

# India

Kamala Naganand

Aarna Law, Bangalore

## A. Protection of cultural property

### 1. What are the key characteristics of your country's regulations on cultural heritage and national patrimony?

India has a rich and dynamic cultural history, with external influences over the centuries resulting in the creation of innumerable cultural traditions and forms of artefacts, monuments, paintings, sculptures, lithographs, cave paintings, manuscripts, books and textile traditions, *inter alia*. Article 49 of India's Constitution imposes an obligation on the state to protect monuments, places, and objects of artistic and historic significance. Considering the large commercial, political and economic interests attracted by art and antiquity, India enacted the Antiquities and Art Treasures Act, 1972 (Antiquities Act) along with the Antiquities and Art Treasures Rules, 1973 ('Antiquities Rules'), falling within the authority of the Archaeological Survey of India, Ministry of Culture. As a key feature of these regulations, is not only the ownership of art or antiquity but also control or possession that mandates registration before the officer under section 14 of the Antiquities Act.

### 2. Under your national law, which criteria must be met in order to classify goods as cultural property?

The age of the item is taken into consideration while classifying it as an 'antiquity' under section 2(1) (a) of the Antiquities Act. There are also certain prominent artists and personalities of eminence whose works are considered national treasures and which cannot be exported out of the country.

### 3. What are the legal consequences arising from classifying an asset as cultural property? Does the classification of a private asset as cultural property affect the right of ownership?

One of the immediate consequences of classifying a good as cultural property is the associated restriction on its movement outside India, without the prior consent/licence from the appropriate authority under the Antiquities Act. Therefore, any private individual or institution which owns cultural property classified as a 'national treasure' may own the property within the geographical territory of India. The individual may choose to sell it to other individuals who are not resident in India, on the condition that the work does not leave India. The classification of an asset as cultural property does not affect the rights of ownership in the property. It only limits the asset being taken out of the country.

**4. Which authorities in your country define cultural property and who advises these authorities?**

The Archaeological Survey of India (ASI) is the principal authority defining and assessing cultural property. This body is advised by its Director-General and experts who have been appointed by the ASI from time to time.

**5. Has your country ratified the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, and, regarding the illegal export of cultural objects and artwork: what are the main characteristics of the national implementation?**

India has been a signatory to the 1970 UNESCO Convention since 24 January 1977. The Antiquities Act 1972, complies with the Convention and put in place the legal framework that was a requirement of countries in complying with the Convention's basic principles. The Act provides for the legal framework on the ownership, transfer and sale for antiquity as defined in section 2(a) of the Antiquities Act. In accordance with the Antiquities Act, it is mandatory for every person who owns, controls, or is in possession of any antiquity to register it with a registering officer. The antiquities can only be sold and purchased by a licensed person. Furthermore, according to section 3 of the Antiquities Act, export of antiquity is prohibited by anyone other than central government or its agencies.

**6. Has your country ratified the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, and, regarding the illegal export of cultural objects and artwork: what are the main characteristics of the national implementation?**

India is not a signatory to the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.

**7. Has your country ratified any other international conventions or bilateral agreements relating to the export of cultural objects?**

India is a party to the following international conventions relating to the export of cultural objects:

- Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, The Hague, 14 May 1954.
- Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954.
- Convention concerning the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972.
- Convention for the Safeguarding of the Intangible Cultural Heritage, Paris, 17 October 2003.

Furthermore, India has also signed memoranda of understanding and bilateral agreements with various countries, including: Afghanistan, Algeria, Anguilla, Argentina, Armenia, Australia, Austria, Bahrain, Bangladesh, Belarus, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei, Bulgaria, Burkina Faso, Cambodia, Chile, China, Colombia, Congo, Croatia, Cuba, Cyprus, Czech Republic, Cote D'ivoire, Djibouti, Ecuador,

Egypt, Estonia, Ethiopia, Finland, France, Georgia, Germany, Ghana, Greece, Guyana, Hungary, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Laos, Latvia, Lebanon, Lesotho, Libya, Lithuania, Luxembourg, Madagascar, Malaysia, Maldives, Malta, Mauritius, Mexico, Moldova, Mongolia, Morocco, Mozambique, Myanmar, Namibia, Nepal, the Netherlands, Nicaragua, Nigeria, North Korea, Norway, Oman, Pakistan, Panama, Peru, Philippines, Poland, Portugal, Qatar, Romania, Russian Federation, Rwanda, Senegal, Serbia, Seychelles, Singapore, Slovak Republic, Slovenia, Somalia, South Africa, South Korea, Spain, Sri Lanka, Sudan, Suriname, Syria, Tajikistan, Tanzania, Thailand, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Arab Emirates, Uzbekistan, Venezuela, Vietnam, Yemen, Zaire, Zambia and Zimbabwe, on illegal export protection, documentation of arts, museum objects and production of cultural resources.

## **B. Restrictions on the export of cultural property and artwork**

### **1. What are your country's export restrictions regarding cultural property and artwork?**

The Foreign Trade (Development and Regulation) Act, 1992 and the Import-Export Policy 2015–2020 count in detail, goods that can be freely exported or imported. The Import Export Policy 2015–2020 has been extended until 31 March 2021 under Notification no 57/2015-2020, 31 March 2020.

The classification is based on the Indian Trade Classification-Harmonised System as explained below:

- *Restricted goods*

Before exporting any restricted goods, an exporter must first obtain a licence explicitly permitting them to do so. The restricted goods must be exported through a set of procedures/conditions which are detailed in the licence.

- *Prohibited goods*

These are items that cannot be exported. The vast majority of such items include wild animals and animal articles that may carry a risk of infection.

- *State Trading Enterprise*

Certain items can be exported only through designated State Trading Enterprises. The export of such items is subject to the conditions specified in the Export-Import Policy.

Antiques are placed in the restricted category, therefore making their import or export deemed banned under section 11 of the Customs Act, 1962 and section 3(3) of the Foreign Trade (Development and Regulation) Act, 1992.<sup>1</sup>

Moreover, to enable customs authorities to identify an object as an antique, in the context of export, the ASI has posted an archaeologist of the rank of deputy superintending

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<sup>1</sup> *Department of Customs v Sharad Gandhi Crl Appeal 174/2019 (SC)* re prosecution under Customs Act and Antiquities Act.

archaeologist (Group-A) to examine objects referred by customs authorities. The ASI has also constituted an Expert Advisory Committee at Circle level to issue non-antiquity certificates.

In case there is any question about the authenticity of the art object, the ASI's Director-General has the power to determine whether or not an article is an antiquity or art treasure. In the event of seizure of any object by any enforcing agency, it is required to be presented before the ASI's Director-General for examination, according to section 24 of the Antiquities Act, 1972. Subsequent further action is undertaken by enforcing agencies.

In case of theft of any antique from a centrally protected monument, a look out notice is issued to all Circle offices of the ASI and India's enforcing agencies, and efforts are made to recover the object.

### **1.1 Under which conditions is export permission granted?**

Export permission is granted subject to strict compliance with the procedure set out by the ASI's Director-General, as defined under the Antiquities Act 1972, to individuals who possess the importers-export code number issued by the Director-General or any officer authorised by the Director-General.

The permission for exporting artwork for exhibition, educational and research purposes is only granted for a six-month period. It may be extended by another six months on the request of a borrowing institution or organisation and following approval of the Inter Ministerial Committee for Exhibition (IMEC), headed by the Culture Secretary. It can be loaned to a foreign institution/museum for a three-year period, which may be extended by another two years on request of the borrowing institution and the IMEC's approval.

It is relevant to mention that a Draft Antiquities and Art Treasures Regulation, Export and Import Bill of 2017 has been pending approval. This draft Bill proposes to ease the trade of art and antiques within the country by repealing the licence requirement under the current Antiquity Act. This draft Bill has yet to see the light of day.

### **1.2 Which authority grants such export permission and who advises this authority?**

Permission to export antiquities or art treasure can only be given by the ASI's Director-General in consultation with the Culture Secretary, Ministry of Culture, Government of India, and the Inter-Ministerial Committee as set up from time to time.

### **1.3 What does the proceeding look like, who are the parties to the proceeding and what is the duration of the proceeding?**

The proceedings for penalties are covered under section 26 of the Antiquities Act. The Court of a Presidency Magistrate or a Magistrate of the First Class will take cognisance in matters and issue penalties. For offences relating to export trade in antiquities and art treasures, the proceedings take place under the Customs Act, 1962. The provisions under the Antiquities Act and Customs Act, 1962, related to export of artwork and penalties, are independent of each other. Consequently, the offender may be charged with penalties under both these laws. 'The prosecution

under Section 132 and 135 of the Customs Act, 1962 is not barred in regard to antiquities or art treasures'.<sup>2</sup>

Section 23(2) of the Antiquities Act further states that the provisions of the criminal code relating to search and seizure, that is, sections 102 and 103 of the Code of Criminal Procedure, 1898 (5 of 1898), now Code of Criminal Procedure, 1973 (2 of 1974), section 100, shall apply. Section 27 stipulates that it shall be lawful for any Presidency Magistrate or any Magistrate of the First Class to pass any sentence under this Act in excess of his power under section 32 of the Code of Criminal Procedure.<sup>3</sup>

Criminal proceedings involve the following steps:

1. Filing a First Information Report (FIR), or a complaint by the police.
2. Once the FIR is registered by the police, the investigation into the case commences by the police, who collect and examine evidence, interrogate witnesses, record witness statements, obtain court orders to prevent the article or individual from leaving the country.
3. Once the investigation has been completed, a charge sheet is filed before the jurisdictional magistrate.
4. The magistrate then hears the preliminary issues and frames charges on the basis of the evidence presented before the court. Once the charges are framed, the case goes to trial before the magistrate.
5. Detailed evidence is led through documents and witnesses by the prosecution as well as the defence.
6. On conclusion of evidence, the final arguments are submitted by the counsels and the judgment is pronounced by the court.

#### **1.4 Are there any monetary thresholds (*de minimis*)?**

There are no monetary thresholds for the export of art in India.

#### **1.5 Does the circumstance of the artist still being alive or the time of the creation of the artwork matter?**

Yes, the artist being alive is material to whether a work can be considered an antique or not. Section 2(1)(II)(b) of the Antiquities Act, while defining 'art treasure', also states that an artwork shall not be declared as an 'art treasure' under the said clause so long as its author is alive. Therefore, any human work of art, declared by the central government by notification in the *Official Gazette*, as being an art treasure shall not materialise until the artist's death.

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<sup>2</sup> See n 1.

<sup>3</sup> Now the Code of Criminal Procedure, 1973 (2 of 1974), Section 100.

**2. Is the state obliged to buy out the artwork for which an export permission was denied?**

There is no express provision under Indian law mandating the state's buying out of artworks where export permission has been denied.

However, the Antiquities Act does permit the sale of antiquities to other 'licensees' in case of revocation of the licence of the person possessing the antiquity. While the Antiquities Act empowers the government to sell certain items of antiquities to the exclusion of all others by making a declaration to that effect in the *Official Gazette*, it does not contemplate the state buying out antiquities where export permission is denied.

On a connected note, in instances where central government is of the opinion that certain art treasures/antiquities are desirable to be conserved, it may proceed to pass an order for 'compulsory acquisition' under section 19 of the Antiquities Act. Although the government is not obligated to purchase such art treasures/antiquities, it shall be bound to compensate such acquisition. Compensation is arrived at through mutual agreement. Failing that, central government shall appoint an arbitrator who is, or has been, or is qualified for appointment as, a judge of a high court. The decision of the arbitrator shall be final, subject to an appeal within 30 days before the jurisdictional high court.

**3. Are there any exceptions to these regulations (eg, temporary export for exhibitions, conservation, or private reasons of the owner)?**

In the case of Indian artwork going out of the country, the permission for exporting artwork for exhibition purposes, educational purposes and research will only be granted for a six-month period. It may be extended by a further six months on the request of a borrowing institution or organisation and on approval of the Inter Ministerial Committee for exhibition (IMEC), headed by the Culture Secretary. It can be loaned abroad to a foreign institution/museum for three years, which may be further extended by two years on request of the borrowing institution and on approval of the IMEC.

The following categories of antiquities cannot be loaned within the country or abroad:

1. Antiquities and art treasures are classified under the 'AA' category.
2. Works of art under worship in any form, irrespective of their location and placement.
3. Embedded antiquities and art objects.
4. Antiquities/art treasures which have not been documented by the concerned museum.
5. Antiquities/art treasures displayed in specific context of the site/monument.
6. Antiquities/art treasures that are not in a good state of preservation and not fit for movement.
7. Antiquities and art treasures cannot be taken for exhibition unless at least three years has elapsed since they were returned from a previous exhibition. However, this provision may be relaxed in exceptional cases, with the specific written permission of the IMEC, headed by the Culture Secretary, Government of India.



## **C. Consequences in case of violation of export restrictions; restitution and repatriation of illegally exported cultural property**

### **1. What are the legal consequences in case of a breach of export restrictions?**

The penalties for breach of any export restriction under the Foreign Trade Act are seizure and confiscation of goods, penalties on the exporter and suspension or cancellation of the export licence. If any person is found exporting or attempting to export any antique in contravention of the provision of the Foreign Trade Act, they shall be liable to a minimum six-month prison sentence, extendable to three years along with a fine. Furthermore, contravention of any provisions of the Foreign Trade Act by a licensee may also result in their licence being revoked.

The export of antiques is also covered by the ban imposed under section 11L of the Customs Act, the violation of which is charged with a penalty of up to three times the value of the goods, along with confiscation of the goods in certain cases.

### **2. Give a description of the regulations and practices in your country relating to the restitution and repatriation of illegally exported cultural property**

Section 11 of the Customs Act contemplates the central government's power to ban either absolutely or subject to certain conditions, as may be notified by them, for the protection of national treasures of artistic, historic or archaeological value. Section 11 (I) of chapter IV(B) of the Customs Act further states that, if the central government is satisfied that 'to check the illegal export or facilitate the detection of goods which are likely to be illegally exported', it may notify such goods as 'specified goods' which cannot then be exported, and those caught exporting such goods will face heavy penal sanction.

Since, India has signed the 1970 UNESCO Convention, it has successfully restituted several antiquities and artefacts such as: the statue of Sri Devi from the Chola dynasty belonging to Tamil Nadu from the US; a statue of Uma Parameshwari from Singapore; a Mahishasuramardini idol belonging to Kamu Kashmir from Germany; a bronze statue of Saint Mannikkavachaka; metal images of Ganesha, Bahubali and Parvati, a terracotta female figure from the Mauryan period; and a floral tile of Kashmir and Yogini Vrishanana from Paris, to name but few. Furthermore, the Court of Appeal in the case of *Bumper Development Corporation Ltd v Commissioner of Police of the Metropolis*, [1991] 4 All Er 638, has upheld the decision of the House of Lords, to repatriate the 12th-century bronze Nataraja to the Union of India. This judgment has set a precedent for repatriation of illegally exported cultural property. Recently the Indian High Commission in London has made a request to the Ashmolean Museum, Oxford for restitution of a 15th-century bronze idol of Saint Tirumankai Alvar made in Tamil Nadu.

In most cases, the Government of India has mediated under the auspices of the UNESCO Convention, UNESCO, and the diplomatic missions of India and the country where the property is found. The provenance of the work of art considered stolen or illegally exported is looked at along with the manner it was illegally exported and the money trail to buy the work is also examined.

**3. Under which conditions does your country assist foreign countries seeking repatriation of cultural property/artwork?**

India cooperates with foreign countries seeking repatriation of cultural property/artwork as it is a signatory to the 1970 UNESCO Convention. This Convention provides for the contracting state to take measures to prevent the illicit import of cultural property stolen from their territory.

Apart from the above Conventions, India has also signed various bilateral, multilateral and unilateral agreements with several countries that exempt documentation and rates of import tax and duties when the cultural property is brought into the country for cultural exchange and public exhibitions. These agreements also impose a mutual obligation on the repatriation of cultural property/artwork.

**4. Does a buyer enjoy protection against restitution claims for violation of foreign export restrictions?**

No, the buyer does not enjoy protection against the restitution claims for violation of the foreign export restriction.

**5. Which regulations exist for the protection of the purchaser against title claims?**

On first principles, all purchasers are required and assumed under the law to have exercised reasonable due diligence while making a purchase. The legislation governing the duties and obligations of 'buyers' and 'sellers' is the Sales of Goods Act, 1930, which specifically holds that the buyer acquires no better title to the goods than the seller had unless the buyer acts in good faith and has not at the time of the contract of sale noticed that the seller has no authority to sell. It is important also to mention that the Sales of Goods Act contemplates a 'buyer beware principle' which shifts significant accountability of the authenticity of the purchased item on the buyer; wherein the absence of any inquiry from the buyer, the seller is not bound to disclose every defect in goods (perhaps including title) of which he might be aware. This principle corresponds with the English Law doctrine of *caveat emptor*.

**6. Does a lender from abroad enjoy protection against seizure of items on loan to local exhibitors if the good fails to have a proper export licence?**

No, a foreign lender does not enjoy immunity or protection against seizure of items on loan to local exhibitors if the goods fail to have a proper export licence.

**7. What regulations exist concerning the import of cultural property that may have been exported illegally from its country of origin or that is the subject of claims?**

In accordance with section 11 of the Custom Act, central government has the power to ban either absolutely or subject to certain conditions, import and export of goods for the purpose of protection of national treasures of art and works of historic or archaeological value. Section 11 B of the Customs Act also grants powers to central government for the detection of illegally-imported goods and the prevention of their disposal.

India has signed various memoranda of understanding and bilateral agreements for the protection of cultural property with several countries which protect cultural property which may have been illegally exported from its country of origin and brought to India.

India has also ratified the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of the Ownership of Cultural Property.



The Convention provides that the contracting parties would take steps to prevent the illicit import of stolen cultural property into their territories.

## **D. Due diligence obligations**

### **1. What general due diligence is required from the seller/buyer of artwork if the artwork is intended to be exported?**

The most important seller's obligation prior to selling the artwork is that they must ensure that the item is sold under a valid licence in accordance with the Antiquities Act. Section 3 of the Antiquities Act bans the export of antique products by anyone other than the state or its agencies. A contravention of this provision is punishable by a fine and at least six months' imprisonment, which could be extended by a further three years.

A seller must also ensure the artwork being sold matches the description provided to the buyer. They must ensure that the artwork is in the condition disclosed as described by the seller in terms of quality and fitness. The seller must also ensure that the artwork is not damaged beyond repair prior to making the sale.

Interestingly, the *caveat emptor* 'let the buyer beware' doctrine, is supplemented with *caveat venditor*, that is, 'let the seller always be cautious', therefore making the seller accountable for the goods sold. This balances the duty, interests and obligations of the seller and buyer in the sale and purchase of artwork.

From a buyer's perspective, it is imperative to trace the provenance of the article being sold. The buyer must confirm the provenance by checking the historical documentation relating to its chain of custody. The seller's history and reputation should also be verified to ensure they have the licence to sell antiques and are not selling stolen items.

As discussed in C.5 above, a buyer acquires no better title to the goods than the seller (Section 27, Sale of Goods Act, 1930), therefore necessitating a careful physical examination and verification of title in the artwork by the buyer to ensure that it corresponds with the seller's description. Section 15 of the Sale of Goods Act, 1930 entitles a buyer to receive a description of the goods supplied by the seller, where the contract is for sale by description.

### **2. Are there any anti-money laundering regulations applicable to (individual) sellers, dealers, auction houses, or agents?**

No, there are no specific anti-money laundering regulations applicable to the above entities. The Prevention of Money Laundering Act, 2002 (PMLA, 2002), which is the principal legislation dealing with the framework of anti-money laundering in India, has the concept of reporting entities (RE's) (Section 12, PMLA, 2002). The Prevention of Money Laundering Act, 2002 empowers the Government of India to notify any business or profession and these individuals or entities notified as reporting entities are required to maintain certain records (Section 2(1)(a)(iii) of PMLA, 2002). Although individuals who are dealing with art objects have not been categorised as reporting entities under PMLA, 2002 currently, the possibility cannot be precluded in future.