

UNIDROIT 1993  
Study LXX - Doc. 45  
(Original: English)

U n i d r o i t

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW  
=====

COMMITTEE OF GOVERNMENTAL EXPERTS  
ON THE INTERNATIONAL PROTECTION OF CULTURAL PROPERTY

OBSERVATIONS OF GOVERNMENTAL DELEGATIONS  
ON THE PRELIMINARY DRAFT UNIDROIT CONVENTION  
ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS

(India)

Rome, September 1993

## INDIA

### Article 1

It applies to claims of International Character for restitution of stolen cultural objects removed from the territory of a State. The terms "contrary to its law", which imply that this article would not apply to the objects removed at a time when there was no legislation restricting such export. The clause should be to cover cultural objects removed prior to the adoption of such laws also.

### Article 2

This concerns definition of cultural objects etc. Alternate II may be adopted. The following points need to be suitably added at the beginning.

Any manuscript, record or other document which is of scientific, historical, literary or aesthetic value and in existence for not less than 75 years.

"Art Treasure" which is defined to mean any human work of art, not being an antiquity, declared by the Indian Government in the Official Gazette, to be an art treasure having regard to its artistic or aesthetic value but no such declaration is made as long as the author of the work of art is alive. The Government of India has declared paintings (including drawings, sketches, diagrams etc.) and objects of plastic art by Rabindranath Tagore, Amrita Sher-Gil, Jamini Roy and Nandalal Bose to be "art treasure" (Notification 1st Dec. 1976). In addition the following works were also brought under Art Treasure by special notifications: Paintings of Ravi Varma; Gaganendra Nath Tagore; Abanindra Nath Tagore; Sailoz Mukherjee; N. Roerich (10th Aug. 1979). The Jewellery items belonging to HEH. Nizam's Jewellery Trust were variously declared 7 items on 8.11.1982 and 9.5.1984 and 19 items on 24.10.1986 and 24.7.1987. In case of doubt as to whether an object is an antiquity or an art treasure, the final decision rests with the Director General, Archaeological Survey of India.

### Article 3

#### Paragraphs 1 and 2

May be agreed to.

#### Paragraph 3

For filing the restitution the period should be at least 30 years. See the cases of Sivapuram (lost in the year 1956 and retrieved from Los Angeles, USA in the year 1986) and Pathur Nataraja, Tanjavur district (Tamil Nadu) (lost in the year 1976 and retrieved from U.K. on 9.8.1991).

The clause "ought reasonably to have known" be deleted as it is ambiguous, particularly in case of stolen objects, as India is a vast country (indeed a sub-continent) with varied types of objects in different geographical zones and in different cultural contexts of its long history extending over five millenium years. Many times, it is impossible to get the identity of the persons or agencies who engaged to steal and trade in such objects. No time limit be imposed for the claim for restitution of an object belonging to a an individual collector.

#### Paragraph 4

For public collections of the Contracting State the clause "shall be brought within a time limit of 75 years", the period be restricted to 20 years. Proper definition of "public collection" be worked out.

#### Article 4

In the Unidroit Committee of Governmental experts on the International Protection of Cultural Property, held in Rome (6-10 May, 1991), India has placed its views on the terms "Innocent Purchaser" or "a person who has valid title to that property", used in the article 7(b)(ii) of the UNESCO Convention of 1970. The possessor of a stolen cultural object "did not know" that the object was stolen and in a position to prove that due diligence was exercised when acquiring the object cannot be taken on the face value. When a similar point arose such ambiguous expressions both in nature and extent have not been accepted. As a matter of fact if a Nataraja image is offered for sale to an individual who is ready to pay a handsome price, he should have certainly been aware of its origin, the period and also its aesthetic, artistic and cultural significance. As such the primary duty of the purchaser to verify whether country of origin certificate or validation certificate or such other documents as export permit are accompanied with the object or not. In fact, one should ensure before possessing an art object or before its purchase that the property is not a stolen one. On the other hand, if one acquires the object of cultural importance without making any such verification calling him "innocent purchaser" or "did not know" is just a camouflage and amounts to acquiring other nation's patrimony through clandestine channels. Similarly the term "valid title to the objects" is also a misnomer, as it needs to be defined what constitutes a valid title of the object.

At the time of acquisition posing himself as anonymous, a purchaser would not bother to ascertain whether the object is stolen or any export permit is issued thereof as the purchaser is sure of compensation according to this provision. Therefore, the purchaser in the present situation is neither to lose anything nor to prove anything if defected in possession of an object belonging to another country. It is needless to point out that mere production of a receipt of purchase is not a proof of valid title. Being a signatory to the 1970 Unesco Convention, India is supposed to pay compensation if this clause 7 b) ii) is operative to the innocent purchaser at the time of demanding restitution of cultural property. It is not

morally justified to compel a country, which has been the victim of illicit export to pay compensation for the restitution of its own property.

#### Article 5, Alternative I

##### Paragraph 1

The phrase "contrary to its law" may be substituted by the phrase "illegally exported" so that more specific action can be taken in case where in spite of the precise laws and rules in force the investigating agencies being more than one (Air and Sea Customs, Police, CBI) in a big country like India with wide spread coastal lines, checking and restricting at the exit points becomes difficult. No foolproof system also could be arrived at. Here paragraph 2 should not come in the way by such lack of information of a factual or legal nature when the cases are referred to the court or other competent authorities of the State.

##### Paragraphs 3 and 4

They cannot be agreed upon and should be deleted. Once the illegal export of the object is established, the State from where the object was found should return to the claimant State and it will be its duty to take steps to conserve, preserve and remit the same to its historical context and original set up.

#### Article 6

##### Sub-paragraph (a)

It may be deleted as it tantamounts to the denial of the claimant State even after establishing its ownership.

##### Sub-paragraph (c)

Such objects of outstanding cultural importance and integral to a monument of great artistic merit, even if lawfully removed and taken by a Government in power, there should be a law of Convention to return such outstanding objects to the State concerned so that its art-historical, architectural and contextual relevance is preserved for humanity. The stress is on the Buddhist sculptures and inscribed architectural members of the Amaravati Maha Chaitya (A.P.) now with the British Museum and Musée Guimet, Germany, which were exported by the then British excavators under the British rule. As a result these scattered relics do not provide a full picture of the great Buddhist Monument (Maha Chaitya) which has been excavated subsequently at Amaravati. This Stupa site at the place wears a desolate look, shorn of its sculptural wealth. Even such vital components of the rail parts and ornamental copings and cross-bars, found in British Museum are incomplete and parts of the very same members lying either at the Museums in India or at site. It would be most desirable to get back such vital components to the place of origin so that completeness of a

particular component is achieved by such repatriation of the integral parts of an outstanding monument of world class.

#### Article 7, paragraph 2

No such period can be specified as it takes longer duration for a State to pursue the cases of lost objects. Moreover the phrase "ought reasonably to have known" may be deleted, as it is not in the interest of the State which suffers the loss of cultural object.

#### Article 8

Just compensation may be considered if the possessor provides validity documents, purchase cost, acquisition, details of the object and returns the objects without any damage or alteration.

It may incidentally be pointed out that India is facing major problems of illicit exports of movable antiquities and art treasures. The amount of theft of cultural objects has reached alarming proportions and only a small percentage of recoveries are reported - say about 12% according to Interpol perhaps much less in so far as our country is concerned. While one agrees in principle that all the past cases of illicit export cannot be revoked and retrieval sought for by the countries of origin - efforts should be made for return of extremely rare and irreplaceable cultural properties to the country of origin. Several catalogues published in recent years from U.S. have revealed how invaluable antiquities and art treasures from various developing and under-developed countries like India, Cambodia, Thailand, Tibet, Burma, Nepal, Pakistan, Sri Lanka, Indonesia and Java reached U.K. and U.S.

A perusal of catalogues reveal collection of historical terracottas of great importance from not only India but from the neighbouring countries like Tibet, Thailand, Burma, Pakistan, Sri Lanka, Indonesia and Java. Nearly 34 exhibits are from India alone and forms part of the Paul F. Walter and Marilyn Walter grounds collection of the Los Angeles Country Museum, whose ownership and mode of acquisition are not specified.

In another exhibition catalogue we get to know, for the first time, nearly 205 pieces which were reported as collections for the said Museum variously made during the year 1904, 1913 and 1930. Amy G. Poster, From Indian Earth, 4200 years of Terracotta Art, the Brooklyn Museum (Jan. 17 - April, 14, 1986). In most of the cases they are stated to be a collection of Mr Samuel Eilenberg or gifts of Dr Bertram Schaffner or anonymous gift and so on. What baffles the Indian scholar are such outstanding objects like Terracotta plaque depicting Rama-Lakshmana from U.P. Gupta period 5<sup>th</sup> century (n 1, cover page). Standing Mahavishnu (p. 152, n 20); terracotta sculptures tiles from Harwan (Kashmir) n 63-65. There are several others from Mohenzodaro and Charsada of neighbouring Pakistan.

In another interesting catalogue - "The Lotus Trascendent Indian and South East Asian Art from the Samuel Eilenberg Collection (New York, 1991) objects, (about 40), besides some choicest ones from neighbouring Nepal, Bangladesh, Pakistan, Sri Lanka, Thailand, Indonesia, Java. Out of these n 2 to 9, stone rings of the Mauryan period, n 1 Bronze Bull-cart with woman from Kausambi (late Harappan 2000-1700 B.C.); n 10 Goddess (Durga) with weapons in her hairdo Bronze (Mauryan), n 63 Linga with one face, from M.P. (5<sup>th</sup> century A.D.), n 47, Standing Indra, Sandstone from Mathura or Ahichchatra, 2nd century A.D.; and n 68 Bronze Bahubali Chalukyan 6<sup>th</sup> century A.D. The last one is the earliest known Bahubali as yet to be discovered in India.

The above instances show how museums are exposed to theft and how such thefts are committed with the ulterior motive of smuggling the antiquity out of India for sale in a foreign country. By no means, it is a recent development although during the last few decades there has been a burst up in international trade in art and antiquities. Apart from the unchecked flow of cultural property out of the country due to direct patronage by the developed Nations, there had been the menace of illicit export. The European market proved more potential than that of the American.

#### Article 9

Alternative II may be considered.

#### Article 10

The phrase "contrary to its export laws" be deleted. There may not have been proper legislation in this regard in a vast country like India when Princely States were independent and nominally owing allegiance to the British Empire before and a few years after Independence as well. No precise export restrictions were applicable and several items of regalia, dynastic heirlooms, State gems and jewellery, Gold Muhars of late medieval period were either smuggled out or lost to the country as these are no doubt precious cultural property of the State.

#### Article 11

Paragraph (b) be deleted and (a) and (c) be retained.

#### Articles 12 and 13

Be retained.

