



## A LEGAL BURIAL TO THE FUTILE CASE OF THE KOHINOOR DIAMOND IN INDIA

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**Abstract:** The sacrosanct issue of cultural repatriation is built on the foundation of human values and its historical significance, which goes beyond the trade interests and property rights paradigm. One such issue is the never ending dispute over the ownership of the Kohinoor diamond, a magnificent piece of jewelry which holds great significance in the history of India. The main aim of this research paper is to establish a legal pathway to retain such a precious artefact by tracing back the identity and connected destiny of this precious stone. As there seems to be no records that support the absolute ownership of the diamond, the research paper aims in connecting the legal and non-legal aspect. But as per the latest order of the Supreme Court of India, the matter can only be taken up in the International forum as the possession of the diamond is currently with Britain. Hence, as the Indian legal system is absolutely helpless in this situation only the foreign affairs ministry of the country could bring a plausible justification to the same. The never ending battle for the Kohinoor in the Indian Courts has undergone a legal burial after all as the Bench proclaimed that it has no jurisdiction and with no power to take up the case the legal system is helpless. Hence, the historians have to succumb to the efforts of repatriating the diamond leaving them to establish in their textbooks that the British stole the Diamond from a young Indian prince over a contract that was drafted way back in time.

### Keywords:

*Cultural repatriation, trade interests, property rights, History of India, Kohinoor, jurisdiction, legal burial, Foreign Affairs ministry, absolute ownership.*

## I. INTRODUCTION

The legal procedure for the repatriation is laid down by conventions but the factual theories behind the ownership of the artifacts are still a dilemma. Thereby, the outlook of the Koh-i- noor diamond being brought back to its legal owner which is quite evident if there was a treaty signed by the respective nations. The paper examines the mid-nineteenth century appropriation of the Koh-i-noor to show how the diamond functioned on a number of levels in British imperial culture and often contradictory ways. The Koh-i-noor diamond is one of the most famous pieces of royal material culture in the UK at 105.60 carats, 36.00 inches by 31.90 times 13.04 millimetres, as tourists at the Tower of London see it. It was confiscated in 1849 on behalf of the British Crown from the possession of the Punjabi Maharaja Duleep Singh and has since been in possession of the Crown Jewels. It was first shown in public during the great exhibition of 1851 as the property of Queen Victoria.<sup>2</sup>

## II. HISTORY OF THE KOHINOOR DIAMOND

When the Kohi-Noor Diamond entered the public discourse in Britain, the court and the colonial government used the biography of the stone to put the British conquest in India in a progressive light. The dominance of this narrative was strongly questioned after the presentation of the Koh-i-noor in 1851: The physique of the stone did not meet the aesthetic expectations of the exhibition visitors. The gemstone was one of the biggest attractions of the exhibition and was nevertheless considered by the spectators as dull and unsatisfactory. The language of imperialism in the mid-nineteenth century represented exploitation by colonial rule as a safeguard of British industrial progress, advancing the "civilizing mission." To what extent the public, gender-based appropriation of Koh-i-noor and Victoria did not fit these "respectable" values of that period was the cornerstone of the stone's reprocessing. I claim that the transformation of the Koh-i-noor was an attempt to restore the stone as a

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<sup>2</sup> Danielle C. Kinsey, 'Koh-i-noor: Empire, Diamonds, and the Performance of British Material Culture' Vol. 48, No. 2, 391

gemmological component of the British civilization mission, in which the weight of British science and machinery literally weighed on the diamond. during the great exhibition of 1851 as the property of Queen Victoria.

The diamond, which was delivered to England as an artefact of the British conquest, became a symbol of "civilizing mission" and a controversial mission. Contemporaries fought for their resonance as objects of value, as objects of feminine desire, as the epitome of "Oriental", as a symbol of the monarch and as a symbol of the non-progressive economy. The calling of British imperial identity to activate the monarchy was not reserved for the period of high imperialism in the 1870s and 1880s, but was used much earlier in the century for complex and unforeseen effects. Recent studies on material culture have asked us to appreciate the mutually constituent state of things and their contexts as they move both in time and in space, changing from things to goods to things, while having different cultural, economic and cultural dimensions Artistic tasks fulfil ideological work for different target groups.

Another perspective of the repatriation of the Koh-i-noor diamond is the claim that between 1851 and 1854 in many reports. The "Mountain of Light" represents the stolen Indian jewel, which British soldiers made loot of for the English Crown. This stone was on exhibition in the Crystal Palace at the World's Fair in London.<sup>3</sup>The first recorded owner of the diamond was the Rajah of Malwa, who ruled India in the early 12<sup>th</sup> century. Two hundred years later the diamond got into the possession of the Sultan Babar, the first Mughal Emperor passed it to his generation of Mughal rulers including Shah Jahan. Nadir Shah of Persia conquered the Delhi province in 1738<sup>4</sup>, one of the members of the defeated emperor Mohammed Shah's harem reputedly informed Nadir that the emperor engaged in the oriental custom of exchange of turbans which signify their brotherly ties, sincerity and eternal friendship. Since then it has been in the hands of Nadir Shah until 1849 when the British defeated Sikh king Ranjit Singh, annexed the Punjab province and the diamond became in their possession.

The new British commissioner of Punjab sent it to Queen Victoria and it got displayed at an exhibition. Amidst many reports claiming the Koh-i-noor to be cursed, her Majesty ordered that the Kohinnor must only be worn by women as the curse was believed to be affecting the men who wore the jewel. In Queen Elizabeth II's coronation it was put in her crown. This is now kept in a vault under the parade ground in front of the Tower's Waterloo Barracks where they are guarded by Yeomen Warders or Beefeaters arrayed in striking uniforms. In recent years, India, Iran, Afghanistan and Pakistan have claimed the rightful ownership of the diamond, but it is unlikely that the British family will ever give up one of their most famous jewels, the famous Koh-i-noor diamond.

### III. THE LEGAL BATTLE FOR THE KOHINOOR DIAMOND IN INDIA

This takes us to a section of the research as to what the people in India and the rest of the countries who have their claim on the Koh-i-noor have been doing to retain their precious stone back. The Members of Parliament have been vouching on the fact that the Diamond had been recorded to be in the hands of Indian ruler and hence the claim is to be by the Indians.Despite its dreary radiance, the Koh-i-noor is deeply meaningful to many in the Indian subcontinent. In recent decades, numerous individuals and nations have proclaimed ownership of the diamond. Repatriation of the diamond has been requested by officials in India. The Members of Parliament claim that the Koh-i-noor was taken away illegally and that they have the right to get it back.<sup>5</sup> In a letter signed by the Members of Parliament from both houses of parliament and across party lines, they argued that the Koh-i-noor was misappropriated by the colonial rulers during the British Raj. It was an appropriate time to take up the matter with Britain, the MPs said, because of a move initiated by Prime Minister Tony Blair in 2000 to return artefacts acquired during colonialism to their country of origin.

It was noted by the court that the relevant instrument is the 1970 UNESCO Convention on the Means of Prohibiting and Preventing Illicit Import, Export and Transfer of Ownership of Cultural Property, which deals with illicit import, export and transfer of ownership of cultural property. The UK became a signatory in 1977. It would be seen that Article 15 of the Objects. 1970 Convention allows State Parties to seek the restitution of a removed cultural property by entering into a special agreement with the concerned State Party with respect to cultural property removed or transferred before its entry into force of the Convention, Article 15 would be relevant. It is reiterated that India's credentials regarding ownership of the Koh-i- noor based on historical evidence cannot be doubted.

The Court observed that the Koh-i-noor, as well as other Indian artefacts', manuscripts and items of artistic and historical value that are precisely in the UK, are a significant expression of India's historical heritage. Koh-i-noor is an Indian artifact that was located for most of its history within the political and geographical boundaries of India.<sup>6</sup> The answering respondents are mindful of the sentiments that have been expressed by the Indian public and that the Parliament from time to time, about the return of the Koh-i-noor and other items of India. The Government of India continues to explore ways and means for obtaining a satisfactory resolution to the issue with the UK Government.

The Supreme Court later refused to review its decision against passing any order on reclaiming Koh-i-noor diamond from the United Kingdom on April 29th<sup>7</sup>. The five-judge bench, headed by the then Chief Justice of India Ranjan Gogoi, has found no good ground to reconsider the Court's earlier order. The bench dismissed the curative petition, saying there is no merit in it and that the petitioner has failed to make out any substantial

<sup>3</sup>Ibid 1

<sup>4</sup>Page S. Goodwin, Mapping the Limits of Repatriation of Cultural Heritage: A Case Study of Stolen Flemish, in French Museums, Page no. 691.

<sup>5</sup>International Institute for the Unification of Private of Private Law Convention of Stolen or Illegally Exported Cultural Objects, 1970.

<sup>6</sup> Bradley P. Dean, Thoreau and "The Celebrated Koh-i-noor Diamond", The Thoreau Society Bulletin, No. 242(Winter 2003), pp. 6-7 (2 pages).

<sup>7</sup> BKS R Ayyangar vs Archaeological Survey Of India on 21 August, 2018 [CIC/ALSOI/A/2018/111930]

reason why the issue needs to be kept alive. "We have gone through the Curative Petition and the connected papers. In our opinion, no case is made out within the parameters indicated in the decision of this Court in the case of Rupa Ashok Hurra Vs Ashok Hurra and another<sup>8</sup>. Hence, the Curative Petition is dismissed," held the bench in a recent order. The bench also included Justices SA Bobde, NV Ramana, DY Chandrachud and SK Kaul. The top court had earlier disposed of the petition filed by NGO 'All India Human Rights and Social Justice Front'. It had then noted that it cannot direct the United Kingdom on what to do with the Koh-i-noor diamond.

The Court asked how petitions requesting the return of properties belonging to a foreign government should reach the Supreme Court, which has no jurisdiction over matters that are best left to international diplomacy and not to the judiciary. The central government, in its affidavit, had said it was "continuing to explore ways for a satisfactory resolution" over the diamond with the UK. The affidavit had said the issue of the Koh-i-noor was "taken up time and again since the Independence". The return of Koh-i-noor would, according to the government, require a "special agreement" between the two countries. It added that the 1972 Law on Antiques and Art Treasures, which prevented the export of valuable objects and treasures from the land, could not help in this case, as the British East India Company was the Koh-i-noor of the young King Maharaja Duleep had confiscated Singh in 1849, which was much before the law came into force.

#### IV. BRITAIN AND INDIA'S BATTLE OF CLAIMS

Although no legal claim or suit has been filed by India so far, the academic grounding of India's argument for repatriation has a normative and a semi-legal basis. It is interesting to note that Article 93 of the UN Charter would accord the International Court of Justice the jurisdiction to take up such a case, the UK and India being ipso facto parties to the Statute. The Court would however only apply principles from the existing Treaties and Conventions pertaining to the issue.<sup>9</sup>

Another argument is that Maharaja Duleep Singh was only a minor at the time of transfer and that it was void ab initio.<sup>10</sup> Without prejudice to this argument, it is also felt that the normative foundation of this transfer is challengeable on the basis that a transfer of property or a gift can only be made the rightful owner of the object and by virtue of the fact that it is notions of collective property<sup>11</sup> that attach to cultural property.<sup>12</sup> In such a situation, it is the demands of the nation, which must prevail over any other argument.<sup>13</sup> This is because, as argued, the identity of people is so inextricably linked with the cultural property in question, it renders them unable to consent to transactions that would effectuate a transfer of them.<sup>14</sup> In this context, Britain's retention of the Kohinoor can be said to be, as it classifies, for purposes, i.e. retention for the sole purpose of preventing others from having it.<sup>15</sup> It is not only the Government of India that has been lobbying for repatriation. Other stakeholders include the descendants of Maharaja Ranjit Singh, the Jagannath Temple in Puri (claiming that the diamond was bequeathed to it before the death of Maharaja Ranjit Singh), an individual named Mr. Beant Singh Sandhanwalia and even the Government of Pakistan (that claims the diamond was taken from the Province of Punjab which would fall within the territorial bounds of what constitutes present day Pakistan).<sup>16</sup> In fact, Pakistan has recently resorted to legal action for repatriation very recently.<sup>17</sup>

The United Nations General Assembly has called for the return of cultural assets from the colonial era. The first of these was in 1973, when she complained that "works of art were transferred from one country to another, often as a result of colonial or foreign occupation, with virtually no pay." and redress, they remain soft law and are in no way binding on the market States. One of Britain's strongest defence remains that the transfer of the diamond happened validly from the de facto King of Punjab, as he bestowed it as a gift to Queen Victoria. This 'good in law' defence is something Britain has argued with respect to the Parthenon Marbles as well.<sup>18</sup> As a result and as Merryman and others have argued, such property becomes a part of British history and Britain has as much of a cultural claim over it as India by virtue of the fact that it has been in their possession for so long.<sup>19</sup> Britain also seems to have an alternative argument lined up in case the validity of this transfer was to come into question in the 'Spoils of War' doctrine<sup>20</sup>, which has been a rule of war throughout most of history and much prior to all the applicable Conventions coming into effect.

<sup>8</sup> Rupa Ashok Hurra Vs Ashok Hurra and another

<sup>9</sup> Johnson Thomas Karingozhakal, Legal Notice to the European Union to Repatriate the Kohinoor Diamond and All Indian Heritage, available at <https://indianheritageprotection.wordpress.com/2012/11/20/41/9>

<sup>10</sup> RashmeeRoshanLall, Britain Nixed Pakistan Claim to Kohinoor, Times of India (Dec. 30 2006), available at <http://timesofindia.indiatimes.com/articleshow/986002.cms>

<sup>11</sup> Ibid 4

<sup>12</sup> Satish Jacob, Indian MPs Demand Koh-i-noor's Return, BBC NEWS ONLINE, Apr. 26, 2000

<sup>13</sup> Ibid 5

<sup>14</sup> Patty Gerstenblith, Art, Cultural Heritage and the Law, Carolina Academic Press 2004, Page no. 33.

<sup>15</sup> Margaret Jane Radin, Property and Personhood, 34 Stan. L. Rev. 957 (1982).

<sup>16</sup> Supra note 10.

<sup>17</sup> Petition filed to bring Kohinoor from UK to Pakistan, Times of India (Dec 3, 2015), [http://timesofindia.indiatimes.com/india/Petition-filed-to-bring-Kohinoor-from-UK-to-Pakistan/articleshow/50033931.cms?utm\\_source=facebook.com&utm\\_medium=referral&utm\\_campaign=TOI](http://timesofindia.indiatimes.com/india/Petition-filed-to-bring-Kohinoor-from-UK-to-Pakistan/articleshow/50033931.cms?utm_source=facebook.com&utm_medium=referral&utm_campaign=TOI).

<sup>18</sup> Roger W. Mastalir, A Proposal for Protecting the 'Cultural' and 'Property' Aspects of Cultural property Under International Law, 16 Fordham Int'l J. 1033.

<sup>19</sup> Ibid 12.

<sup>20</sup> Leonard D. Duboff, Art Law: Cases and Materials, Page 20



Another rather contentious defence is the idea of 'Universal Culturalism'. This propagates the idea that everyone has an interest in the preservation and enjoyment of all cultural property, no matter where it is physically located. This property is said to belong to the world at large<sup>21</sup> and the theory suggests that it should be protected by a country that is better placed and has greater resources to ensure its maintenance.<sup>22</sup> Even with respect to title dispute over the Elgin marbles, Britain has argued that the presence of the marbles in the British Museum has protected them from potential damage that could have occurred through the exposure at their source location (the Acropolis rock).

Another defence that colonial powers usually resort to is what has come to be known as the 'Fallmerayer theory'.<sup>23</sup> This view posits that the population of the source country does not constitute the biological descendants of the ancient peoples from whom this property was taken and that there is a clear disconnect between the two groups. This ignores all notions of a continuing identity.<sup>24</sup> Britain's resort to temporal restrictions is strengthened by the decisions in Right of Passage over Indian Territory<sup>25</sup> And the Island of Palmas case<sup>26</sup> where the ICJ rejected the use of international law and practice to interpret events that occurred in the past. Further, the national laws prevalent during British conquest do not support the return of cultural property held by Britain.<sup>27</sup> Britain welcomes the multitude of claims over the Kohinoor as this ultimately complicates the issue of ownership and adversely affects the strength and validity of any one claim in particular.<sup>28</sup> Some applicable Conventions pertaining to the issue of repatriation include the Hague Convention, 1899 (establishing the first formal guidelines for the protection of cultural property in the event of armed conflict), the Armed Conflict Convention<sup>29</sup>, the 1970 UNESCO Convention<sup>30</sup>, the UNESCO Convention on National heritage<sup>31</sup> and UNIDROIT<sup>32</sup>, inter alia. One of the most significant flaws with the international framework pertaining to repatriation is the manner in which cultural property itself is viewed. This is the first hurdle that needs to be overcome.

The legal framework almost completely ignores the exclusivity attached to such property and is premised upon an ordinary tangible property analysis of the trajectory of the legal title to such property. This happens without reliance upon its historical and cultural significance on human civilisation.<sup>33</sup> Such an analysis overlooks the crucial distinction between collective and individual ownership and has remained rather primitive in nature.<sup>34</sup> With respect to the basic property rights doctrine, the objects are subject to specific identifiable ownership that can, in turn, be transferred to others. This is clearly not the case with respect to cultural property. Second, the framework is governed by the general principle of repose, mandating continuance of status quo in absence of a significant necessity or reason for change. Third, laws pertaining to repatriation and restitution seem to have been designed in a manner that protects commercial interests of market/possessing countries and seem to be skewed against the interests of the former colonies in the manner in which they are framed. The existing framework fails to provide for clarity on what would constitute cultural artifacts and is inadequate for a legitimate pursuit by an aggrieved source country.

Fourth, the framework is bound by severe temporal restrictions. Most claims of repatriation are eligible for a summary rejection based on the restrictive limitation periods laid down across the framework. Such restrictions take away from the efficacy of the framework in its entirety.<sup>35</sup> This again is founded on a tangible property rights approach to cultural property.<sup>36</sup> This can be seen for instance in Section 3 of the Armed Conflict Convention<sup>37</sup> which mandates that the protection and repatriation of objects refer to those obtained either before or after the beginning of actual hostilities or occupation (this also indicates that Conventions are limited to specific contexts)<sup>38</sup>. Further, the diamond was transferred over a century before the Convention came into effect, the scope of its applicability being only prospective in nature. Such a provision can be seen in Article 7(a) of the 1970 UNESCO Convention clarifying its applicability only to items "exported after entry into force of this Convention, in the States concerned."<sup>39</sup> The period of limitations under the 1995 UNIDROIT Convention is three years relatively (from the date when the claimant first had knowledge of the cultural object's location and possessor) and 50 years absolutely.

<sup>21</sup> Nadia Banteka, The Parthenon Marbles Revisited – A New Strategy for Greece,

[http://www.researchgate.net/publication/256041553\\_The\\_Parthenon\\_Marbles\\_Revisited\\_A\\_New\\_Strategy\\_for\\_Greece](http://www.researchgate.net/publication/256041553_The_Parthenon_Marbles_Revisited_A_New_Strategy_for_Greece).

<sup>22</sup> Ibid 3.

<sup>23</sup> Ibid 17.

<sup>24</sup> Ibid.17

<sup>25</sup> Island of Palmas (U.S. v. Netherlands), 2 R.I.A.A. 829, 845.

<sup>26</sup> Right of Passage over Indian Territory (Port v. India), 1960 I.C.J.

<sup>27</sup> India's Right to Reclaim Cultural and Art Treasures from Britain under International Law, 23 Geo.Wash. J. International & Economic, Page no. 465.

<sup>28</sup> Supra note 5.

<sup>29</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1972

<sup>30</sup> UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership in Cultural Property, 1970

<sup>31</sup> UNESCO Convention Concerning the Protection of the World Cultural and National Heritage

<sup>32</sup> Ibid 3.

<sup>33</sup> Supra note 5.

<sup>34</sup> Ibid 3.

<sup>35</sup> Supra note 5.

<sup>36</sup> Ibid.26

<sup>37</sup> Vivek K. Hatti, India's Right to Reclaim Cultural and Art Treasures from Britain under International Law, 23 Geo. Wash. J. Int'l Econ. 465 1999-2000.

<sup>38</sup> Treaty of Lahore.

<sup>39</sup> Pari Materia provisions can be found in the UNIDROIT Convention as well.

## V. THE LEGAL BATTLE BETWEEN COUNTRIES

There is no lawsuit filed for the repatriation of the Koh-i-noor Diamond, nor has any official complaints have been filed with any international governing body. Therefore, the fundamental legal question of repatriation begins with the enquiry as to where shall the legal proceedings begin. In any exercise of repatriation for the Koh-i-noor Diamond, the legal dialogue and subsequent discourse will either begin its journey at, or pass through at some point via repatriation lawsuits, the International Court of Justice ("ICJ") or the European Court of Justice ("ECJ").<sup>40</sup> Additionally, Article 93 of the U.N. Charter mandates that the two nations involved in the case of the Koh-i-noor, the United Kingdom and the Republic of India, are ipso facto parties to the statute of the ICJ. Therefore, if India were to bring an actionable lawsuit before the ICJ for the return of the Koh-i-noor Diamond, the Court would apply the text and statutes of relevant treaties and conventions as part of the legal framework of customary international law.

The specific issue of returning cultural property such as the Koh-i-noor diamond to its original owner does not contain any explicit provision under customary international law, and Therefore ownership must be determined by a relevant and applicable teaching development in the international age. In the emerging arena of contemporary international law there is a clear tendency to preserve culture.

## VI. INTERNATIONAL LAWS GOVERNING CULTURAL ARTIFACTS

In 2009, nearly 55 years after the United States participated in the drafting of the first international convention devoted solely to the protection of cultural assets, the United States ratified the 1954 Hague Convention on the Protection of Cultural Property in Armed Conflict. New Developments in the US have helped in the implementation of the 1970 UNESCO Convention on the Prohibition and Prevention of the Illicit Import, Export and Transfer of the Protection of Cultural Property by the 1983 Law<sup>41</sup>, the Convention on the Implementation of Cultural Property, continues to expand and review the parameters of the role of the USA in this international treaty regime. Eventually claims, restorations and the return of plundered, smuggled and stolen cultural assets continued.

The reality of international law affecting the private property rights of individuals, business entities, and other non-state actors. In some contexts, property rights are directly created by international law, such as rights in deep seabed minerals or the rights of aboriginal peoples in their ancestral lands.<sup>42</sup> International law also harmonizes trans-boundary property rights, such as rights in equipment that travels between nations or rights in intellectual property. The fact is that international law often restricts nationally-created property rights, such as rights in cultural objects or rights.

By examining the unsuccessful efforts to create a broad, internationally enforceable human right to property in the second half of the twentieth century, we note that the doctrines of international property law have evolved in recent decades despite this failure in specific contexts. The lessons are drawn from four sources: regulation of the global community, coordination of cross-border property rights, adoption of global strategies to prevent specific damage and protection of the human rights of vulnerable groups. This is an essential source for establishing the need for international ownership. The importance of the UNIDROIT (Convention on Stolen or Illegally Exported Cultural Objects) Convention<sup>43</sup> comes to cultural property. The UNIDROIT Convention mandates the return of a stolen cultural object to the original owner. Further, any cultural object that has been excavated unlawfully or excavated lawfully but retained unlawfully is deemed to be stolen." In addition, a party nation to the UNIDROIT Convention may demand that a court of another party country to the convention order the return of a cultural object illegally exported from the territory of the requesting nation.<sup>44</sup>

The Convention regulates the time period that an affected party may bring a claim for the restitution of stolen cultural property or the return of those illegally exported. Such a claim may be brought in three years from the time when the claimant knew the location of the cultural property and the identity of the possessor and in 50 years since the time of the theft which is in Article 3.3 of the convention.<sup>45</sup> However, there are exceptions to this rule for stolen objects. Cultural objects that form an integral part of an identified monument or archaeological site, or which belong to a public collection are not subject to time limitation other than a period of three years said in Article 3.4. In addition, a Contracting State may declare that a claim warrants an extended time limit of 75 years or longer if so stated in its national law, talked about in Article 3.5 of the convention.<sup>46</sup> The UNIDROIT Convention is not a retroactive treaty. Its provisions only apply to cultural property stolen or illegally exported after the Convention entered into force as in Article 10. However the UNIDROIT Convention "does not in any way legitimise any illegal transaction of whatever which has taken place before the entry into force of this Convention"<sup>47</sup>

<sup>40</sup> Ann P. Prunty, Toward Establishing an International Tribunal for the Settlement of Cultural Property Disputes: How to Keep Greece from Losing its Marbles, 72 G.Eo. L.J. 1155 (1984).

<sup>41</sup> Simon Halfin, The Legal Protection of Cultural Property in Britain: Past, Present and Future, 6 DePaul J. Art, Tech. & Intell. Prop. L. 1 (1995)

<sup>42</sup> Patty Gerstenblith, 2009 Cultural Heritage Legal Summary, Journal of Field Archaeology, Vol. 35, No. 2 (June 2010), pp. 237-243 (7 pages)

<sup>43</sup> UNIDROIT Convention, 1995

<sup>44</sup> Marilyn e. Phelan, The UNIDROIT convention on stolen or illegally exported cultural objects confirms a separate property status for cultural treasures, HeinOnline -- 5 Vill. Sports & Ent. L.J. 31 1998.

<sup>45</sup> John G. Sprankling, The Emergence of International Property Law, Pacific McGeorge School of Law, 2012

<sup>46</sup> Ibid 41

<sup>47</sup> Mark Sagoff, The Economy of the Earth: Philosophy, Law and the Environment, Cambridge University Press, Page no. 58.

## VII. CONCLUSION

Unless the framework pertaining to cultural property is drastically strengthened, India's position will continue not to hold much water. Further, initiating action and losing a battle due to the fact that the framework itself is lacking would be devastating and would probably result in the matter having been put to rest permanently. Ironically therefore, the country cannot afford to initiate action for something that it believes to rightfully belong to it. If countries like India are to have a legitimate claim over the cultural property that was taken from them, it is important to expand and clarify the definition of what constitutes cultural heritage.

Next, temporal restrictions that unfairly preclude the applicability of the legal framework to such property should be done away with and thus create a possibility for a claim for recovery in the first place. One of the greatest obligations that the present owes to The future is to transmit its heritage.<sup>48</sup> Even resorting to legal action might be a strong option for India even if simply being a negotiation tactic, this having seemed to have work in Greece's negotiations with the J. Paul Getty museum.<sup>49</sup> It is also important that the developed world stop having such a big say in the manner in which the framework is structured so that even if former colonies were to initiate action, they would do so in an equal position. The UNIDROIT Convention is a prime example of this misuse of power, it being modeled in a manner to satisfy the market states about the correction of all unfavourable provisions that were present in the earlier UNESCO Convention<sup>50</sup>.

As of now, the situation seems to have reached a complete dead-lock and neither side seems to want to concede at the risk of losing a moral high-ground that has required much upkeep. The only options that could be exercised today are those where there is no transfer of title actuated but the Kohinoor is physically moved between the countries for certain periods on a loan basis, if both parties are amenable.<sup>51</sup> Such a middle ground if exercised, however, could either pave the way for an eventual repatriation being carried out or may go against India for having not stuck to its guns and battled the issue out, even at the risk of losing.



<sup>48</sup> Ralph Frammolino and Jason Felch. Greece Vows Legal Action Against Getty, L.A. Times, <http://articles.latimes.com/2005/nov/23/local/me-getty23>.

<sup>49</sup> United Nations Educational, Scientific and Cultural Organization: Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, The American Journal of International Law, Cambridge University Press, Vol. 65, No. 5 (Oct., 1971), pp. 887-895 (9 pages)

<sup>50</sup> Ibid 3.

<sup>51</sup> Ibid 7.