



UNIVERSITÉ
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United Nations
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In partnership with
UNESCO

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September 2016.

Case Durga Idol – India and Germany

India/Inde – Germany/Allemagne – Subhash Kapoor – Artwork/œuvre d'art – Post 1970 restitution claims/demandes de restitution post 1970 – Due Diligence – Illicit Exportation/exportation illicite – Criminal offence/infraction pénale – Ownership/propriété – Negotiation/négociation – Diplomatic Channel/voie diplomatique – Settlement agreement/accord transactionnel – Unconditional restitution/restitution sans condition

In the 1990s, a 10th century idol representing the Indian Goddess Durga was reported as stolen from a temple in Tengpora, Pulwana in the state of Jammu and Kashmir in India. The idol was found at the Linden Museum in Stuttgart in 2012. After presenting the evidence of its provenance, the idol was returned to India on “ethical grounds”.

I. Chronology; II. Dispute Resolution Process; III. Legal Issues; IV. Adopted Solution; V. Comment; VI. Sources.

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I. Chronology

Post 1970 restitution claims

- **1990s:** The Mahishasuramardini Idol, a 10th century idol depicting the Indian Goddess Durga, slaying Mahishasura, the Buffalo Demon (hereinafter “Durga Idol”), was stolen from a temple in Tengpora, Pulwana in the state of Jammu and Kashmir in India.¹
- **2000:** The Linden Museum in Stuttgart, Germany, bought the Durga Idol for an estimated price of €224,000.²
- **25 October 2011:** The Indian Central Bureau of Investigation (CBI) issued an international arrest warrant for Subhash Kapoor, the owner of the Art of the Past Gallery in New York, in connection with the theft and exportation of the Durga Idol.³ Five days later, Kapoor was arrested in Germany.
- **2012:** Archaeological Society of India (ASI) received a tip off that the Durga idol was at the Linden Museum in Stuttgart.⁴
- **14 July 2012:** Kapoor was extradited to India where he was charged for the looting and illegal export of cultural objects.⁵
- **2014:** Representatives from the ASI travelled to Stuttgart to present evidence regarding the origin and the theft of the Idol to the Linden Museum and hence to obtain its return to India.⁶
- **23 September 2015:** The Linden Museum hands over the Durga Idol to the Indian Ambassador to Germany.⁷ However, the idol was formally returned by German Chancellor, Angela Merkel, to the Indian Prime Minister, Narendra Modi, at a public ceremony in India on **5 October 2015**.⁸

II. Dispute Resolution Process

Diplomatic Channel – Negotiation – Settlement agreement

- After the statue was reported missing and a First Information Report was lodged in Kashmir, ASI authorities received information in 2012 that the idol had been spotted in Stuttgart. A delegation of two ASI officials travelled to Stuttgart in 2014 to present evidence of the illegal export of the idol and begin negotiations for the return of the stolen idol. Subsequently, the federal State of Baden-Wurttemberg entered into discussions with the Embassy of the

¹ Aamir M. Khan, “Stolen Durga Idol Returns to Valley after 25 Years”, *The Tribune India*, March 31, 2016.

² Alexandra Scherle, “Germany Returns Hindu Statue to India”, *Deutsche Welle*, September 23, 2015.

³ Jason Felch, “Reckless: In Pursuit of Shiva, the National Gallery of Australia Ignored the Advice of Its Attorney,” *Chasing Aphrodite*, March 17, 2014.

⁴ “Germany Returns Stolen Durga Idol Found in Linden Museum”, *Huffington Post India*, October 5, 2015.

⁵ See supra note 3.

⁶ “Durga Idol Stolen from Kashmir Temple Returned by Germany”, *The New Indian Express*, October 5, 2015.

⁷ See supra note 3.

⁸ Priyanka Mogul, “Angela Merkel Returns Stolen 10th Century Goddess Statue to Indian Prime Minister Narendra Modi”, *International Business Times*, October 6 2015.

Republic of India in Berlin. As a result of the negotiation, the idol was handed over to the Indian Ambassador, SE Vijay, and returned on “ethical grounds”.⁹

III. Legal Issues

Due Diligence – Criminal offence – Illicit Exportation – Ownership

- The Indian Antiquities Act of 1972 states that ownership of antiquities is vested *ipso iure* in the State.¹⁰ Export of such artefacts can therefore only take place after a valid export license is obtained from the competent national authorities.¹¹ As the Durga Idol was not accompanied by such an export certificate, it can be argued that it was stolen and subsequently illicitly exported.
- The person that orchestrated the removal of the statue, Subhash Kapoor, was arrested and prosecuted in India. Kapoor’s business partner, Aaron Freedman, recognized at trial that the statue was stolen from a Tamil Nadu temple and that, together with Kapoor, he had sold numerous artworks to museums and galleries around the world with forged provenance documents.¹²
- Arndt Oschmann, a representative from the German Ministry of Science, Research and the Arts, said that, “[b]ack then, the Linden Museum thoroughly examined where the artefact came from, but there were no qualms about its origin. The seller, Subhash Kapoor from New York was known as a reliable art dealer”.¹³

IV. Adopted Solution

Unconditional restitution

- The idol was handed over to the Indian Embassy in Berlin on 23 September 2015 but the formal return took place on 5 October 2015 during the Third Inter-Governmental Consultations between the governments of India and Germany, when the idol was handed over at a public ceremony to the Indian Prime Minister, Narendra Modi, by German Chancellor, Angela Merkel.
- The return of the Idol to India was a signal of the goodwill shared between the two countries, with neither Germany nor the Federal State of Baden-Wurttemberg receiving any financial compensation for the same.¹⁴

⁹ There seems to be no further information regarding the restitution.

¹⁰ Section 3(1) of the Antiquities and Art Treasures Act 1972.

¹¹ *Ibid.*, Section 5.

¹² *People of the State of New York v. Aaron Freedman*, No. 13-091098, N.Y. Sup. Ct., plea agreement, 4 December 2013. See also Jason Felch, *supra* note 3.

¹³ *Ibid.*

¹⁴ “Germany Returns Durga Idol Stolen 20 Years Ago From Kashmir Temple”, *The Quint*, October 5, 2015, and Alexandra Scherle, *see supra* note 2.

V. Comment

- The case in question is noteworthy for many reasons. First, it is another successful case of restitution obtained through diplomatic means by the Indian Government.¹⁵ Second, it is important as another example demonstrating the magnitude of the criminal scheme run by Subhash Kapoor. Third, this case demonstrates that the legal differences between civil law and common law countries constitute an important impediment to the restitution of wrongfully removed cultural objects. For instance, India follows the common law system under which no one can transfer title on stolen property. As a result, since a thief cannot be considered to be the owner of a property, the sales concluded by Subhash Kapoor are to be deemed as *void ab initio*. On the other hand, in Germany – but the same applies in other civil law jurisdiction such as France and Switzerland – the law allows *bona fide* purchasers to acquire good title once the applicable limitation period has run, even if the seller did not have such a title.
- This latter issue shows that restitution of wrongfully removed objects can more easily be achieved through the adoption of non-adversarial and cooperative (out-of-court) means. In effect, the case at hand was not settled on the basis of the relevant domestic laws but in light of the obligation of cooperation set out under the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970.¹⁶

VI. Sources

a. Legislation

- Antiquities and Art Treasures Act, 1972.

b. Court decisions

- *People of the State of New York v. Aaron Freedman*, No. 13-091098, N.Y. Sup. Ct., plea agreement, December 4, 2013.

c. Documents

- Madeleine Frith, Ece Velioglu Yildizci, Marc-André Renold, “Dancing Shiva Statue – India and National Gallery of Australia,” Platform ArThemis (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva.

¹⁵ See Madeleine Frith, Ece Velioglu Yildizci, Marc-André Renold, “Dancing Shiva Statue – India and National Gallery of Australia,” Platform ArThemis (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva.; and Lauren Burse, Alessandro Chechi, Marc-André Renold, “Case Parrot Lady Sculpture – Canada and India,” Platform ArThemis (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva.

¹⁶ 17 November 1970, 823 UNTS 231.

- Lauren Bursey, Alessandro Chechi, Marc-André Renold, “Case Parrot Lady Sculpture – Canada and India,” Platform ArThemis (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva.

d. Media

- Khan, M. Aamir. “Stolen Durga Idol Returns to Valley after 25 Years.” *The Tribune India*, March 31, 2016. Accessed on September 16, 2016. <http://www.tribuneindia.com/news/jammu-kashmir/stolen-durga-idol-returns-to-valley-after-25-years/215576.html>.
- Mogul, Priyanka. “Angela Merkel Returns Stolen 10th Century Goddess Statue to Indian Prime Minister Narendra Modi.” *International Business Times*, October 6, 2015. Accessed on September 15, 2016. <http://www.ibtimes.co.uk/angela-merkel-returns-stolen-10th-century-goddess-statue-indian-prime-minister-narendra-modi-1522726>.
- “Durga Idol Stolen from Kashmir Temple Returned by Germany.” *The New Indian Express*, October 5, 2015. Accessed on September 20, 2016. <http://www.newindianexpress.com/nation/Durga-Idol-Stolen-From-Kashmir-Temple-Returned-by-Germany/2015/10/05/article3064179>.
- “Germany Returns Stolen Durga Idol Found in Linden Museum.” *Huffington Post India*, October 5, 2015. Accessed on September 16, 2016. <http://www.huffingtonpost.in/2015/10/05/germany-restores-stolen-durga-idol-from-india-found-in-linden-mu/>.
- Scherle, Alexandra. “Germany Returns Hindu Statue to India.” *Deutsche Welle*, September 23, 2015. Accessed on September 18, 2016. <http://www.dw.com/en/germany-returns-hindu-statue-to-india/a-18731495>.
- Felch, Jason. “Reckless: In Pursuit of Shiva, the National Gallery of Australia Ignored the Advice of Its Attorney.” *Chasing Aphrodite*, March 17, 2014. Accessed September 20, 2016. <http://chasingaphrodite.com/2014/03/27/reckless-inpursuit-of-shiva-the-national-gallery-of-australia-ignored-the-advice-of-its-attorney/>.