VIII.

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An Intercultural Approach to the Problem
of European Collections of Colonial Provenance

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Naazima Kamardeen

Abstract

Cultural property has evoked partisan feelings in the minds of both those who retain it and those from whom it has been taken. With the rise of human rights jurisprudence and the corresponding affirmation of cultural rights, the retention of cultural property taken by means legal at the time, yet illegal by modern standards (and unjust by any reasonable yardstick) continues to be a matter of deep concern to many countries including Sri Lanka, which was colonised by three European nations. In ascertaining the possible legal arguments for and against the original taking and current retention of cultural property, it is argued that the operative system of international law during the heyday of European colonialism was created by Europe itself and served its expansionist agenda. The holders of colonial cultural property continue to shift the goalposts through various means to ensure that the property stays in their hands. Against this backdrop, the legal basis for the return of cultural property taken in colonial times has been negated, and what is left is to appeal to a sense of justice that confirms the wrongdoing of the taking as well as the necessity to correct the historical injustice even at this late stage.

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Changement d'objectifs. Une perspective légale sur la propriété culturelle (Résumé)

La propriété culturelle a suscité des réactions partisanes, tant chez ceux qui les conservent que chez ceux à qui elle a été enlevée. Avec l'essor de la jurisprudence en matière de droits humains et l'affirmation correspondante des droits culturels, la conservation de la propriété culturelle, obtenue par des moyens alors légaux mais illégaux selon les normes actuelles (et injustes selon tout critère raisonnable), continue d'être un sujet de préoccupation pour de nombreux pays, y compris le Sri Lanka qui a été colonisé par trois nations européennes. En déterminant les arguments juridiques possibles pour et contre l'acquisition initiale et la conservation actuelle de la propriété culturelle, il est avancé que le système opérationnel du droit international à l'apogée du colonialisme européen a été créé par l'Europe elle-même et a servi sa politique expansionniste. Les détenteurs de propriété culturelle n'ont de cesse de changer les règles par divers moyens pour s'assurer que les biens restent entre leurs mains.

Dans ce contexte, la base légale pour la restitution de la propriété culturelle enlevée dans un contexte colonial a été réduite à néant et il ne reste plus qu'à faire appel au sens de la justice, indiquant que ces biens ont été pris à tort et que l'injustice historique doit être corrigée – mieux vaut tard que jamais.

Introduction

Cultural property has long held a special place in the fabric of society. From early times, humans have been fascinated by the different cultures they have seen around them. Apart from a desire to know and participate in other cultures, cultural identity has also posed a threat, especially where one group has sought to suppress another. In such circumstances, it became necessary to suppress or destroy that culture by destroying or suppressing its symbols. The "taking" of cultural objects can therefore be motivated by a number of reasons, as outlined above. One of the sharpest examples of "taking" cultural property without the sanction or approval of the owners or guardians of such objects took place in the colonial era, which is at the focus of this volume.

In the context of colonial cultural property, this chapter will examine the relationship between law and justice with special reference to the temporal

nature of law and the varying conceptions of justice. The historical and contextual perspectives are expected to shed light on why two parties with completely opposing views might both believe that they hold both the legal and moral high ground when it comes to a claim over colonial cultural property. The chapter will then examine instances where the holders of such colonial cultural property attempt to "shift the goalposts" by applying different standards to colonial cultural property than they do to other cultural property. The study will thus establish that such tactics are resorted to with the intention of holding on to such property while giving the impression that it could in fact be returned, provided certain conditions are met. The chapter will conclude by considering some of the options available to those requesting the return of such cultural property.

Definitions of Key Terms

In this chapter, the central focus is on cultural property acquired during colonial times. The term "cultural property" is of a more general nature. Two major international conventions, namely the UNESCO Convention of 1970 and the UNIDROIT Convention of 1995, reflect the same thinking: that cultural property is any item that a country regards "as being of importance for archaeology, prehistory, history, literature, art or science" on "religious or secular grounds". Such property will include art, artefacts, antiques, historical monuments, rare collections, and religious objects that are of particular significance to the cultural identity of a people.[1]

The above definition, while sufficient to describe the nature of cultural property, is not adequate to explain the status of cultural property that finds itself far from its place of origin, is contested as to its ownership, and has no direct importance for the archaeology, prehistory or history of its current place of location. It is only in more recent times that such objects, predominantly taken during colonial occupation, have been endowed with their own definitions. Van Beurden aptly describes these as colonial cultural objects and defines such as "of cultural or historical importance acquired without just compensation or involuntarily lost during the European colonial era."[2]

Sri Lanka's Loss of Cultural Property During Colonial Times

Sri Lanka, sometimes described as "The Granary of the East" and the "Pearl of the Indian Ocean", was a land rich in agricultural and natural reserves. An island with strategic geopolitical advantage, it was the target of European colonisation from the 16th century onwards, falling prey to the Portuguese, Dutch and British for about 375 years in total. During the Portuguese era, King Dharmapala (1551–1597) – who converted to Christianity and took the name Don Juan Dharmapala – made a deed of gift to the Portuguese authorities. It is believed that many items of cultural significance left the country at that time, but they are no longer to be found in public collections in Portugal. Items from this era, however, are found in some German museums.[3] The Dutch era has actual records of much more movement of cultural property. More than 300 items from Sri Lanka are found in various Dutch museums. These have either been captured in battle or gifted by the Dutch governor of Ceylon to the Dutch King.[4]

It was during the British era that the largest movement of cultural property out of Sri Lanka was recorded. More than 3,000 objects have been officially catalogued in over 16 museums in England.[5] Among these is the statue of Tara, the only female reincarnation of Buddha. This bronze statue, which dates to the 10th century AD, was taken by Governor Robert Brownrigg (1758–1833) in 1830. It is now on display at the British Museum but was for long years locked up in a storage room, considered too obscene for exhibition.[6]

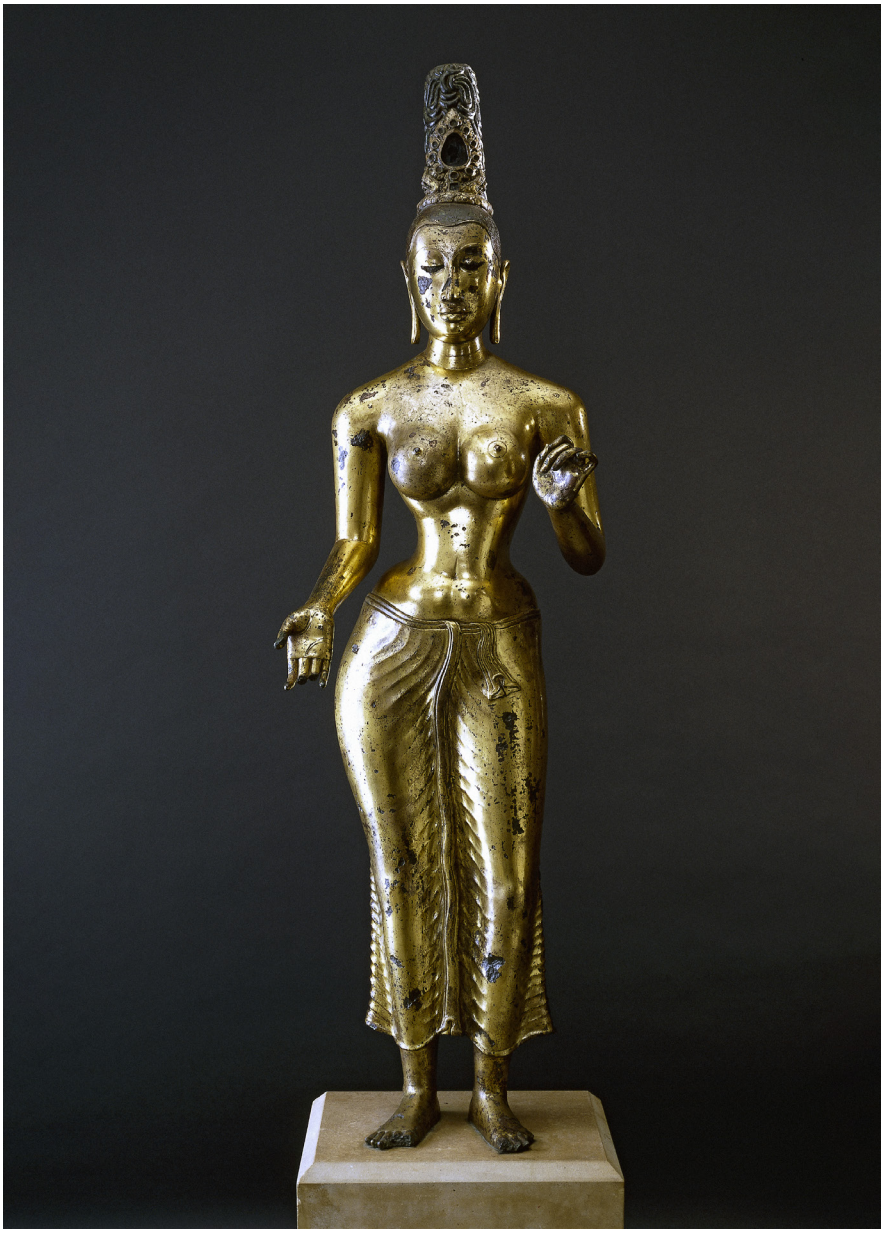

Figure 1 | Statue of Tara, London, British Museum, Inv. No. 1830,0612.4

Legal Regime Pertaining to Cultural Property

Cultural property became a topic of concern only in the 1960s, long after the creation of the UN. It took several years for the UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* (1970) to be drafted.[7]

From the preamble, it appears that the problem that was being addressed was the post-World War II movement of cultural property, and not, in fact, the property looted during the colonial era. While calling on states to designate items as cultural property under their national laws which fall within the definition provided (Article 1), Article 2 mentions that the illicit import, export and transfer of objects is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property. It is ironic that such impoverishment is seen as a problem only after 1970, even though the mass scale movement of cultural property happened during the colonial era, when the colonies were at their weakest.

Article 4 recognises, as part of the cultural heritage of each state, cultural property "found" within the national territory (Article 4 (b)). It is contended that the word "found" can be taken to denote an object that found its way into a particular territory even by means that are not legal. As the Convention does not question how the cultural property came to be "found" there, this provision can be read as an attempt to legitimise the illegal presence of cultural property looted during colonial occupation.

Articles 10–14 contain provisions mandating that state parties help each other to recover and return stolen property when requested to do so by the source country. The only acknowledgement of cultural property of a previous era is in Article 15:

> *Nothing in this Convention shall prevent States Parties thereto from concluding special agreements among themselves or from continuing to implement agreements already concluded regarding the restitution of cultural property removed, whatever the reason, from its territory of origin, before the entry into force of this Convention for the States concerned.*

In 1978, UNESCO created the *Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation* (ICPRCP). Sri Lanka then made a request to this committee in April 1980.[8] It was turned down on the basis that no evidence had been submitted to the effect that bilateral negotiations had failed.

Since the convention had come into effect only in 1972, it would affect the movement of objects only after that period and therefore had no bearing on objects from the colonial era. While Sri Lanka, UK, Portugal and the Netherlands are state parties to this Convention, it is not useful to address Sri Lanka's loss of cultural property to these nations. In fact, the wording of the entire Convention reveals a desire to steer clear of colonial cultural property altogether.

The UNIDROIT *Convention on Stolen or Illegally Exported Cultural Objects* (1995) sets time limits for the return of the latter. According to Article 3, an object must be requested three years from the time the location of the object and the identity of the possessor are known, and 50 years in any event. Neither Sri Lanka nor the United Kingdom are parties to this Convention, although Portugal and the Netherlands are.[9] Therefore this Convention is of limited use to Sri Lanka's cause.

It is contended that the current international legal regime is based largely on Eurocentric sources with colonial origins. Antony Anghie argues that many of the basic doctrines of international law that we regard as universal were in fact forged out of the attempt to create a legal system that could account for relations between the European and non-European worlds in the colonial confrontation. According to Anghie, the set of structures created by international law out of the movement of "New World" European encounters, structures that he convincingly demonstrates are repeated throughout the history of modern international law, constructed the "difference" of Indigenous subjects in such a way as to disable them vis-a-vis normal international law, even as it turned them into prime objects of concern and reform.[10]

By the sixteenth century, the Christian European law of nations and the law of war had begun its radical transformation into a secular and universally applicable international law.[11] The bias that it embodied regarding "native subjects" thus became embedded into, and acquired legitimacy within, the international legal system. It is little wonder that this system of international law that we now use does not support, as a legal right, the return of cultural property removed during the colonial era.

Law versus Justice

In the preceding section, we have observed that the international legal regime concerning cultural property has carefully excluded colonial cultural property from its protective framework. However, initiatives such as the UNESCO *Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation* were founded on the premise that there was a basis on which these nations could request restitution. The basis ought, then, to be justice, not law. This would involve an appeal to a sense of fairness rather than to a legally established right. The following section will now focus on justice as a basis for the return of colonial cultural property.

Even if the legal standards may vary, we have been trained to think that justice at least is universal, constant and enduring. However, this is not always the case. In every conflict, each side believes that it is justified in taking the measures that it does and uses all the means at its disposal to do so. Buddhism, which advocates non-aggression, has viewed justice as a concept that is always touted by those who wish to justify their stance, however wrong it may be, because no one wants to admit that the course of action they are undertaking is unjust.

"Who decides what is just and unjust? [...] Our war is always 'just' and your war is always 'unjust'. Buddhism does not accept this position."[12]

Justice has often been used to promote equal treatment among equals. However, the euro-centric international legal system of the 18th and 19th centuries that allowed its proponents to consider "natives" as "uncivilised" apparently saw no contradiction in retaining slavery while it developed a human rights regime, and similarly does not have a problem with retaining looted cultural property while it takes steps to prevent the illicit transfer of the same.

This is the retainment of the colonial mentality, which allows those following it to maintain double standards while advocating equality for all. Until this mentality is erased from our collective consciousness, the situation will never be rectified. The legal regime pertaining to cultural property claims to work to protect it while in fact safeguarding only certain types of such, thus leaving colonial cultural property in a legal vacuum.

Shifting Goalposts

This section will examine shifts in legal standards at various junctures in history with a view to establishing that states seeking the restitution of their cultural property are subject to various requirements at various times. In the centuries leading up to World War II, the positivist agenda that was largely in place throughout Europe enabled conquest and the taking of war booty. After World War II, the legal position changed to reflect the position that conquest was illegal, as was the looting that in many cases ensued. However, this system retained the position that previous takings would remain legal, since the law would not apply retrospectively. Prescriptive periods were also laid down, timeframes that were impossible for newly independent states to meet. Again, these were set through the influence of the very nations who were retaining colonial cultural property, which effectively ensured that goods taken previously would not be returnable.

The most recent example of goalpost-shifting is the false hope that restitution will be made provided that the provenance can be established, even though it is well known that documentation of this type is in most cases unavailable, especially when the property was indiscriminately looted. For example, we find that Governor Brownrigg simply removed the statue of Tara without consulting anyone or making any record. In more recent times there have been negotiations between the Netherlands and Sri Lanka about the possible return of the Cannon of Kandy, a ceremonial cannon gifted by Lewke Disawe to King Rajasinghe of Kandy (1780–1832). The *Rijksmuseum*, where the cannon is currently on display, wished to conduct further provenance research even though available documentation had pointed it to be of Sri Lankan origin and there were no other claimants to the object. The research was carried out under the aegis of a wider project and ran from 2019 to 2022, revealing no further details about the origin of the cannon.[13]

Enactment of legislation to pre-empt efforts at restitution is another method of goalpost-shifting. The British Museum Act of 1963 prevents it from returning objects in the museum, even though international law prevents domestic legislation from being used to hinder international obligations from being met.[14] The British Museum Act has been used to refuse a large number of requests. It is doubtful whether any other country would be allowed to evade international obligations by quoting the terms of a domestic law that is highly flawed in concept.

Another example of shifting goalposts is the term "cultural diplomacy" – the selective return of cultural objects to promote certain ends. Such instances have been justified as fostering cultural exchange, such as the provision of scholarships to study in the country in question. However, cultural diplomacy has also involved the restitution of property to support a diplomatic or economic agenda, which is counterproductive to the interests of affected nations. For example, Belgium's willingness to return objects to the Democratic Republic of Congo in the 1960s and 1970s derived primarily from its wish to preserve its mineral interest in Katanga.[15] This particular manifestation of cultural diplomacy is extremely damaging to the collective interests of states seeking restitution, as it pits them against each other in the race to curry favour with the holders of such property. It also reinforces a type of neo-colonialism, where these nations are forced to part with one thing in order to regain another thing that they should never have lost in the first place.

Conclusion

Cultural property has been acknowledged as an integral part of a state's identity. We must recognise the flawed bases of law and justice on which we have been operating to date, and acknowledge that they are not in the best interests of humanity. We must affirm universal, rather than convenient, principles. We must see all humans as human, even at this late stage. We must respect the rights of all peoples to their cultural identity, embodied in their cultural property. To this end, the global community must put an end to shifting goalposts and apply the same legal principles to all cultural property, regardless of the time period in which they were looted. Provenance research in former colonies must bear in mind that the victors write the history and maintain the records, and that these records – should they even exist – are likely to be sketchy or silent as to the wrongdoings of the victors. Debates about colonial cultural property should not be left to bilateral negotiation, where former colonies are usually the weaker party. Neo-colonialism in the guise of cultural diplomacy must be stopped completely. The holders of colonial cultural property must realise that they need to approach the negotiations in a spirit of honesty and good faith and treat the other party with respect.

1 See here and in the following: UNESCO (1970): *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,* Paris, https://en.unesco.org/about-us/legal-affairs/convention-means-prohibiting-and-preventing-illicit-import-export-and, accessed 12 March 2023.
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3 Kamardeen, Naazima (2017): "The Protection of Cultural Property: Post-Colonial and Post-Conflict Perspectives from Sri Lanka", in: *International Journal of Cultural Property*, Vol. 24, no. 4, pp. 429–450.
4 Ibid.
5 De Silva, P. H. D. Hemasiri (1975): *A Catalogue of Antiquities and Other Cultural Objects from Sri Lanka (Ceylon) and Abroad*, Colombo.
6 Wanniarachchi, Senel (2020): "Finders Keepers: On Sex, Tara the Buddhist Deity at the British Museum and Brownness in the Colonies", 8 January 2020, on: https://blogs.lse.ac.uk/gender/2020/01/08/finders-keepers-on-sex-tara-the-buddhist-deity-at-the-british-museum-and-brownness-in-the-colonies/, accessed 12 March 2023.
7 *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,* https://en.unesco.org/about-us/legal-affairs/convention-means-prohibiting-and-preventing-illicit-import-export-and, accessed 12 March 2023.
8 ICRPCP, Statement Presented by the Democratic Socialist Republic of Sri Lanka Concerning the Restitution of Significant Cultural Objects from Sri Lanka, (April 1980), UN Doc. CC.79/CONF.206/COL.10.
9 See UNIDROIT (1995): *Unidroit Convention on Stolen or Illegally Exported Cultural Objects*, Rome, https://www.unidroit.org/instruments/cultural-property/1995-convention/; Ste Parties, https://www.unidroit.org/instruments/cultural-property/1995-convention/status/, accessed 12 March 2023.
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12 Cf. Anghie, Antony (2011): "The Grotius Lecture: ASIL 2010, International Law In a Time of Change: Should International Law Lead or Follow?", in: *Am. U. Int'l L. Rev.*, Vol. 26, Issue 5, pp. 1315–1376, Quoting *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion of 8 July 1996, I.C.J. 226.
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14 British Museum Act (1963), https://www.britishmuseum.org/sites/default/files/2019-10/British-Museum-Act-1963.pdf, accessed 12 March 2023.
15 Van Beurden, 2016, *Treasures in Trusted Hands.*