggled the objects to Delhi. The idol was then sold to Kashi Nath who was an antique broker of Delhi and, finally, was acquired by Shreekant Jain who was supposed to smuggle it to New York. Before, he could board the flight, he was questioned by airport authorities and later, Customs Department got involved. After the recovery of the stolen items of the antiquities was made at the Delhi Airport, a case was filed against the accused. However, due to a botched investigation, the accused was acquitted in 2017. The judgement shows how the judiciary was lamenting on its own decision: -

But to say the least, if investigations are conducted in such a manner by CBI as highlighted in this judgement, time is not far away when people will lose faith in the system and government will be forced to constitute another agency. All senior officers of CBI kept sitting with their eyes closed during an investigation in this case which was very unfortunate. Need is felt that CBI should sensitize its officers for making them more responsive and effective towards investigation and they required to awake long slumber...

Later, a writ petition was filed in 2018 by the CBI in Delhi High Court, and after due deliberations, the court disposed of the writ and kept the order of the Lower Court aside. Such incidents highlight the fact that when it comes to protection of antiquities, our legal system still has a long way to go.

There have been many incidents where cases were filed over not only those antiquities which were stolen but also the ones which were under active worship in different parts of the country. Such a case was recently taken up by the Madras High Court in 2022. The Buddha Trust in Salem had prayed for a direction to the ASI to conduct an inspection of a statue at Thalavetti Muniyappan temple in Periyari village, which was believed to be of Hindu deity. At an earlier hearing, the judge had directed the Commissioner of the State's Archaeological Department to inspect the temple and the statue and submit a report. The court also halted Hindu rituals at the temple. The archaeological department, led by the Commissioner, carried out inspections at the temple and concluded that the idol's structure is a depiction of the mahalakshanas (attributes or great traits and refer to the discourses that inspired physical depictions of the Buddha, through statues and illustrations). Justice Anand Venkatesh remarked that allowing the Hindu Religious and Charitable Endowment department to "continue treating the sculpture as that of Thalavetti Muniyappan would be against the tenets of Buddhism."



The judge observed that after having received such a report, the mistaken identity can no longer be allowed to prevail. In view of the categorical report submitted by the Commissioner, the assumption of the department that it is a temple is no longer sustainable and the control must go into the hands of some other authority," the court said. "In view of the same, the original status must be restored and permitting the HR&CE department to continue to treat the sculpture as Thalaivetti Muniappan will not be appropriate". The judge observed and directed the Commissioner of Archaeological Department to take control of the property and maintain it.

### **International Efforts to Protect Cultural Property**

Looted antiquities have been posing a concern for culture-rich nations since times immemorial. Antiquities have traversed a long arduous journey in international history. From the ancient archaeological sites to known public museums such as Paul Getty Museum and Metropolitan Museum of Art in the US to the British Museum in the UK, antiquities often find a way from archaeological sites and private collections to government buildings. While these museums may symbolise the long roads through which civilisations have travelled and serve as important reminders of humankind's achievements, they are also representative of conquests and acquisitions<sup>20</sup>.

The principles regarding preservation and return of cultural property were initially a part of the Laws of War in the form of Hague Convention of 1899 and 1907<sup>21</sup>. Article 27 of the fourth Geneva Convention recognised that state parties must undertake all necessary steps in sieges and bombardments to ensure that buildings dedicated to religion, art, science or charitable purpose, historical monuments and hospitals are protected as long as they are not used for military purpose<sup>22</sup>. The laws, however, failed to prevent the utter destruction witnessed during World War I and World War II.

The regulations were put to test in the ensuing war in 1914 where deliberate and widespread destruction of property took place<sup>23</sup>. Cultural property and its preservation started getting more attention after the experience of World War-I. The first international conference for the protection and conservation of Artistic and Historical Monuments was held in Athens in 1931. It was drafted by Le Corbusier at the fourth Assembly of the International Congresses on Modern Architecture (1933)<sup>24</sup>. The Conference attempted to rationalise the possession of art by establishing procedures for preservation and protection of arts and communities. The Conference aimed to spark a debate regarding the universality of preservation values and cities grappling with preserving endangered

<sup>20</sup>Matthew R Hoffman, Cultural Pragmatism: A new approach to International movement of Antiquities. IOWA LAW. REV 665 (2010).

<sup>21</sup>Convention Respecting the Laws and Customs of War on Land, October 18, 1907, Art 27, 36

<sup>22</sup>International Humanitarian Law Databases, (September 21, 2024) <https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-iv-1907/regulations-art-27>.

<sup>23</sup>Vrdoljak, Ana Filipa, The Criminalisation of the Intentional Destruction of Cultural Heritage (October 19, 2015). FORGING A SOCIO-LEGAL APPROACH TO ENVIRONMENTAL HARM: GLOBAL PERSPECTIVES. Ed. M. ORLANDO AND T. BERGIN (London: Routledge, 2016).

<sup>24</sup>From the Emergence of the Concept of World Heritage to the creation of ICOMOS (September 12, 20124) <https://www.icomos.org/en/about-icomos/mission-and-vision/history?showall=1>.

properties. Most of the principles agreed upon by parties found their way into the Athens Charter<sup>25</sup>. The resolutions passed at Athens were made into 'Carta del Restauro.' The Charter was a brave step to create an international framework to protect historic sites and represented a growing consciousness amongst the leaders of the world regarding the importance of protecting antiquities and international heritage. The charter defined the basic principles of restoration and tasked each signatory to work towards the restoration and preservation plan keeping their cultures and traditions in mind. The Charter, thus, contributed towards internationalising efforts towards conservation and restoration of historic documents.

The Second World War and its resultant destruction, however, was at a scale far more than the world had experienced before. Cultural sights were destroyed and large-scale displacement of cultural objects took place. Most of the art works of western Europe were plundered by Germany. This led to inclusion of plunder of public and private property as a War crime in the Nuremberg Charter and the Control Council Law No 10. The Nuremberg Tribunal convicted Mr. Rosenberg, who headed 'Einsatzstab Rosenberg' the organisation that carried out confiscations of art work and cultural objects. He was found guilty for systematically removing to Reich those treasures which were considered an important part of the heritage by all and sentenced to death<sup>26</sup>. There have been other instances of awarding punishment to private individuals found guilty of destroying monuments commemorating the dead of the first world war by the French Permanent Military tribunal.

The judgment of the Nuremberg Tribunal paved the way for future codification efforts. In the wake of World WarII, efforts began internationally to strengthen the laws protecting cultural property resulting in modern protections for the cultural objects. The result was the 1954 Hague Convention for the Protection of Cultural Property in the event of Armed Conflict<sup>27</sup>. The Convention was adopted under the aegis of UNESCO, the agency at the forefront in initiating efforts to protect tangible and intangible cultural property.

The Convention was one of the first and most comprehensive multilateral treaties directed towards protection of cultural heritage in times of war and peace. The Convention provided for protection of monuments, art, archaeological sites, works of art as well as other scientific collections irrespective of their authorship or ownership. Article 1 of the convention covers cultural property irrespective of origin or ownership and includes moveable, immovable property such as monuments, art, history, buildings, works of art and objects of artistic, archaeological interest. It even covered buildings where moveable cultural property was kept. Articles 3 and 4 press upon the high contracting parties to safeguard and respect cultural property situated within their territory and not to use it for purposes which are likely to expose it to danger. Article 5 enjoins upon the contracting parties who are occupying a territory in whole or in part to support the national authorities to safeguard the cultural property. Articles 10 and 16

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<sup>25</sup>David A Scott, *Modern Antiquities: The Looted and the Faked*, INT'AL JOURNAL OF CUL'AL PROPERTY (2013) 20:49-75. doi:10.1017/S0940739112000471

<sup>26</sup>VRDOLJAK *Supra* Note 23

<sup>27</sup>Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954 (2 September 2024) <https://www.unesco.org/en/legal-affairs/convention-protection-cultural-property-event-armed-conflict-regulations-execution-convention>





mandate putting the cultural property under protection during armed conflict by marking them with distinct emblems. However, the convention confined itself only to destruction that took place in the times of armed conflict. Plundering and looting in times of peace was not addressed. A protocol was adopted to regulate the protection of cultural property during occupation and provide for restitution of illegally exported objects<sup>28</sup>. A second protocol to the convention was added in the year 1999 which created a new category of enhanced protections for cultural property of great importance and defined sanctions for violations of the protocol<sup>29</sup>.

An increase in the market of cultural property and its illegal smuggling lead to UNESCO's General Conference adopting 'The Convention on the Means of Prohibiting and Preventing the illicit Import, Export, and Transfer of Ownership of Cultural Property' also known as the World Heritage Convention in 1972<sup>30</sup>. The Convention intended to protect outstanding cultural heritage which is unique and important to the present and future generations and common heritage of mankind. It is considered as the first international endeavour to address the concerns regarding proliferation of illegal trade and market of cultural objects<sup>31</sup>. The Convention aimed to regulate the international antiquities market by requiring importing nations to prohibit importation of goods that were exported from foreign countries in violation of export restrictions<sup>32</sup>. It charges all the signatories to create rules to assist in the recovery of looted and stolen property.

The Preamble to the Convention states, "the interchange of cultural property among nations for scientific, cultural and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations."

Article 1 of the Convention contains first detailed definition of the term 'Cultural Property' which, on religious or secular grounds, is specifically designated by each state being of importance for archaeology, prehistory, history, literature, art or science and which belongs to rare collections of fauna, flora, literature, art and science. Article 2 recognises that illicit import, export and transfer of ownership of cultural property is one of the main causes of impoverishment of the cultural heritage of the countries of origins of such property. Article 3 illegalises export, import and transfer of ownership of the property contrary to the provisions of the Act. Article 5 urges state parties to set up national services for the protection of cultural heritage and maintain an inventory of protected properties within their territory. Article 6 puts in place a system of mutually enforceable certifications by each state party which would specify that the export of the

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<sup>28</sup>Protocol for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954. (2 September 2024) <https://ihl-databases.icrc.org/en/ihl-treaties/hague-prot-1954>

<sup>29</sup>Second Protocol to the Hague Convention of 1954 for the protection of Cultural Property in the Event of Armed Conflict, 1999.

<sup>30</sup>Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970 (September 12, 2024 1:10 pm), <https://www.unesco.org/en/legal-affairs/convention-means-prohibiting-and-preventing-illicit-import-export-and-transfer-ownership-cultural>

<sup>31</sup>Patty Gerstenblith, Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past, CHIC JRNL OF INT'L LAW: Vol. 8: No. 1, Article 10. (2007) (September 2, 2024 17:05 pm), <https://chicagounbound.uchicago.edu/cjil/vol8/iss1/10>

<sup>32</sup>Supra Note 11 (Gerstenblith, Patty,2007)

property in question is authorized. Article 7 urges the state parties to take measures through national laws to prevent museums within its territory from acquiring cultural property originating in another state that has been illegally exported after the coming into force of this convention. Article 8 asks the states to put in place penalties and administrative sanctions on persons found guilty of violating the provisions of the treaty. Article 9 makes a case for international cooperation amongst state parties in identifying cultural property and take measures to prevent irremediable damage to cultural heritage of the requesting state. The Convention, thus, reconciles the interests of art importing and art exporting states<sup>33</sup>. The World Heritage Convention also established the World Heritage Committee and World Heritage List that designates list of protected properties<sup>34</sup>.

However, there was a difference in systems that protected property acquired in good faith and those who held that stolen property could not transfer a good title. This difference in legal systems came to be easily exploited by traffickers to their advantage prompting UNESCO to commission a study on ways and means to improve national legal control of illicit trafficked cultural property. The study recommended that UNESCO should address this issue through a treaty that will address the difficult questions of private Law. UNESCO asked The International Institute for the Unification of Private Law (UNIDROIT) to work on rules of private law that would be applicable to illicit traffic in cultural objects<sup>35</sup>.

This resulted in the UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects, 1995. The Convention purported to create an individual cause of action for the return of stolen cultural property. It adopts the same definition of cultural objects but differs significantly from the UNESCO convention by allowing private owners to claim back any kind of cultural objects not designated or registered by the state which was a mandatory requirement under the UNESCO Convention. The Convention also introduces a limitation period of three years for restitution from the date of location of the cultural object and the knowledge of the identity of the possessor and all other cases within a period of 50 years from the date of the theft<sup>36</sup>.

The Heritage Convention and UNIDROIT Convention are the two most influential multilateral treaties today that give right to all signatory states to restrict the import of items of cultural significance even if owned by private entities<sup>37</sup>.

Further, in 1999, UNESCO promulgated an International Code of Ethics for Dealers in Cultural Property, the code calls on dealers not to facilitate trade in stolen, illegally alienated, clandestinely excavated and illegally exported cultural property and accept

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<sup>33</sup>James A.R. Nafzige, Trading and Returning Cultural Objects under International Law, (2) *SANT ART AND CULTURE L REV* 179-194 (2016).

<sup>34</sup>Joseph P. Fishman, Locating the Int'l Interest in Intrnational Cultural Prop. Disputes, 35 *YALE J. INT'L L.* 347, 389 (2010).

<sup>35</sup>Lyndel V. Prott, UNESCO and UNIDROIT: A Partnership against Trafficking in Cultural Objects, [1] *[UNI L REV]*, Volume 1, Issue 1, January 1996, Pages 59-71, (1996). <https://doi.org/10.1093/ulr/1.1.59>

<sup>36</sup>UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS art. 3(3) and 10(2), June 24, 1995

<sup>37</sup>FISHMAN *Supra* Note 34



as binding the principles of professional practice intended to distinguish cultural property being illicitly traded from that illicit trade and they will seek to eliminate the former from their professional activities<sup>38</sup>.

Since the early 1980s, the United Nations has also been playing an active role in highlighting the need for protecting cultural property. The General Assembly has adopted a series of resolutions addressing return of stolen cultural objects. It adopted a resolution on Restitution of Works of Art to Countries Victim of Expropriation, 1973<sup>39</sup>. The Resolution recognized the obligation of countries which had access to cultural objects as a result of colonial or foreign occupation to promptly restitute those objects without charge as a measure of just reparation. In the wake of widespread destruction of cultural property by ISIL (Da'esh), The Security Council adopted a resolution in 2017 condemning the destruction of historical sites and artefacts and urged member states to adopt legal measures to counter trafficking in cultural property.

## Conclusion

A look at the historical developments and international efforts to address looting, destruction of cultural property proves a widespread acceptance and broad consensus among countries regarding the importance of protecting cultural heritage. Throughout the world, governments are becoming sensitive towards the antiquities and 'native treasures', and are cordially returning the heritage to their original places. Not only governments, but even international organizations are lending support to various nations so that they may protect their cultural legacy<sup>40</sup>. However, what is crucial here is how we respond to questions like: Will the upcoming generations be able to witness the wondrous monuments and images that speak volumes about our historic legacy? Whether what has been done till now in terms of the projects for protection of heritage, awareness programs or the laws enacted, is sufficient to safeguard them from the harm, both natural and human? The answers to these have been attempted by Lahiri as:

Heritage conservation should be separated from the scope of work of the Archaeological Survey. The deplorable deterioration of both the principles and standards despite increasing amounts of government money being spent on structural and chemical conservation underlines that it is not the lack of resources, but of accountability that is responsible for the present state of affairs. Conservation weighs like a mill-stone of the Archaeological aspects of monuments and sites, but the Survey must no longer be primarily responsible for conservation. The regulatory framework that a National Heritage Commission puts in place ought to be more decentralized.

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<sup>38</sup>UNIDROIT CONVENTION Supra Note 36

<sup>39</sup>UNITED NATIONS SECURITY COUNCIL RESOLUTION 3187 (XXVIII)

<sup>40</sup>Aga Khan Trust of Culture, established in 1988 is a private philanthropic foundation which aims to revitalize culture and improving the overall quality of life in societies where Muslims have a significant presence. Under it, is a programme called The Aga Khan Historic Cities Programme which undertakes the restoration and rehabilitation of historic structures and public spaces in ways that spur social, economic and cultural development. Aga Khan Trust of Culture along with Archaeological Survey of India has done restoration work in Humayun's Tomb and Sunder Nursery near Nizamuddin in Delhi.

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Although remarkable strides have been made in this direction, nevertheless there is still scope for stringent application of the Laws and Conventions for safeguarding the Cultural treasures. Institutional mechanisms and implementing agencies need to be brought up in tune with the growing discourse and widespread acceptance of general principles regarding preservation of antiquities.