

Repatriation claims of the Kohinoor by India to protect its cultural heritage

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Introduction

Since decolonization, most colonies around the world have been demanding repatriation of their properties taken away from their land by the colonizers. These properties represented the colonies' vibrant culture and heritage. They are essential in an age of nationalism. It is difficult to decide these issues within the existing international legal framework. One such issue is that of the Kohinoor diamond that has been in demand by India for the past few years.

The diamond has a rich history and has been in the hands of many people in different places. It was handed over to the British East India Company in 1849 by the Sikh ruler Duleep Singh at Lahore, in present Pakistan.¹ At present, the diamond lies with the British. Its repatriation involves several complexities, such as the nature of the property, the claims of various States over it, the legal paradigm of property disputes used to decide repatriation, and the existence of a futile international legal framework which the author has tried to comprehend further.

The Kohinoor: a cultural property

The Kohinoor is intrinsically connected to India's vibrant History. It serves as a cultural property as it represents an approach to the study of humanity, particularly of Indians in this case². It, in essence falls within the scope of a "cultural property"³. Repatriation of it would be in line with

¹ Amit Ranjan et al, *Kohinoor and Its Travelogy: The Dialectic Of Ownership And Reparations Of An Artefact*, 6 COLDNOON: INTERNATIONAL JOURNAL OF TRAVEL WRITING & TRAVELLING CULTURES (2018), <https://coldnoon.com/journal/dandelion-february-2018/kohinoor-and-its-travelogy-the-dialectic-of-ownership-and-reparations-of-an-artefact/>.

² John Henry Merryman, *The Public Interest In Cultural Property*, 77 CALIFORNIA LAW REVIEW (1989).

³ UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970.

cultural advancement of the Indian State as it has a certain utility which enables cultural achievement⁴ of a State.

India's claim to the Kohinoor

After decolonization, former colonies like India justly began demanding for the return of their artefacts from their colonisers. India, being the source country,⁵ demanded the return of the Kohinoor to its territory from Britain. The historical claim is that the diamond was not freely handed over by Duleep Singh and that he was prompted into gifting the diamond to the British⁶.

Another claim is based on the theory of Cultural nationalism⁷. It supports India's claim that the object is integral to the culture, history and heritage of the country such that, it is a cultural property and does not fit within the usual legal paradigm of property disputes.⁸ Using this basic property analysis, the legal title to such property⁹ can be transferred by the British to anyone they choose to transfer ownership to.¹⁰ This discretion over the object is opposed by India.

India's claim, based on cultural nationalism uses the cultural property paradigm.¹¹ Every cultural object is, to some extent, a part of a larger context to which it adds meaning. If these objects are separated from its context, the object and the context both lose significance.¹² This context is the Indian cultural nationalism and the demand for the Kohinoor then, is in line with attributing

⁴ *Supra* note 2.

⁵ Carol A. Reohrenbeck, *Repatriation Of Cultural Property – Who Owns The Past? An Introduction To Approaches And To Selected Statutory Instruments*, 38 INTERNATIONAL JOURNAL OF LEGAL INFORMATION (2018), <http://scholarship.law.cornell.edu/ijli/vol38/iss2/11/>.

⁶ Satish Jacob, *Indian Mps Demand Kohinoor's Return*, BBC NEWS ONLINE (Apr. 26, 2020), <http://news.bbc.co.uk/2/low/south-asia/727231.stm>.

⁷ Saby Ghoshray, *Repatriation Of The Kohinoor Diamond: Expanding The Legal Paradigm For Cultural Heritage*, 31 FORDHAM INTERNATIONAL LAW JOURNAL (2007), <https://ir.lawnet.fordham.edu/ilj/vol31/iss3/6>.

⁸ JOHN HENRY MERRYMAN, THINKING ABOUT THE ELGIN MARBLES 83 (1st ed. 1985).

⁹ Gautam Sundaresh, *Bringing Back The 'Mountain Of Light', Repatriation Of Cultural Property And The Kohinoor Diamond*, RESEARCH GATE (Dec. 2015), https://www.researchgate.net/publication/301754442_Bringing_back_the_%27Mountain_of_Light%27_Repatriation_of_Cultural_Property_and_the_Kohinoor_Diamond?channel=doi&linkId=5725ce4608ae586b21dcb4e9&showFulltext=true.

¹⁰ *Id.*

¹¹ *Supra* note 7.

¹² *Supra* note 2.

significance to the Indian nationalist drive and the grand diamond. The Kohinoor evokes Indian sentiments in the form of nostalgia for the people, events, and cultures that produced them.¹³

There are several other reasons¹⁴ for Indian cultural nationalism over the Kohinoor. One of the reasons is that of Kohinoor being claimed as a basis of cultural memory. One reason is that of a memory where the Kohinoor is claimed as a basis of cultural memory. There is a desire to remember, and to be remembered for the history that the diamond carries. The second reason is with regards to survival, as the diamond is the survivor of a rich, diverse and controversial past and yet exists in the present, while the ones who possessed it once have turned to dust. Identity is another reason as the diamond provides us cultural identity by telling us who we are and where we came from.¹⁵ The political reason for repatriation would rely on the very word repatriation which itself is political. It assumes that cultural objects have patria or a national character and a national homeland.¹⁶ India's special claim is then associated with its "national cultural patrimony."¹⁷

Another claim is based on economic reasons by which the Indian State claims the Kohinoor since this would promote Indian tourism. Since cultural property is valuable, it would constitute the wealth of a nation in a sense. More tourists would want to visit India and this would benefit the Indian tourist industry.¹⁸

There is also an ethical aspect to the repatriation. Historian Elazar Barakan, would term this as international morality.¹⁹ The demands made by the former colonies are seen as a way of making the colonizers correct the historical injustices being committed against these countries. It would be a good demonstration by Britain to freely shed its imperial encumbrances and pave the way for decolonization.

Though repatriation claims and reasons have transformed national politics, worldwide diplomacy and shaped the international law of cultural property, former colonies like India are unable to

¹³ *Supra* note 2.

¹⁴ *Supra* note 2.

¹⁵ Albert Elsen, *Introduction: Why Do We Care About Art?*, 27 HASTINGS LAW JOURNAL 951 (1976), https://repository.uchastings.edu/hastings_law_journal/vol27/iss5/1.

¹⁶ *Supra* note 2.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Elazar Barkan Barkan, *Between Restitution And International Morality*, 25 FORDHAM INTERNATIONAL LAW JOURNAL (2001), <https://ir.lawnet.fordham.edu/ilj/>.

repatriate their cultural objects within the existing International legal framework. This has been highlighted in the later parts of this paper.

Conflicting claims

Other than the Indian State, the States of Pakistan and Afghanistan²⁰ have also put forth their claims to the Kohinoor diamond. The question of 'originating state' made Pakistan put forward its claim for the diamond as Lahore, which was in former India, became part of Pakistan after Partition.²¹ Citing historical instances when the diamond was present in their territories, Iran and Afghanistan also claim the ownership rights of the diamond.²²

Legal framework under which India can claim Kohinoor diamond

There are many conventions that exist for the preservation of cultural property. The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property²³ was implemented by the UNESCO in 1970. It provides a legal framework to repatriate cultural properties to their countries of origin. Article 1 of the Convention defines “cultural heritage as “property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science”²⁴. The objectives of the convention are to protect the cultural heritage which constitutes one of the basic elements of civilization and national culture²⁵ and prevent the illicit movement of cultural property in the world. The operative legal concept throughout the Convention is that of national cultural "heritage" or "patrimony".²⁶

However, this Convention is essentially prospective in nature and thus, does not cover recovery claims of antiquities prior to 1970.²⁷ This has made it difficult for India to claim recovery of the Kohinoor diamond.

²⁰ Kate Clark, *Taliban Demand Gen from UK Crown Jewels*, BBC NEWS ONLINE (Nov. 7, 2000), <http://news.bbc.co.uk/2/hi/southasia/1011468.stm>.

²¹ Rashmee Roshan Lall, *Britain Nixed Pakistan Claim to Kohinoor*, TIMES OF INDIA (Dec. 30, 2006), <http://timesofindia.indiatimes.com/articleshow/986002.cms>.

²² *Supra* note 1.

²³ *Supra* note 3.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id* at Art. 7(a).

The 1954 Hague Convention²⁸ also doesn't support the claims of the Indian State. Its substantial coverage would not cover India at the time when the Kohinoor was taken because, India was not a signatory to the convention at that time and due to the prospective application of its provisions. The UNIDROIT²⁹ also places temporal restrictions on repatriation and is similar to the Hague Convention regarding its substantive scope.

The UNESCO National Heritage Convention³⁰ is the weakest convention. The spirit of cooperation is superficial without legal definitiveness.³¹ The powerful members of this convention are primarily the owners of some of the renowned museums that seek to retain and preserve these cultural properties. It is in their commercial interest to deny repatriation of the objects. There is no adjudicatory authority to mandate the target country to return the objects and the Convention also doesn't support retrospective application of its substantive content.

There is also an issue regarding the forum for this dispute, since no formal complaint has been filed by the Indian State as of now. Using Article 93 of the U.N. Charter, the two nations involved, the United Kingdom and the Republic of India, could be ipso facto parties to the statute of the ICJ.³² This would then permit application of the treaties and conventions as part of the legal framework of customary international law³³ by the ICJ.

Limitations to the International legal framework

Individually none of the existing International conventions provide an effective and efficient mechanism, nor do they explicitly mandate an applicable procedure for the return of the accumulated objects.³⁴ The conventions are also heavily conditioned by the first world-third world and west block-east block politics.³⁵ They support an understanding of cultural internationalism

²⁸ Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954.

²⁹ UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Jun. 24, 1995.

³⁰ UNESCO Convention Concerning the Protection of the World Cultural and National Heritage, Nov. 16, 1972.

³¹ *Supra* note 7.

³² U. N. Charter art. 93, Chapter XIV.

³³ *Supra* note 7.

³⁴ *Supra* note 7.

³⁵ *Supra* note 2.

and not that of cultural nationalism. Looking at the scope of the provisions and the intention behind them, what becomes apparent is the bias against the repatriation of the objects.

Conclusion

It is essential that cultural nationalism and cultural internationalism coexist peacefully to serve a more comprehensive international agenda without interfering with the objectives of each other. The claim of the Indian State is in line with the Kohinoor being a cultural property and the paradigm of cultural nationalism. Without a compelling and legally binding convention, the amity and goodwill sought to be promoted internationally will always be undermined. These mechanisms thus prove futile for countries demanding repatriation. Thus, though repatriation claims and reasons have transformed national politics, worldwide diplomacy and shaped the international law of cultural property, former colonies like India are unable to repatriate their cultural objects within the existing International legal framework.