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Case Nataraja Idol – India and the Norton Simon Foundation

India/Inde – Norton Simon Foundation – Archaeological object/objet archéologique – Pre 1970 restitution claims/demandes de restitution pre 1970 – Judicial claim/action en justice – Negotiation/négociation – Settlement agreement/accord transactionnel – Criminal offence/infraction pénale – Ownership/propriété – Loan/prêt – Conditional restitution/restitution sous condition

In 1956, an ancient bronze statue of the Lord Siva (Lord of the Cosmic Dance or Sivapuram Nataraja) was removed from a temple in India for restoration purposes, subsequently held by an Indian private collector and ultimately sent to the United States with false export documents. In 1973, the Nataraja idol was sold by a New York dealer to the Norton Simon Foundation. In the same year, the Government of India sued the Foundation, seeking the return of the sculpture. The case, however, was settled out-of-court. Under the terms of the agreement, the Norton Simon Foundation recognised India's title, while the Indian Government accepted to temporarily assign the Nataraja idol to the Foundation in the framework of a 10 year-long loan agreement.

I. Chronology

Pre 1970 restitution claims

- **1951**: **Six 10th-century bronze statues** of great beauty, including an image of Lord Siva (Lord of the Cosmic Dance or *Sivapuram Nataraja* – Nataraja is the Hindu god of destruction and regeneration), were **unearthed** near Sivapuram, in the district of Tamil Nadu. Under Indian treasure trove law, the Nataraja figure was given to the local temple, though ownership was vested in the State.[1]
- **1956**: The statue was delivered by the temple to a **professional Indian craftsman for** purposes of **restoration**. Apparently, during repairs, a **copy** of the Nataraja idol was made and substituted for the original. It is not known whether the restorer or someone else substituted the sculpture for the original. Nor is it yet known who stole the original. However, it was later discovered that the restorer himself prepared the fakes.[2]
- **1965**: Douglas Barrett of the British Museum denounce that the statue in the temple at Sivapuram was a fake.[3]
- **1967**: The Nataraja idol came into the possession of **Boman Behram**, a Bombay collector of art, who sold it to **Ben Heller**, a New York art dealer.[4]
- **1973**: Ben Heller **sold** the idol to the **Norton Simon Foundation** for a reported $ 900,000.[5]
- **1973**: The **Metropolitan Museum of Art (MET)** in New York began planning an **exhibition** of the Norton Simon Foundation's Indian art collection. Through the publicity surrounding the show, the Indian Government learned about the statue's presence in the United States. This was the first time that the Indian Government had traced the object since its theft. Consequently, the **Indian Government wrote a letter of protest to the MET** and, with the help of the United States Department of State, blocked the show's opening.
- **1973**: The Nataraja idol was shipped to the British Museum for further restoration.[6]
- **1973**: The **Indian Government filed suit** in Los Angeles (the domicile of the Norton Simon Foundation) and New York (the domicile of Ben Heller) seeking restitution.[7] Furthermore, it exercised political pressure on the Government of the United Kingdom, consequentially leading to Scotland Yard **impounding the statue**. The Norton Simon Foundation refused to return the Nataraja idol by asserting that India had no rights or title to it.
- **1975**: **India voluntarily interrupted the litigation** for a set one-year period in a hope to **facilitate an out-of-court settlement**.
- **1976**: The Norton Simon Foundation and the Government of India **settled** the case out-of-court by way of a mediated agreement.[8]

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[1] Indian Treasure Trove Act (VI of 1878).
[2] Franklin F. Sayre, "Comment: Cultural Property Laws in India and Japan," *UCLA Law Review* 33 (1986): 876.
[3] Ibid., 877.
[4] Leonard D. Duboff, *The Deskbook of Art Law* (Washington: Federal Publications: 1977), 110–111.
[5] Ibid.
[6] Ibid.
[7] Ibid. *Union of India v. the Norton Simon Foundation*, United States District, Southern District of New York, 74 Cir. 5331 (SDNY 1976); United States District Court, Central District California, Case No. CV 74-3581-RJK (CD Cal. 1976).
[8] Leonard D. Duboff, *The Deskbook of Art Law* (Washington: Federal Publications: 1977), 111–112.

II. Dispute Resolution Process

Judicial claim – Negotiation – Settlement agreement

- Ever since the theft was discovered, the Indian Government sought the immediate and unconditional return of the Nataraja idol by means of a criminal investigation against the craftsman, via inter-governmental cooperation with the States concerned (the United States and the United Kingdom), and through the lawsuits filed in Los Angeles and New York. The suits filed in the United States alleged that the Indian Government held title to the idol and that the object should be returned to India. This ownership claim was based on two legal theories: (1) purchase and import were completed with the full knowledge of the violation of Indian legislation; and (2) the idol was illegally exported since it was falsely described in the export permit.[9]
- The Indian Government also sought damages and expenses. It is noteworthy that the claimant not only asked for litigating costs. It also sought punitive damages and compensation for the costs incurred in locating the idol. Alternatively, the Government of India asked for a substitute payment of $ 4 million if the idol could not be returned. In addition, it is interesting to note that the Indian Government asked for damages for infliction of mental suffering. This was caused by the fact that the retention of the statue by the defendants (i) constituted a denial of the Indian people's right of religion and (ii) that the Nataraja idol, which was regarded as divine or made by god, was wrongfully detained. According to Indian law, in effect, the idol, as installed in a special shrine and worshipped, was considered as a legal entity capable of suing and being sued, not a mere movable property.[10]
- Although at the beginning it showed no willingness to compromise with the Foundation, in 1975, the Indian Government decided to discontinue the lawsuit for a one-year period in order to facilitate an amicable settlement. It can be submitted that this attempt was made because of the fear of a lengthy and costly lawsuit.
- The Norton Simon Foundation denied that India had any rights or title to the statue. In particular, the defendant argued that the plaintiff's lawsuit should be dismissed because of its own inaction as the statue has been displayed openly and notoriously, at least since 1965, in the collection of an Indian collector Boman Behram. In other words, it was argued that the plaintiff had not exercised due diligence in searching for the idol. As a result, the defendant maintained that India's title in the Nataraja idol had been extinguished by virtue of both California and New York statutes of limitations.[11]

[9] Ibid.
[10] Ibid.
[11] Ibid.

III. Legal Issues

Criminal offence – Ownership

- The instant case involved legal questions which typically arise in disputes about objects that have been stolen and subsequently transferred to another country in breach of domestic legislation: whether the owner's title had been extinguished; whether the possessor has acquired the object in good faith; whether the legal action was timely; and whether the courts of the State where a stolen object has been transferred to is under an obligation to recognize or enforce the protective laws of the country of origin. However, no court of law dealt with any of these issues in the present case as a result of the settlement achieved by India and the Foundation.
- In the 1970s and early 1980s, US courts have decided a number of important restitution claims: *Menzel v. List*,[12] *United States v. Hollinshead*,[13] *United States v. McClain*[14] and *Kunstsammlungen zu Weimar v. Elicofon*.[15] These cases involved some of (if not all) the legal issues underlined above and US courts cope with them by elaborating innovative (and culture-sensitive) solutions such as the "demand and refusal" rule[16] and the so-called "*McClain* doctrine".[17] As demonstrated by later decisions, these and other solutions have the effect of excluding (or limiting) the mechanical application of the norms enacted for normal business transactions involving ordinary goods (especially private international law norms). As it was settled extra-judicially, the case *Union of India v. The Norton Simon Foundation* does not constitute, legally speaking, a precedent pursuant to the principle of *stare decisis* or the doctrine of *jurisprudence constant*. Nevertheless, the agreement which led to the restitution of the Nataraja idol constitutes a valuable paradigm that, in fact, has been replicated several times in the past two decades.[18]

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[12] 267 N.Y.S.2d 804, 809 (Sup. Ct. N.Y. 1966), *rev'd*, 246 N.E.2d 742 (N.Y. 1969).
[13] 495 F.2d 1154 (9th Cir. 1974).
[14] 545 F.2d 988 (USCA 5th Cir. 1977), rehearing denied 551 F. 2d 52 (USCA 5th Cir. 1977); 593 F.2d 658 (USCA 5th Cir. 1979); affirmed in part, reversed in part, 444 U.S. 918 (1987).
[15] 478 F.2d 231(1973); 536 F.Supp. 829 (E.D.N.Y.1981), *aff'd*, 678 F.2d 1150 (2d Cir.1982). On this see Alessandro Chechi, Anne Laure Bandle, Marc-André Renold, "Case 2 Dürer paintings – Kunstsammlungen Zu Weimar v. Elicofon", Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva, June 2011.
[16] Under the "demand and refusal" rule, the original owner can commence a legal action against the possessor if he proves that the purchaser refused to return the property after a formal request. *Menzel v. List* and *Solomon R. Guggenheim Foundation v. Lubell* (567 N.Y.S.2d 623, Ct. App. 1991).
[17] In *McClain* several US art dealers were convicted for dealing in stolen Mexican antiquities. Under the *McClain* doctrine, an object may be considered stolen in the US, pursuant to the National Stolen Property Act of 1948 (18 U.S.C. § 2314), provided that the country can prove that: (1) the object was discovered within its current borders; (2) the pertinent legislation unequivocally vests ownership of such object in the State, even without physical possession, and that it was in force when the object was removed from that country; and (3) the foreign law does not violate the US conception of due process. Therefore, the National Stolen Property Act – as interpreted by *McClain* – recognizes and gives extra-territorial effects to the foreign patrimony laws that vest ownership of certain objects to the national government.
[18] See, e.g., the accords concluded between 2006 and 2008 by the Italian Government with a number of US museums, including the Boston Museum of Fine Arts, the J. Paul Getty Museum of Los Angeles, Princeton University's Art Museum, the Cleveland Museum of Art, and the New York Metropolitan Museum of Art. On the latter see Raphael

IV. Adopted Solution

Loan – Conditional restitution

- In 1976, before the case came to trial and the opening of the Norton Simon Museum in Pasadena, California, diplomatic efforts resulted in an unprecedented out-of-court settlement. According to the stipulation and order that emerged from the United States District Court for the Central District of California, the Norton Simon Foundation recognised India's ownership title to the Nataraja idol.[19] In exchange, India allowed the statue to remain in the Foundation's possession for ten years. In addition, the Foundation was allowed, for a one-year period, to acquire any other Indian art object, found outside of India, with full immunity from suit by the Indian Government.
- The agreement also concerned Ben Heller, the dealer from whom the Foundation had bought the Nataraja idol and against whom both the Foundation and the Indian Government had counterclaimed.[20] As part of the same settlement, Heller transferred various artworks and an unspecified sum of money to the Foundation.[21]
- Clearly, the parties reached such a win-win solution because the selected dispute settlement method helped them in de-escalating contentiousness, in promoting bargains and reciprocal concessions and, crucially, in setting aside procedural hurdles and legal arguments.

V. Comment

- The out-of-court settlement agreement of 1976 between the Norton Simon Foundation and the Government of India is noteworthy for many reasons. The first is that it is one of the earliest accords on the restitution of an important artwork between a source nation and a museum.
- The second reason pertains to the process. It can be submitted that it was the ability of negotiators (the parties' lawyers) and diplomats – and not the protection afforded by domestic laws – that ultimately brought about the return of the Nataraja idol to India. International cultural heritage law was still in its infancy in the 1970s and hence had no impact on the resolution of the dispute. In effect, the only pertinent treaty, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970,[22] was not operative at the relevant time as it does not apply

Contel, Alessandro Chechi, Giulia Soldan, "Case Euphronios Krater and Other Cultural Goods – Italy and Metropolitan Museum", Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva, October 2011.

[19] Leonard D. Duboff, *The Deskbook of Art Law* (Washington: Federal Publications: 1977), 111–112.

[20] Ibid.

[21] Ibid.

[22] 17 November 1970, 823 UNTS 231. Under Article 7(a) State Parties undertake to adopt measures to discourage domestic museums from acquiring cultural property illegally exported after the Convention has entered into force. Under Article 7(b)(i) State Parties also undertake "to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the States concerned, provided that such property is documented as appertaining to the inventory of

retroactively:[23] if it cannot be proved that a treasure falling within its scope of application has been illegally exported in contravention of the laws of the country of origin after the Convention has formally entered into force for both the States involved, it cannot be applied.[24]

- The third relevant aspect of the settlement under consideration concerns its content. On the one hand, it reveals the ability of the negotiators. They succeeded in resolving the issue of title with a mutually beneficial solution by focusing on the needs and interests of the parties: India demanded the recognition of its ownership title and the restitution of the statue for cultural and religious reasons; the museum had an interest in acquiring materials for exhibition. The balance between these different needs was struck with the trade-offs contained in the described agreement.
- On the other hand, the clause of the agreement that allowed the Foundation to buy any Indian artwork, located outside India, for a one-year period with full immunity from India is somehow startling. True, the Norton Simon Foundation affirmed in a statement that this clause was important to exhibit other great works "along with the *Sivapuram Nataraja* as a help to better understanding between people of differing cultures".[25] However, one could argue that the Government of India agreed on this condition because it was not aware of the magnitude of the illicit trade at that time and of the increasing role of the United States as one of the principal markets for articles of archaeological or ethnological interests. Therefore, it could be submitted that the Government of India underestimated the dangers that one-year immunity could have caused to the national cultural and religious heritage.[26]

VI. Sources

a. Bibliography

- Brodie, Neil, Jenny Doole and Peter Watson. *Stealing History: The Illicit Trade in Cultural Material*. Cambridge: The McDonald Institute for Archaeological Research: 2000.
- Duboff, D. Leonard. *The Deskbook of Art Law*. Washington: Federal Publications: 1977.
- Messenger Mauch, Phyllis, *The Ethics of Collecting Cultural Property: Whose Culture? Whose Property?*. Albuquerque: University of New Mexico: 1999.
- Sayre, Franklin F. "Comment: Cultural Property Laws in India and Japan." *UCLA Law Review* 33 (1986): 851–890.

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that institution; (ii) at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned […]".

[23] Given the silence of the Convention, Article 28 of the Vienna Convention on the Law of Treaties (AJIL, 1969, p. 875) of 1969 applies: "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party".

[24] India ratified the UNESCO Convention in 1977, the United States in 1983.

[25] Messenger Mauch Phyllis, *The Ethics of Collecting Cultural Property: Whose Culture? Whose Property?* (Albuquerque: University of New Mexico: 1999): 77.

[26] See, e.g., Neil Brodie, Jenny Doole and Peter Watson, *Stealing History: The Illicit Trade in Cultural Material* (Cambridge: The McDonald Institute for Archaeological Research: 2000): 28.

b. Court decisions

- *Menzel v. List*, 267 N.Y.S.2d 804, 809 (Sup. Ct. N.Y. 1966), *rev'd*, 246 N.E.2d 742 (N.Y. 1969).
- *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974).
- *United States v. McClain*, 545 F.2d 988, 991-992 (5th Cir. 1977).
- *Kunstsammlungen zu Weimar v. Elicofon*, 478 F.2d 231(1973); 536 F.Supp. 829 (E.D.N.Y.1981), *aff'd*, 678 F.2d 1150 (2d Cir.1982).
- *Solomon R. Guggenheim Foundation v. Lubell* (567 N.Y.S.2d 623, Ct. App. 1991).

c. Legislation

- Indian Treasure Trove Act (VI of 1878).
- UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 17 November 1970, 823 UNTS 231.