

DECONSTRUCTING THE DICHOTOMY IN CULTURAL PROPERTY LAW[†]

*Vedika Shah **

I. INTRODUCTION

The world's oldest extant book 'Jikji' housed at the Bibliothèque Nationale de France has garnered much attention worldwide. Printed in 1377 during the reign of the Koryō Dynasty in Korea, Jikji is a Korean Buddhist document comprising of excerpts from the writings of erudite Buddhist monks. Since around the 1950s, Jikji has been displayed at the Bibliothèque Nationale de France.¹ Though the circumstances surrounding Jikji's transfer to France are unclear, it has been alleged by some that Jikji was looted from Korea by the French, while several others contend that Jikji was legally taken out of the country by a French private collector, and was thereafter donated to the Bibliothèque Nationale.²

At its heart, the Jikji controversy rests upon the rival claims of Korea and France to this cultural object of great significance. Korea, on one hand claims that Jikji, bearing historical significance to the people of Korea, must be rightfully returned to its source nation. In contrast, the Bibliothèque Nationale de France contends that Jikji forms an integral part of the cultural heritage of mankind, and does not belong to one particular country. The Bibliothèque Nationale de France further contends that given the unmatched technological and scholarly

[†] This article reflects the position of law as on 24 February 2019.

* The author is a student of Government Law College, Mumbai and is presently studying in the Fourth Year of the Five Year Law Course. She can be contacted at vedikashah8@gmail.com.

¹ Hye Ok Park, 'The History of Pre-Gutenberg Woodblock and Movable Type Printing in Korea' (2014) 4 *International Journal of Humanities and Social Science*, 9, 14.

² Lee Eun-joo, 'Jikji Buddhist Documents – A Question of Ownership' (2009), *BTN-Buddhist Channel*, at <http://www.buddhistchannel.tv/index.php?id=92,7622,0,0,1,0#.WcJx8ohx3IU> (last visited 24 February 2019).

resources that it possesses, Jikji has been better preserved and secured in France than it would be elsewhere.³

The contentious claims of the two countries reflect two competing ideologies dominating the cultural property debate today—cultural nationalism versus cultural internationalism.⁴

The present article explores the two fundamental theories of the cultural property conundrum and examines in great detail the rationale behind demanding return of cultural property. Part I of this article is introductory in nature. Part II delves into the concepts of cultural nationalism and cultural internationalism and explains their facets. Part III examines the application of the theories of cultural nationalism and internationalism in four varying circumstances. In each situation, the author has proposed a solution best suited to the needs of that peculiar situation. The circumstances analysed include: disputes between metropoles and their colonies over ownership of acquired cultural property; the existence of multiple claims by different nations, each having varied connections to a single piece of cultural property; determination for preservation of cultural property in conflict-ridden nations; and lastly, discerning the rivaling claims of Greece and Britain with respect to the Parthenon Marbles and consequently, the need to find a way through. The article ends with concluding statements and explores which of the two theories is more tenable.

II. THE CONCEPT OF CULTURAL PROPERTY AND ITS THEORIES

A. *Cultural Property*

The word ‘cultural property’ was first defined in the *Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954*

³ Kwak, ‘World Heritage Rights versus National Cultural Property Rights: The Case of the Jikji’ (2005), *Carnegie Council for Ethics in International Affairs*, available at https://www.carnegiecouncil.org/publications/archive/dialogue/2_12/online_exclusive/5153 (last visited 24 February 2019).

⁴ Naomi Mezey, ‘The Paradoxes of Cultural Property’ (2007) 107 *Columbia Law Review* 2004, 2011.

(1954 Convention)⁵ as movable and immovable property of great importance to the cultural heritage of people.⁶ ‘Immovable property’ has been defined to include monuments of architecture, art or history, archaeological sites whereas movable property includes manuscripts, books, scientific collection among others.⁷

The 1954 Convention was enacted as a reaction to the massive cultural looting which took place during World War II, however, it confined itself to protecting cultural property only during times of armed conflict. It failed to address looting, illicit importing and pillaging of cultural property in peacetime.

Prior to 1970, the illegal trade of antique objects and cultural items was widespread. Consequently, several sovereign states embarked upon preservation of important historical and culturally significant objects by enacting the *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970* (1970 Convention).⁸ The 1970 Convention enabled safeguarding of cultural property in peacetime. The meaning ascribed to the term ‘cultural property’ in the 1970 Convention is very similar to that of the 1954 Convention.

The *UNESCO Recommendation Concerning the International Exchange of Cultural Property, 1976* further went on to give a definitive meaning to the term ‘cultural property’, as being ‘items which are used as means of expressions, evincing human creation and evolution of nature for *inter alia* historical, artistic, scientific or technical value and interest’.⁹ The aforesaid recommendation gives a more inclusive definition of cultural property, thus encompassing a wider category of objects.

⁵ *UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict* (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 240.

⁶ 1954 Convention, article 1.

⁷ *Ibid.*

⁸ *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* (adopted 14 November 1970, entered into force 24 April 1972) 823 UNTS 231.

⁹ UNESCO, Records of the General Conference, 19th Session, *Recommendation Concerning the International Exchange of Cultural Property* (26 November 1976), para 1.

In context of cultural property, disputes pertaining to ownership arise between two parties, ie, the source nation and the market nation. The concept of what constitutes a ‘source nation’ has been widely contested. Several authors have propounded different interpretations of this concept. The popular leaning has been towards ‘source nation’ being referred to as the place where cultural property is produced and with which people of that country have a direct and genuine link.¹⁰

On the other hand, countries that purchase, or more often than not, loot and pillage cultural property from the source nations or art-rich nations are known as ‘market nations’.¹¹ For instance, the Benin Bronzes, a collection of numerous metal plaques and intricately carved sculptures depicting the rulers of the ancient kingdom of Nigeria, formerly known as Benin, were looted in 1897 by Britain during an attack on Benin City, and since then have been treated as spoils of war and have been property of the British Museum. In such a scenario, Nigeria would be treated as the source nation whereas Britain would fall under the category of market nations.

The burgeoning scuffle between source nations and market nations has sparked a growing interest in cultural property, and has brought the cultural property debate, particularly the aspect concerning the restitution of cultural property to source nations, to the forefront. The perception as to what constitutes cultural property largely differs from region to region. An object which may be considered significant in one culture may not be so considered in another. A strict approach in designating what constitutes cultural property would be antithetical to a country’s autonomy in determining its cultural identity.

B. Cultural Nationalism

The proponents of the theory of cultural nationalism believe that states have a right to retain their cultural treasures within their territorial boundaries.¹² They believe they are entitled to complete

¹⁰ Lyndel Prott, *Commentaire Relatif à La Convention Unidroit* (1st edn UNESCO 2000) 46.

¹¹ John Henry Merryman, ‘The Public Interest in Cultural Property’ (1989) 77 *California Law Review* 339, 340.

¹² *Ibid*, 350, 351.

control over cultural property that originated in their territory and forms part of their country's national patrimony. Cultural nationalists place emphasis on national interests and values. According to them, cultural property is an element of national culture and can be understood only in relation to its origin, history and traditional setting and must be kept in its original archaeological context.¹³ They believe that many market nations in the past have done much damage to the cultural heritage of source nations and to protect the national interests and values of these nations, return of the plundered property to the source nation is essential.

The two chief conventions dealing with illegal import, export, theft and transfer of ownership of cultural property are the 1970 Convention and the *UNIDROIT Convention on Stolen and or Illegally Exported Cultural Objects, 1995* (1995 Convention).¹⁴ Both these conventions condemn illicit import, export and transfer of ownership of cultural property and recognise the absolute right of source nations to retain their cultural property.¹⁵ While the 1970 Convention reflects a milder undertone in encouraging parties to return cultural property to source nations, the 1995 Convention emphatically advocates for the right of the source nations to have their cultural property restituted. Furthermore, the United Nations General Assembly has recognised the right of the source nation to have its cultural property returned to it.¹⁶ Cultural property has been repatriated to the source nation

¹³ James Cuno, *Whose Culture? The Promise of Museums and the Debate over Antiquities* (1st edn Princeton University Press Princeton 2009) 9.

¹⁴ *UNIDROIT Convention on Stolen and or Illegally Exported Cultural Objects* (adopted on 24 June 1995, entered into force 1 July 1998) 2421 UNTS 457.

¹⁵ 1970 Convention, articles 3 and 6, and 1995 Convention, articles 3 and 5.

¹⁶ General Assembly, 'Resolution 3026 (1972): Human Rights and Scientific and Technological Developments' (A/RES/3026(XXVII)A, December 1972); General Assembly, 'Resolution 3148 (1973): Preservation and Future Developments of Cultural Values' (A/RES/3148(XXVIII), December 1973); General Assembly, 'Resolution 58 (2003): Return or Restitution of Cultural Property to Countries of Origin' (A/RES/58/17, December 2003); General Assembly, 'Resolution 61 (2007) : Return or Restitution of Cultural Property to Countries of Origin', (A/RES/61/52, February 2007); General Assembly, 'Resolution 67: Return or Restitution of Cultural Property to Countries of Origin' (A/RES/67/80 (2012) and General Assembly, 'Resolution 67 (2015): Return or Restitution of Cultural Property to Countries of Origin' (A/RES/70/76, December 2015).

on a few occasions. The most recent example of this is the return of the Maori's skull of New Zealand by Germany. The Maori, an indigenous community in New Zealand, traditionally preserved the skulls of revered male relatives, famous chiefs and enemies killed in war. From the 1840s to 1910, thousands of heads and skulls of indigenous Maori were taken from New Zealand by European and American anthropologists with many ending up in museums or private collections. One such museum, the Rautenstrauch Joest Museum of World Cultures in Cologne, Germany, returned such a preserved Maori skull to New Zealand. Henriette Reker, the mayor of Cologne, told the delegation from New Zealand in a statement made at the ceremony, 'I cannot reverse the wounds of the past. But I have done what I could to take your descendant out of an anonymous collection and return his human dignity.'¹⁷ Reaching such a compromise today not only conveys a rightful regard for the cultural sentiments of source nations which they ought to be granted, but is also the epitome of utmost international cooperation. Other such repatriations include the Makonde Mask to the United Republic of Tanzania,¹⁸ the Mask of Gorgon to Algeria¹⁹ and Maori heads to New Zealand.²⁰

The theory of cultural nationalism propagates that in order to lead a fulfilling life and ensure a secure identity, people often feel the need to be exposed to their history, most of which is represented by historical objects. These objects provide people with the means to

¹⁷ Kurt Bayer, '60 Maori and Moriori heads and skulls repatriated from UK and US', *The New Zealand Herald*, at <https://www.nzherald.co.nz/nz/news/article.cfm?id=1&objectid=11638270> (last visited 24 February 2019).

¹⁸ Return or Restitution Cases, UNESCO website, at <http://www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/return-or-restitution-cases/> (last visited 24 February 2019).

¹⁹ 'Recent Restitution cases of cultural objects using the 1970 Convention,' UNESCO website, at <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/recent-restitution-cases-of-cultural-objects-using-the-1970-convention/> (last visited 24 February 2019).

²⁰ Press Association, 'Maori Chief's Mummified Head to Return to New Zealand After 150 Years in UK' (2013), *The Guardian*, at <http://www.theguardian.com/culture/2013/aug/06/maori-chief-head-returned-new-zealand> (last visited 24 February 2019).

connect to their heritage and roots. On this basis, it is perceived as a moral imperative for market nations to return to source nations their cultural property.

C. *Cultural Internationalism*

The cultural internationalism theory propounds that cultural property is of vital importance for the people of the world and must therefore be available all around the world, so that everyone has an opportunity to access their own as well as the cultural achievements of other people.²¹ It is not necessary that something made in a particular place must belong there, or that the present government of a nation should have under its control artefacts historically associated with its territory. Given that we live in an increasingly globalised society where there is growing societal acceptance towards harmonisation of cultures, cultural internationalism is viewed as quintessential for the preservation of cultural property.

The principles of preservation, access and integrity are the three principal tenets of the cultural internationalism theory which must be considered while determining the appropriate allocation of cultural property.²² Cultural internationalism mandates preservation.²³ There exists a presumption that market nations are better situated to care for and preserve the property for the enjoyment of mankind. The obligation is recognised by the 1970 Convention itself and requires the retaining state to promote ‘the development or the establishment of scientific and technical institutions, (museums, libraries, archives, laboratories, workshops) required to ensure the preservation and

²¹ John Henry Merryman, *Thinking about the Elgin Marbles: Critical Essays on Cultural Property, Art and Law* (2nd edn Kluwer Law International Netherlands 2009) 61.

²² *Ibid*, 1912.

²³ John Henry Merryman, ‘Two Ways of Thinking About Cultural Property’, (1986), Vol. 80, No. 4, *The American Journal Of International Law*, 831-53.

presentation of cultural property'. Even generally, the obligation to preserve is internationally recognised.²⁴

The principle of access recognises that cultural property is a medium through which the peoples of the world gain intellectual exchange and hence they have a right to claim access to it.²⁵ The concept of 'common heritage of mankind' promotes widespread access to cultural property and its preservation for future generations; states are therefore responsible for the preservation of cultural property and have the duty to take appropriate steps to render it accessible to everyone.²⁶ Cultural internationalism opines that cultural property forms part of the common cultural heritage of mankind and its protection is an *erga omnes*²⁷ obligation.²⁸ Lastly, the principle of integrity signifies that any work of art or other cultural object should be as intact and whole as possible—the object loses value (aesthetically, scientifically or monetarily) even if some of it has been separated.²⁹

²⁴ UNESCO, 'Records of the General Conference: Recommendation on International Principles Applicable to Archaeological Excavations' (9th Session, 5 December 1956), Preamble; UNESCO, 'Records of the General Conference: Recommendation for the Protection of Movable Cultural Property' (20th Session, 28 November 1978), para 15; UNESCO, 'Records of the General Conference: Recommendation Concerning the Protection, at the National Level, of the Cultural and National Heritage' (17th Session, 16 November, 1972).

²⁵ Sharon Williams, *The International and National Protection of Movable Cultural Property: A Comparative Analysis* (Oceana Publications, New York, 1978)1, 52.

²⁶ Stephen Urice, *The Beautiful One Has Come - To Stay in Imperialism, Art and Restitution* (1st edn Cambridge University Press Cambridge) 152.

²⁷ In international law, the concept of *erga omnes* obligations refers to specifically determined obligations that states have towards the international community as a whole. An *erga omnes* obligation is a non-derogable legal obligation that is cast on all states, and which must be performed at all times.

²⁸ *Temple of Preah Vihear (Cambodia v. Thailand)* (1962 Interpretation separate opinion of Judge Cançado Trindade) [2011] ICJ Reports 566, 598.

²⁹ Ana Sljivic, 'Why Do You Think it's Yours? An Exposition of the Jurisprudence Underlying the Debate Between Cultural Nationalism and Cultural Internationalism' (1997) 31 *George Washington Journal of International Law and Economics*, 393, 414.

The cultural internationalism theory finds its genesis as early as 1863 in the *Lieber Code*.³⁰ The *Lieber Code* contained a number of regulations relating to protection of cultural property during armed conflict. The *Lieber Code* was followed by the 1954 Convention. The 1954 Convention is the first official international instrument which views cultural property as the heritage of mankind, and lays emphasis on its preservation. Articles 3 and 4 of the 1954 Convention enjoin upon state parties the responsibility to abstain from damaging cultural property situated either in its own territory or in any other country, and to take measures to safeguard and protect it.³¹

The concept of cultural property protection being an *erga omnes* obligation received a further impetus when various international tribunals recognised the desecration of cultural property as a violation of customary international law and punished the perpetrators of these crimes.

The Yugoslav Wars which ravaged the state of Yugoslavia from 1991 to 2001, led to the destruction of a number of structures of immense cultural importance, including the Vukovar City Museum, which contained artefacts dating back to the 13th century. The war destroyed the works of famous Croatian artists like Vlaho Bukovac and perpetuated the destruction of the Church of St. Demetris built in 1715, which was one of the largest cathedrals of the country. It was this cultural depredation that led the International Criminal Tribunal for Yugoslavia, a tribunal which was set up under the aegis of the United Nations to prosecute serious crimes that were committed during the Yugoslav Wars, to hold the destruction of cultural objects as an injury to mankind and a crime against humanity.³²

This principle was reaffirmed by the Claims Commission, a body established to end the war between Ethiopia and Eritrea. During the war between the two countries, the Stela of Marta, a 2,500 year old

³⁰ *Lieber Code*, Instructions for the Armies of the United States in the Field (War Department 1863).

³¹ 1954 Convention, *supra* n.5, articles 3 and 4.

³² *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-T, *Judgement* (International Criminal Tribunal for Former Yugoslavia 26 February 2001), 207.

obelisk bearing a rare description, was destroyed. The Commission reached a conclusion that the destruction of the Stela of Marta was a violation of customary humanitarian law and reparations should be made for the same.³³

The common cultural heritage notion received a further stimulus when the International Criminal Court (ICC) recognised cultural destruction as a war crime against the backdrop of mass wreckage of cultural property in Mali at the hands of militant groups, the Ansar Die and Al-Qaeda.³⁴ Magnificent mosques and mausoleums, erected to commemorate the contribution of revered Muslim saints, which were perceived as the identifying structures of Mali, were annihilated in this rampage.

The prosecutor in her opening statement to the ICC remarked that the shrines and mausoleums were historically significant for humanity, and the whole of mankind was affected by their loss. The ICC eventually prosecuted Ahamd-al-Faqi-al-Mahdi, an Islamic militant for destroying these ancient shrines and mausoleums in Mali.³⁵

Thus, the theory of cultural internationalism in essence does not believe in confining cultural property to the producing nation's capricious borders. Rather, it lays emphasis in recognising and celebrating works of art as manifestations of universal human genius and creativity.³⁶

³³ *Eritrea / Ethiopia Partial Award* – Central Front Eritrea's Claims 2, 4, 6, 7, 8 & 22 (Claims Commission, 28 April 2004), para 113.

³⁴ *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Case No. ICC -01/12-01/15, Judgement and Sentence (27 September 2016), para 52.

³⁵ 'Statement of the Prosecutor of the International Criminal Court Fatou Bensouda, at the opening of the confirmation of charges hearing in the case against Mr Ahmad Al-Faqi Al Mahdi', International Criminal Court website, at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-01-03-16> (last visited 24 February 2019).

³⁶ Claudia Caruthers, 'International Cultural Property: Another Tragedy of the Commons', (1998) 7 *Pacific Rim Law and Policy Journal*, 143, 154.

III. APPLICATION OF THE THEORIES

A. Colonial Era

1. Historical Background

The era of colonisation can be traced back to 1270 BC during the reign of Ramesses II. Ramesses II was a renowned Egyptian king who ruled Egypt from 1279-1213 BC. He was a formidable leader under whose aegis the Egyptian empire expanded vastly. He was also extremely passionate about art and architecture, and built a number of monuments under his patronage. During his reign, he colonised a number of Mediterranean countries and robbed these countries of their cultural property.³⁷ Another prominent pillage was evinced during the reign of Napoleon Bonaparte, an eminent French emperor. Napoleon Bonaparte was regarded as the greatest commander in the military history in the West. His reign over France spanned from 1804 to 1814 during which he defeated mighty states including Austria and Prussia, and gained control over a major part of Europe by 1810. He extensively plundered artistic treasures from the nations he conquered. The classical oil painting by Italian artist Paolo Veronese, *Wedding Feast at Cana*, which is known to depict the moment when Jesus turned water into wine; and the *Horses of St. Mark* by a Greek sculptor Lysippus, an exquisite set of four bronze horses, formed part of Napoleon's artistic conquests.³⁸

Looting artefacts and paintings was seen as means of raising funds to support military expeditions as well as symbolising victory. Though pillaging was not carried on with an active intent of destabilising the colony but rather to purely add to the wealth of the colonising nation, it produced some disastrous consequences for the colonies.

³⁷ Leonard D DuBoff et al., *ARTLAW: Cases and Materials* (2nd edn. Aspen Publisher New York 2010) 533.

³⁸ Ivan Lindsay 'From Napoleon to Nazis : the 10 most notorious looted artworks', *The Guardian* at <https://www.theguardian.com/artanddesign/2014/nov/13/10-most-notorious-looted-artworks-nazis-napoleon> (last visited 24 February 2019).

Modern-state global colonialism began in the 18th century wherein global powers like Britain, France, Spain and Portugal conducted large scale colonisation in Latin America and Asia. A number of global powers colonised nations that had previously housed the most ancient and culturally rich civilisations of the world. Britain colonised India and Egypt, that cradled the Indus Valley Civilization and the Ancient Egyptian Civilisation respectively, while France captured the Assyrian region (which would include modern-day Syria, Iraq and Egypt) that was the origin of the Mesopotamian civilisation.³⁹

Soon the phenomenon of draining colonised nations of their cultural property gained traction around the world. Colonised nations were stripped of their cultural vestiges with which they shared immense emotional value, while the westernised nations became more powerful both economically and culturally. The 19th and 20th centuries saw the beginning of the process of decolonisation wherein most colonies gained independence from their metropoles. However, the process of decolonisation failed to give the colonies the right to recover their cultural property which they had been unfairly dispossessed of. Even today in the 21st century, cultural property of most former colonies is housed in museums of their powerful European colonisers. The effort of these colonies to have their cultural property repatriated to them has been fraught with obstacles and has barely achieved the desired result. Colonisation not only subjected the colonies into servitude and economic exploitation, but also left them bereft of any power or capacity to recover what is rightfully theirs.

2. Who Owns the Cultural Property?

Cultural property bears an imprint of thoughts, practices and values of a particular culture and is a medium around which the ethnic, communitarian and national identities of a country revolve.⁴⁰ Cultural property formed an integral part of the identity of the people in the colonies. For them, their artefacts were a partial extension of their

³⁹ Timothy Michelle, *Colonising Egypt* (1st edn. University California Press United States of America 1991) 14.

⁴⁰ Amartya Sen, *The Argumentative Indian*, (1st edn Farrar Storaus and Giroux United States of America) 53.

identities, which were revered, and from which they drew their confidence and inspiration.⁴¹ The Coroma textiles of Bolivia are an example of cultural property that has given purpose and meaning to the life of the Aymara community of Bolivia, and which has kept them tied to their ancestors and their roots.⁴² The Coroma textiles are sacred ancient textile bundles, which represent a particular ancestral social group also known as 'Ayllu'. They believe that the spirits of their ancestors are contained within these textiles. They offer prayers and food to them, and consider them to be oracles whose blessings are sought before any important community decision is made. A festival is held every November wherein the Aymara community members wear the sacred textiles and dance as a mark of respect to their ancestors. These textiles were seldom displayed publicly. However, during the aforementioned festival where these textiles were displayed, they were surreptitiously stolen by western traders and widely traded in the international market. The world may perceive these Coroma textiles as mere fabrics as a means of trade but for the Aymara community it formed the bedrock of their identity.

The systematic plundering of cultural property carried on by the colonisers did indeed have a debilitating effect on the subjects of the colonies. The threads that wove an entire culture and nation together had suddenly vanished. The people in the colonies soon found themselves chained in the bondage of despair and experienced a loss of faith in themselves. The means that connected them to their past and inspired them for the future was lost.⁴³ Even after gaining independence, the loss of cultural property and the subsequent loss of cultural continuity, continues to wreak havoc in these indigenous communities.⁴⁴

⁴¹ Shashi Tharoor, *An Era of Darkness* (1st edn Aleph Book Company India) 194.

⁴² Susan Lobo, 'The Fabric of Life : Repatriating the sacred Coroma Textiles' (1991) 15 *Cultural Survival Quarterly Magazine*, 40, 42.

⁴³ Patty Gerstenblith, 'The Public Interest in the Restitution of Cultural Objects' (2001) 16 *Connecticut Journal of Int'l Law*, 197, 206.

⁴⁴ Photini Pazartzis and Maria Gavouneli, *Reconceptualising the Rule of Law in Global Governance, Resources, Investment and Trade* (1st edn Hart Publishing United Kingdom 2016) 154.

Aboriginal Australians are one such indigenous community that have been left culturally enervated after their colonisation by Britain. About 6,000 objects including culturally significant items like the Gweagal shield belonging to aboriginal Australians have been in the possession of British museums.⁴⁵ The Gweagal shield belonged to an indigenous Australian warrior who bravely fought Captain Cook and his crew when they first set foot on Australian shores in 1770. The shield is looked upon by the aboriginal Australians as a symbol of the valour that their ancestors possessed. The aboriginal Australians believe that their culture is dying and the return of cultural objects like the Gweagal shield will help reinvigorate the lost aura and prestige of their culture.

The adherents of cultural nationalism strongly subscribe to the view that cultural property must be returned to the colonised nations, while the proponents of cultural internationalism believe that colonial powers are in a better position to protect the integrity of cultural property. The museums in nations of the colonial powers possess the facilities and expertise required for the safekeeping of cultural property which the colonised nations lack. Furthermore, the museums provide the widest possible access to the cultural property, and people from all over the world have a greater opportunity to behold these objects there *vis-à-vis* their presence in the colonised states.⁴⁶

The entire construct of cultural internationalists is based on the primary foundation that the colonising nations did not do anything wrong or unethical. Loot of cultural property then was viewed as a corollary of war. It was looked upon as the norm and something that was perfectly acceptable. Metropoles believed that in return for administering and managing the affairs of the colonies and providing them with technical and scientific know-how which they did not

⁴⁵ Hannah Ellis Petersons, 'Indigenous Australians demand return of shield taken by Captain Cook' (2016) *The Guardian* at <https://www.theguardian.com/culture/2016/nov/08/indigenous-australians-demand-gweagal-shield-captain-cook> (last visited 24 February 2019).

⁴⁶ John Henry Merryman, 'The Retention of Cultural Property' (1987) 21 *University of California, Davis*, 477, 497.

possess earlier, the colonial powers were entitled to economically and culturally enrich their own country at the expense of depriving the colony. This justification is farcical and ill-founded. The colonisers colonised the nations in order to strengthen their own might and add to their own resources. There was no benevolent intention of helping the colonised country. Therefore, the question of being able to claim a right to exploit as a reward for supposedly selfless actions of improving the colonies does not arise. Looting and plundering a disarmed and resourceless population cannot be justified by the colonisers under the garb of progress, and is an obvious wrong which requires complete redressal.

The next narrative put forth by cultural internationalists that only colonisers possess the resources and expertise to house exquisite cultural property is untrue.⁴⁷ This argument is nothing but a façade put forth by market nations, so as to enable them to retain cultural property over which they historically have no right. Further, even if it was believed that the former colonies did not possess the resources that their metropoles did, the same cannot be said today. Former colonies including India, Greece, Australia and Egypt are today home to some world famous museums like the Egyptian Museum in Cairo, the Australian Museum in Sydney, the Athens Museum in Greece and the Prince of Wales Museum in Mumbai, where cultural property is preserved and protected in an extremely secure environment with the necessary expertise in place. Moreover, these countries have government departments dedicated to the protection and preservation of cultural property, like the Ministry of Culture in India, the Hellenic Ministry of Culture in Greece and the Ministry of Culture in Egypt to ensure cultural property receives due attention and care. The argument of the lack of an ability for preservation of precious cultural property holds no water in light of these developments.

Lastly, the idea that cultural property can be granted full accessibility only in the country of the coloniser is at best haughty and parochial

⁴⁷ Anne Erdos, *Return and Restitution of Cultural Property* (31, United Nations Educational, Scientific and Cultural Organisation France 1979) 58.

in nature. There are only a few percentages of persons who can afford to visit Britain or France to see the cultural property displayed in their museums. It is almost a dream for an average Indian with a Gross National Income of USD 1,680 or an average Egyptian with a Gross National Income of USD 3410, who is barely able to make ends meet, to visit the Tower of London or the Louvre museum in France.⁴⁸ He is unable to view the cultural property residing there which was plundered from his country and of which he ought to be the rightful owner. If cultural property is returned to the colonies, not only would the people of that country, who ought to be the rightful heirs, be able to first-hand witness their own cultural property, but it would also provide a great boost to the tourism industry of the former colony. This move would incentivise a large number of foreign tourists to flock to these countries to experience their rich cultural heritage and stimulate economic growth in this sphere. Further, even if the argument of greater accessibility in the metropoles compared to the colonies is deemed to be a tangible benefit, it can be said that the benefits of reuniting the colonial people with their heritage which is so integral to their life, outweighs any benefit of better access and visibility in the metropoles.⁴⁹

3. Proposed Solution

Objects like Maharaj Ranjit Singh's golden throne, the Kohinoor, Amravati sculptures and Tipu Sultan's famous mechanical tiger are examples of exemplary Indian craftsmanship that remain in the custody of the British even after more than 70 years of independence.⁵⁰ Such amassing of cultural property by colonial powers

⁴⁸ —— *World Bank* at <https://data.worldbank.org/country/india?view=chart> ; —— *World Bank* at <https://data.worldbank.org/?locations=IN-EG> (last visited 24 February 2019).

⁴⁹ Irini A Stamatoudi, *Cultural Property Law and Restitution: A Commentary to International Conventions and European Union Law*, 39 (2011).

⁵⁰ Sonali Pimpalkar, 'Not just Kohinoor these Indian treasures are also in foreign custody' (2008) *The Free Press Journal* at <http://www.freepressjournal.in/featured-blog/not-just-kohinoor-even-these-indian-treasures-are-in-foreign-custody/1222577> (last visited 24 February 2019).

serves as a flagrant reminder of the injustices perpetrated against the colonies by the colonisers. It is imperative to realise that colonised states and indigenous groups have been unfairly deprived of their cultural property, which were either surreptitiously or under coercion removed from their national boundaries. The colonised states are justified in demanding a return of their cultural property belonging to these people. The restitution of cultural patrimony will provide an opportunity to the people to reconnect with their traditional culture and to rediscover a part of their identity which they lost years ago. Artefacts are symbols of achievements of a country, their return will play a great role in inspiring indigenous artists and craftsmen and will motivate them to scale greater heights. It must be remembered that unless cultural property is returned to the colonies, it will continue to remain evidence of the evils of loot, arsenal and pillaging that colonialism was all about.

Further, today in the 21st century where the concept of sovereignty of a state is regarded as sacrosanct,⁵¹ and a sovereign state has complete freedom of action in all its matters without being subject to the authority of any foreign power, it is only fair that countries are entitled to equal freedom and right over the cultural property created by their ancestors without any interference from any external state or authority. A sovereign state must have an unimpeded right to retain, enjoy and recover its cultural heritage. It is only when former colonies can claim recovery of objects that bear witness to their identity and civilisation as a matter of right, without having to be at the mercy of its metropoles, that these former colonies may be considered to be on equal footing with their metropoles and do justice to the mandate of sovereignty in the true sense of the word.

B. Multiplicity in Ownership Claims

The theories of cultural nationalism and cultural internationalism, based on individual parameters of ownership, access, preservation

⁵¹ *The Charter of the United Nations* (adopted on 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, article 2.

and protection respectively, recognise only a single country which can be regarded as the owner or keeper of cultural property. Both these theories fail to address the dilemma as to which country should be given ownership and possession of a piece of cultural property where more than two nations stake a claim over it. This segment analyses three distinct situations under which it would be difficult to individually attribute ownership to one particular country, and outlines the road ahead so as to provide a framework under which such countries can jointly enjoy the cultural property.

1. Culture Traversing Territorial Boundaries

In *Peru v. Johnson*,⁵² the dispute arose when cultural antiquities from the Moche culture, a Peruvian pre-Columbian culture, were looted from Sipin and illicitly imported into the United States. Peru filed a civil suit for recovery of its artefacts. In its judgment, the United States District Court of California held that Peru could not conclusively prove its ownership over the antiquities since the Moche culture spanned not only across Peru but also included areas that were part of modern day Bolivia and Ecuador.⁵³ In this case, if only one country was to be chosen as the legitimate descendant of Moche antiquities, the obvious question which arises is what makes a claim of Peru to Moche cultural property more deserving than an Ecuadorian or a Bolivian claim? Here, one cannot conclusively determine the exact nature of the ownership of Peru, Bolivia and Ecuador. However, the aforementioned countries could contemplate claiming equal and joint ownership over the Moche antiquities.

In circumstances like these where cultural property stems out of a particular culture or community that once resided in an expansive region, but have over the years disintegrated and got categorised into well-defined sovereign states, there is a discernible difficulty in ascertaining an exclusive owner of the antiquities. The followers of the culture in all states may stake a claim to cultural property. Such property belongs to their shared culture and heritage and equally

⁵² *Government of Peru v. Johnson* 720 F. Supp. 812 (DC Cir 1989).

⁵³ *Government of Peru v. Johnson* 720 F. Supp. 812 (DC Cir 1989), para 1.

ties them all to their ancestors. In such cases, it is neither fair nor equitable for one country to be heralded as the heir to the cultural property.

a. *Contribution of Diverse Countries*

In circumstances where cultural property has changed myriad locations, and two or more nations stake a claim to a piece of cultural property, there is a deadlock. There is ambiguity as to the right of which nation would gain precedence over the other.⁵⁴

The case of the Hebrew manuscripts⁵⁵ is one such affair which exemplifies the tussle between countries claiming provenance to the manuscripts. The Hebrew manuscripts were taken from various sources at different points of times. Hebrew books were written in different countries like Islamic-ruled Spain, North Africa, and Christian Europe among others. The local environment of each country left a deep and unique effect on these manuscripts. If the Hebrew manuscripts which are currently housed in the Russian National Library, St. Petersburg, were to be restituted, there is no single country that could make a claim of being the exclusive possessor of the manuscripts. It has been suggested by many that the manuscripts should be restituted to Israel, which is supposedly considered as the official Jewish state. However, it is questionable whether Israel—a single state, which came into existence only in 1948, and by mere reason of it being a Jew dominant state—has a strong enough claim to represent all the different cultures that have contributed to these manuscripts.⁵⁶

⁵⁴ Yehuda Blum , ‘On the Restitution of Jewish Cultural Property Looted in World War II’ (2000) 94 *American Society of International Law* 88, 101.

⁵⁵ Hebrew manuscripts are a handwritten copy of a portion of the text of the Hebrew Bible (Tanakh) made on papyrus, parchment, or paper, and written in the Hebrew language. The oldest manuscripts were written in a form of scroll, the medieval manuscripts usually were written in a form of codex. The late manuscripts written after the ninth century use the Masoretic text.

⁵⁶ Barnavi, ‘Hebrew Manuscripts in the middle ages’ (2015) *Jewish Learning* , at <http://www.myjewishlearning.com/article/hebrew-manuscripts-in-the-middle-ages/> (last visited 24 February 2019).

b. Eventual Disintegration of Conjoined Regions and Dynastic Empires

In the case of the Kohinoor diamond,⁵⁷ both India and Pakistan are at loggerheads, with each claiming to be the rightful owner of the diamond, and demanding its repatriation from England. Maharaj Ranjit Singh, the then ruler of Punjab and Lahore, was the original owner of the Kohinoor diamond. After the death of Maharaj Ranjit Singh, the diamond was passed on to his twelve year old son, Duleep Singh. The treaty of Lahore signed between Maharaj Duleep Singh and the British divested him of his rights over the Kohinoor and subsequently the diamond came into the possession of the British.⁵⁸

On one hand, Pakistan believes that since the diamond was surrendered in Lahore, now part of the territory of present day Pakistan, the diamond should be repatriated to Pakistan.⁵⁹ On the other hand, India believes that the Kohinoor is traditionally part of its own cultural property, forcibly taken out of its control by the British during the colonial era, and which must now be repatriated to India. The question of the Kohinoor is indeed perplexing. Both India and Pakistan were, at that time, a part of one nation—the erstwhile British India—and predominantly shared a common culture and heritage. Recognising any one of the countries as the source nation, and thereby entitling that country to retain the Kohinoor, will in effect deprive the other country of its cultural patrimony.

In situations like these where antiquities originally belonging to an empire or a country which no longer exists, and has split into several independent countries, the theories of cultural property are not precise

⁵⁷ The Kohinoor is a 106 carat diamond which was once the largest diamond in the world. Previously, it has belonged to various rulers in India; today it lies in the hands of the British royal family and is part of the Crown Jewels.

⁵⁸ Utkarsh Anand, ‘The Kohinoor Controversy: The 1970 UN Convention now offers some answers’ (2016) *The Indian Express*, at <http://indianexpress.com/article/explained/kohinoor-controversy-1970-un-convention-offers-answers-12762766/> (last visited 24 February 2019).

⁵⁹ Saby Goshray, ‘Reparation of the Kohinoor Diamond: Expanding the Legal Paradigm for Cultural Heritage’ (2007) 31 *Fordham International Law Journal*, 741, 752.

as to which would then be the rightful place of provenance of the cultural property.

c. *Proposed Solution*

In all of the above discussed scenarios, giving one country an exclusive ownership over the cultural property will amount to denying the right of other countries to their cultural patrimony. The non-receiving countries will be at the mercy of the legally recognised owner to be able to associate with and access their past heritage, of which they ought to be equal inheritors. It is grossly unfair to let only one country possess an unfettered title over the cultural antiquities, while its counterparts possess an equally valid title over the cultural property.

The existence of such competing claims over cultural property only works to the advantage of former colonial powers, as these nations now have an opportunity to fend off claims of restitution raised by such countries on grounds of uncertainty of provenance, and can continue to retain wrongfully acquired cultural property. Britain, for instance, has been reaping the benefits of the Kohinoor, while India and Pakistan squabble over its ownership.

In light of this, the author proposes that in situations where a number of states of a region possess a valid title over a common cultural antiquity, each country should be recognised as the ‘co-owner’ of the cultural property. Each co-owner should have an equal claim over the cultural property. Further, instead of a particular co-owner being given the right to display the cultural property, a regional organisation to which a number of co-owners belong must be entrusted with the task of protecting and preserving the cultural property. For instance, the African Union, a regional organisation representing over fifty African countries, could be assigned the task of safekeeping common cultural property belonging to a number of African States. This would help in the decentralisation of power in the region as no single owner can wield a greater influence over the cultural property than its counterpart. It also reduces the possibility of any kind of animosity among different co-owners. The regional organisation would provide a medium for the co-owners to come together, thaw their differences

and unite in their struggle to bring back their cultural property. Further, it would also ensure a better bargaining power for the co-owners *vis-à-vis* their individual capacity to bargain with a foreign power. In this manner, regional organisations will bridge disparity and provide an equal footing to various co-owners of the cultural property.

C. A Tale of Regions Rife with Conflict

Several countries harbour the notion that their cultural property is only safe within the borders of their country, in lieu of which they tighten their borders and implement stringent restrictions on any sort of transfer of cultural property. However, this perception may not always be best suited for ensuring effective protection of cultural property in certain exceptional cases.

Often, in crisis situations including armed hostilities and insurgencies, artefacts within the boundaries of the conflict-torn nation can be subject to destruction through vandalism, arson or neglect by deviant forces. The wanton destruction of cultural property by the Islamic State of Iraq and Syria (ISIS) in Syria and the unconscionable damage to cultural property caused by the Taliban in Afghanistan bears testament to the fact that mere retention of cultural property within a source country may not always be optimal. In certain compelling situations, source countries must dispel this notion in order to prevent their cultural property from being destroyed.

1. When Cultural Property Fell Prey to Warring Factions

Afghanistan's unique geographical position made it a focal trade route connecting the east to the west. Trade, apart from bringing in economic prosperity, also contributed to the country by becoming a throughway of various cultures. Cultural segments as diverse as the Bronze Age, the Greek epoch, Buddhist and Islamic influences were attracted to the fertile region. Each culture brought with it its unique artistic convention, which enriched the country's heritage. Artefacts ranging from gold and bronze ornaments, effigies belonging to the Bronze Age to Ghandharan sculptures showcasing the earliest figural depictions of Buddha, and Islamic paintings with intricate

geometrical lacing were found in Afghanistan.⁶⁰ This expansive art and architecture collection earned it a distinction of being an art-rich country. However, the reign of the Taliban, a fundamentalist belligerent group in Afghanistan, from 1996-2001, changed the political and social landscape of the country. Afghanistan, once a rich cultural repository, was reduced to ravages. The Taliban annihilated Afghan cultural heritage that the country boasted of. The Kabul Museum, which housed a diverse range of artefacts, was ransacked. 140,000 cultural objects ranging from Islamic art to Roman bronze effigies were destroyed.⁶¹ Ancient archaeological sites in the country were pilfered. Valuable antiques showcasing the rich Afghan civilisation were sold to bordering countries for paltry sums.⁶² All the purloining and destruction left Afghanistan with nothing but smoke smothered museums, shattered artefacts and lost history.

The destruction by the Taliban was followed by the Arab Spring in 2010. The Arab Spring, which may have brought in a ray of hope for freedom and democracy in the Middle Eastern states, ended up giving a major blow to the cultural heritage of mankind. In the face of revolution, collective public sentiment propelled the destruction of cultural property as a means to express anger against the ruling government.⁶³ In Egypt, the Cairo Museum that was home to the most splendid works of art from around the world, fell prey to destruction.⁶⁴ During this time, a number of artefacts were looted and

⁶⁰ Gil Stein, 'The War Ravaged Cultural Heritage of Afghanistan : An overview of Projects of Assesment, Mitigation and Preservation' (2015) 78 *Near Eastern Archaeology*, 187, 189.

⁶¹ Andrea Cunning, 'U.S. Policy on the Enforcement of Foreign Export Restrictions on Cultural Property & Destructive Aspects of Retention Schemes' (2004) 26 *Houston Journal of International Law*, 450, 496.

⁶² James Cuno, 'The Whole World's Treasures' (2001) *Boston Globe*, at http://www.law.harvard.edu/faculty/martin/art_law/cuno.htm (last visited 24 February 2019).

⁶³ Yoma Sarhan, 'The Arab spring and the state of Egypt's antiquities' (2014) *Wilson Centre*, at <https://www.wilsoncenter.org/event/the-arab-spring-and-the-state-egypts-antiquities> (last visited 24 February 2019).

⁶⁴ Alexander Joffe, 'Egypt's Antiquities Caught in the Revolution', *The Middle East Quarterly* (2011) 73.

smuggled to foreign countries. The invaluable objects lost included a statue of King Tutankhamun and a statue of Queen Nefertiti. King Tutankhamun was the 18th dynasty Egyptian pharaoh widely remembered for the numerous building projects undertaken under his patronage. The majestic statue of the king was made of wood, and portrayed him being carried by a goddess. Queen Nefertiti, on the other hand, was one of the most powerful and beautiful women of Egypt and the wife of the great Egyptian pharaoh, Akhenaten. She was known for her worship of the sun God, Aten, and the new belief system created by her that changed the ways of religion within Egypt. The statue of the majestic Queen was made of sandstone and depicted her making offerings to God.⁶⁵ Thus, after all the loot and plunder, Cairo Museum was reduced from a culturally significant building to a plain, vandalised site.

Syria and Iraq witnessed the rise of a fanatic insurgent group, ISIS, who had blatant disregard for cultural property.⁶⁶ ISIS wrecked not only invaluable manuscripts and Islamic books housed in libraries, but also pillaged museums and destroyed artefacts, antiques and architecture.⁶⁷ The situation worsened in 2014, when ISIS captured eastern Syria and Mosul in Iraq. Videos were released showing artefacts displayed in the museum in Mosul being destroyed and several parts of the site of Palmyra being demolished.⁶⁸ To ISIS, these artefacts and statues were nothing more than stone and metal used to honour false Gods. They plundered and desecrated the

⁶⁵ Farah Halime, 'Revolution Brings Hard Times for Egypt's Treasures' (2012), *New York Times*, at <http://www.nytimes.com/2012/11/01/world/middleeast/revolution-brings-hard-times-for-egypts-treasures.html> (last visited 24 February 2019).

⁶⁶ Amr Al-Azm, 'The Pillaging of Syria's Cultural Heritage' (2015) *Middle East Institute*, at <http://www.mei.edu/content/at/pillaging-syrias-cultural-heritage> (last visited on 24 February 2019).

⁶⁷ Graciela Gestoso Singer, 'ISIS's War on Cultural Heritage and Memory' (2015) 6 *UK Blue Shield*, 1, 2.

⁶⁸ Allison Cuneo, Susan Penacho and LeeAnn Barnes Gordon, 'Special Report: Update on the Situation in Palmyra' (2015) *ASOR Cultural Heritage Initiatives*, at <http://www.asor-syrianheritage.org/special-report-update-on-the-situation-in-palmyra/>. (last visited 24 February 2019).

Assyrian capital of Khorsabad, famous for the oldest artefacts in Iraq, without even a semblance of remorse. ISIS carried on looting on archaeological and historical sites, and raised about USD 200 million every year from this to fund its terror activities.⁶⁹ ISIS' acts of cultural destruction have obliterated the rich and diverse foundation of Syrian art and heritage.

2. Proposed Solution

The pilfering and destruction carried on in the aforementioned instances has led to the loss of cultural heritage of not just the citizens of the source nations, but of humanity as a whole. More than 200 years of history represented by the Syrian and Egyptian cultural property, can no longer be witnessed by human civilization. The creativity and culture of our ancestors has been lost forever.

To avoid such a travesty, such objects should be transferred into museums of countries where they would be assured professional care and attention, and better preservation of the antiquities, than in home countries where it is likely that it will be subject to heightened exposure to proprietary destruction. In case of immovable property, it is impossible to transfer the monuments out of the nation, and hence that destruction cannot be prevented. However, in case of movable property, where there is a slight chance to safeguard and protect these assets, every effort must be expended to transfer the cultural property to a safer environment. It would be prudent for source nations to hand over their artefacts for a temporary period to neutral organisations, like the United Nations Education Scientific and Cultural Organisation or the International Council of Museums, which would be in a better position to safeguard the cultural objects. A kind of a trust relationship can be established between the two sides. The safekeeping organisation would be a trustee (a person or country who administers the trust) and the source nation would be the beneficiary (a person or country who receives the benefits of

⁶⁹ Louis Charbonneau, 'ISIS is making \$200 million from stolen artefacts' (2016) *Business Insider*, at <http://www.businessinsider.com/r-islamic-state-nets-up-to-200-million-a-year-from-antiquities-russia-2016-4?IR=T> (last visited 24 February 2019).

the trust).⁷⁰ The trustee country or organisation would preserve and protect the cultural property, and keep it within its safe custody until the belligerent situation in the source nation comes to an end and conditions stabilise. Thereafter, the trustee organisation will transfer the cultural property to the source nation.

An interesting instance of such a forged trust relationship dates back to the late 1990s, when a few Afghan cultural assets were temporarily held by the Afghanistan Museum-in-Exile in Bubendorf, Switzerland, during periods of rising conflict in Afghanistan.⁷¹ If these cultural assets had been left behind in Afghanistan, they too would have faced the same fate as the remaining cultural property in the country. It is because these assets were transferred to the Afghanistan Museum-in-Exile in Bubendorf, Switzerland, that the people of the world still have the opportunity to marvel at them. Thus, through this trust mechanism, cultural objects can be protected from the actions of pernicious forces and can be safeguarded from being lost forever.

D. The Parthenon Marbles Wrangle

1. Greece versus Britain

The scuffle between Greece and England regarding the ownership of the Parthenon Marbles has garnered much attention worldwide. The Parthenon Marbles dispute is one of the most renowned amongst the cultural property repatriation cases.

The Parthenon Temple,⁷² built in around 447 BC was viewed as a divine work of the Hellenistic culture. The Temple was decorated

⁷⁰ Nertila Sulce, ‘Trust as a Relationship Treated by Common Law Legal Systems and as a Relationship Treated by Civil Law Legal Systems. Things in Common and Comparison between the Two Systems’, (2015), 4 *European Journal of Sustainable Development*, 102, 103.

⁷¹ ——, ‘Museum in Exile : Swiss foundation safeguards over 1,400 Afghan artefacts’, UNESCO, at <http://www.unesco.org/new/en/culture/themes/museums/museum-projects/archive/museum-in-exile-swiss-foundation-safeguards-over-1400-afghan-artefacts/> (last visited 24 February 2019).

⁷² ——, ‘An introduction to the Parthenon and its sculptures’, *The British Museum Blog*, available at <https://blog.britishmuseum.org/an-introduction-to-the-parthenon-and-its-sculptures/> (last visited 24 February 2019).

with delicately carved marble friezes and sculptures. These sculptures depicted episodes from the battle between the Olympian Gods and the giants, the battle between the Olympians and the Amazons and the Trojan War. The friezes which were about 160 metres long with 115 panels, displayed the Greek procession on their way to the panathenaic festival, a festival celebrated in Greece to honour the goddess Athena. The friezes and sculptures were placed on the exterior of the Temple and greatly added to the aura and prestige of the edifice.

However, in the seventh century, on the basis of a permit allegedly given by the Ottoman Empire, the then ruling kingdom of Greece, Lord Elgin, a representative of the British crown, removed a plethora of friezes and marble sculptures from the Greek Temple and shipped them to Britain. In around 1816, Lord Elgin sold these marbles to the British Museum, and since then the marbles have been adorned there.⁷³

Since gaining independence, the Greek Government has vehemently demanded return of the Parthenon Marbles. They contend that removal of the Parthenon Marbles from Greece was immoral, as Lord Elgin, in the first place, had no authority to remove the treasure outside the territorial borders of Greece. Further, the Parthenon Marbles are intricately linked to Greek cultural heritage and they must be returned to their rightful owner.⁷⁴

The Parthenon Marbles, together with the Temple of Parthenon, conveyed a glimpse of life and religion in ancient Athens. The de-contextualisation of the Parthenon Marbles from Greece has greatly hampered the integrity of the Temple.⁷⁵ Britain and the proponents of cultural internationalism argue that for centuries the Parthenon

⁷³ John Henry Merryman, *supra* n. 21, 150

⁷⁴ Leila Amineddoleh, 'The British Museum Should Return : The Parthenon Marbles To Greece' (2014) *Forbes*, at <https://www.forbes.com/sites/realspin/2014/12/23/the-british-museum-should-return-the-parthenon-marbles-to-greece/#1d510ca129e5> (last visited 24 February 2019).

⁷⁵ Andromache Gazi, 'Museums and National Cultural Property II: The Parthenon Marbles' (1990) 9 *Museum Management and Curatorship* 241, 246.

Marbles have been better preserved in the British Museum. If left in Greece, they would have been subject to deterioration on account of acute pollution. Moreover, it is contended that the Parthenon Marbles are better viewed and studied by scholars in the British Museum, in the context of artefacts from other civilizations like the Egyptian, Syrian and many others.⁷⁶ The wide accessibility granted to the Parthenon Marbles in the British museum has brought about approbation, and renewed interest in Greek history worldwide.⁷⁷

The Greeks, on the other hand, contend that the imperialistic attitude of Britain that only they can protect and preserve the Parthenon Marbles, is misplaced. The Parthenon Marbles would remain equally safe in the Acropolis Museum, specially created by the Greek Government to house the Marbles. The Marbles would be secure from environmental hazards under controlled conditions. The British now have no reason to retain the Parthenon Marbles and they must be returned to Greece.⁷⁸

Britain argues that even if the Parthenon Marbles were to be returned to Greece, they would be housed in the Acropolis Museum next to the Temple, and not in their original context on the Temple. In this way, the restitution of the Parthenon Marbles to Greece may not entirely restore the context and integrity of the Parthenon Temple. In such circumstances, the return of the Parthenon Marbles has been allegedly considered meaningless.⁷⁹

2. Need for Cooperation between the Two Countries

It is undoubtedly true that source nations are well justified in claiming the return of their lost cultural patrimony. Objects that are

⁷⁶ Dorothy King, *The Elgin Marbles*, (1st edn. Random House United Kingdom 2006) 298-299.

⁷⁷ *Ibid*, 305.

⁷⁸ Melineh Ounanian, ‘Of all the Things I’ve Lost, I miss my Marbles the Most! An Alternative Approach to the Epic Problem of the Elgin Marbles’ (2007) 9 *Cardozo Journal of Conflict Resolution* 109,114.

⁷⁹ John H Stubbs and Emily Makas, ‘Architectural Conservation in Europe and the Americas’ (2005) *Flinders University at* https://dspace2.flinders.edu.au/xmlui/bitstream/handle/2328/8156/241_262%20simpson.pdf?sequence=1 (last visited 24 February 2019).

closely linked to the history of a state or community, essential to the understanding of the heritage, must be returned to the source nation. However, the claims of world museums⁸⁰ that have for years preserved and protected these cultural artefacts cannot be completely disregarded. It would be unfair to expect a universal museum to return each and every effigy and statue demanded for restitution by source nations.

In the situation relating to the repatriation of the Parthenon Marbles, the claim of neither country can be discounted. It is trite that Greece has a right over the Marbles that are intricately connected to Greek culture and life. The fact that Greece has gone ahead and built a museum to specially house the Marbles shows that the country is yearning to have its priceless artefact returned and is committed to go to great length to protect and preserve it.⁸¹ The claim of the British Museum is also not completely without reason. Historically, they had removed the Marbles and transferred them to Britain after obtaining the requisite permission. The fact that Greece now claims⁸² that the consent of the Ottoman Empire was of no consequence and that the consent of the Greeks was not taken, may be perceived as unjust. Further, there exists a fear that if the Parthenon Marbles are restituted, it would be tantamount to opening a Pandora's box—with each country claiming the return of all its cultural artefacts. In situations like these, it is imperative for countries to try and reach a middle ground through the medium of diplomacy and to find a solution.

⁸⁰ *Ibid.*

⁸¹ Andrew Pierce, 'Greek Government unveils new home for Elgin Marbles' (2009) *The Telegraph* at <https://www.telegraph.co.uk/news/worldnews/europe/greece/5304133/Greek-government-unveils-new-home-for-Elgin-Marbles.html> (last visited 24 February 2019).

⁸² Dominic Selwood, 'Greek knows there is no legal right to the Elgin marbles—that is why it won't sue the UK' (2015) *The Telegraph* at <https://www.telegraph.co.uk/news/worldnews/europe/greece/11604991/Greece-knows-there-is-no-legal-right-to-the-Elgin-Marbles-thats-why-it-wont-sue-the-UK.html> (last visited 24 February 2019).

International exchanges, long term loans and memorandums of understanding between the two countries can be considered for promoting understanding and harmony between the countries. The agreement entered into between Nigeria and France on the subject of the Sokoto and Nok statues is also a specimen of such mutual understanding.⁸³ The Sokoto and Nok terracotta statues are the oldest sculptures to be found in West Africa. These statues of humans and animals with distinctive features, represent a rare form of artistry found exclusively in the West African region. Being one of the most sought-after forms of art, these statues were looted from Nigeria in 1998 and entered the French art market, where they were eventually bought by the French Government from a private dealer. Nigeria claimed that the works of art had been illegally exported from the country, while France maintained that they had validly and legally bought the statues.⁸⁴ However, following a rigorous round of negotiation between the two countries, an agreement was concluded between them wherein France recognised Nigeria's ownership over the statues but the objects would continue to be displayed in the French museum for 25 years, subject to a joint renewable agreement.⁸⁵ This cooperative approach has helped the two countries end a bitter feud without jeopardising the interests of either side.

A similar kind of understanding can put an end to the Parthenon Marbles controversy. An agreement can be entered into between the countries whereby the British museum recognises Greece's ownership over the Marbles, and agrees to loan to Greece the Parthenon Marbles for a specified period. In exchange for receiving the Parthenon Marbles, Greece must provide to Britain an opportunity to temporarily exhibit and study unique Greek artefacts. This understanding will be advantageous for both the countries. Greece will get unimpeded ownership over its most prized artefact, and its

⁸³ Ece Velioglu, 'Case Three Nok and Sokoto Sculptures – Nigeria and France' (2012) 1 *Platform ArThemis* 1, 5.

⁸⁴ *Ibid.* 2.

⁸⁵ Marie Cornu and Marc Andre-Renold, 'New Developments in the Restitution of Cultural Property : Alternative means of Dispute Settlement' (2009) *Journal Du Droit International*, 1, 2.

citizens will also get a chance to associate with and access its treasures after years. While for Britain, not only will it retain the ultimate right to access and display the Parthenon Marbles, but it will also get an opportunity to study, access and display to its visitors, exquisite and ancient Greek artefacts. An acrimonious dispute can indeed be solved with a bit of compromise on both sides. Thus, it is advisable for all countries facing such disputes to be circumspect and not think in terms of wins and losses, but to recognise the concern on both the sides and to amicably resolve the dispute.

IV. CONCLUSION

The debate surrounding cultural property is often biased with each side inclined to favour a predisposed ideological view. After analysing the two theories—nationalism and internationalism—thoroughly, the question which arises is: Are cultural internationalists justified in demanding retention of cultural property? The principles of preservation, protection and access are undoubtedly important to an extent, but they are not as critical so as to trump considerations of ownership, sentiments or linkage to heritage. Cultural property is integral to the identity of mankind and every effort must be expended to protect it. However, the off-chance of the cultural property being destroyed in the source nation should not result in the citizens of that country being deprived of the opportunity of beholding their cherished cultural property. It would be fairly reasonable to facilitate transfer of cultural property to secured locations in times of unrest, but not otherwise. The elitist notion followed by cultural internationalists that cultural property is safe only in highly developed countries is an example of the stance of naked retentionism followed by these countries.

Decades have passed since former colonies and nations alike have attained independence and the *United Nations Charter* explicitly recognises⁸⁶ every nation's unimpeachable right of sovereignty.

⁸⁶ *The Charter of the United Nations*, article 2.

A corollary of independence is the equality of states, historically expressed by the maxim *par in parem non habet imperium*.⁸⁷ It is only when one country respects the right of sovereignty and integrity of the other, such respect extending to the ownership of its cultural property, and does not unjustly enrich its self at the expense of the other, that parity between the states can be achieved in the truest sense.

It is high time that countries engage in diplomatic discussions and negotiations to resolve this issue. Such mediums will facilitate in striking a balance between the varying interests of different states. An amicable return of cultural property by market nations to source nations world over will serve as the greatest hallmark of civilised society as a whole.

⁸⁷ James Crawford, *Brownlie's Principles of Public International Law* (8th edn Oxford University Press 2012), 448. The maxim translates to 'For it is not one city to make the law upon another, for an equal has no power over an equal'.