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Rethinking Doctrine of 'Fruits of Poisonous Tree' into Indian Jurisprudence

HIRDAY VIRDI[1] AND ISHANI MUKHERJEE[2]

ABSTRACT

While there is a virtue in the blindness of justice, this should certainly not extend to the admission of evidence collected by mechanisms used in gross violations of the law and human rights. In the zeal to bring the culprits to book, the State's functionaries may sometimes indulge in unlawful methods for obtaining evidence. The doctrine of 'Fruits of the Poisonous Tree' characterizes this evidence as inadmissible, which owes its discovery to evidence initially obtained in violation of a constitutional, statutory, or court-made rule. The expression of 'Fruits of the Poisonous Tree' extends the 'Exclusionary Rule' and postulates that illegally obtained evidence would be inadmissible in the Court of law. The metaphor suggests that if the source of evidence (tree) is tainted, anything derived from it (fruits) bears the same flaw. The paper explores the nuances of admitting the 'tainted fruit' and the position of Indian jurisprudence. It also deals with the need to offer protection against unlawfully obtained evidence against the accused under India's Judicial system and the need to introduce reforms in view of the recognised right to privacy as a fundamental right.

I. INTRODUCTION

Citizens have a right to be secure within the privacy of their homes from unreasonable search and seizure. If evidence is admitted in violation of that right, then, in effect, it would be to "grant the right but in reality, to withhold its privilege and enjoyment".[3] Coerced confessions, wiretapped conversations, sting operations, statements extracted during a period of unnecessary delay in bringing a suspect before a magistrate[4], illegal search, violating the body of a person are some methods for illegally obtaining evidence and evidence obtained by virtue of such illicit conduct becomes the "poisonous tree". When this evidence further leads to discovering new secondary evidence, it becomes the "fruit of the poisonous tree". The evidence obtained using such methods may be reliable, but it raises a question on its

[1] Author is a Student at Law Centre-II, Faculty of Law, University of Delhi, India.
[2] Author is a Student at Amity Law School, Noida, india.
[3] *Mapp v. Ohio*, 367 U.S. 643, 656 (1961)
[4] *Mallory v. United States*, 354 U.S. 449, 455 (1957).

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admissibility because it is tainted with illegality.

The answer to this question cannot be found in the Indian Evidence Act, except in Section 27 of the Act, which provides that a discovery made in consequence of the information received from the accused of any offense, in police custody, so much information as relates distinctly to the facts thereby discovered may be admissible. Therefore, section 27 will apply even if the information is obtained by the police using illicit means.[5]

This paper attempts to discuss the difficulties that arise in the development and application of standards designed to determine whether derivative evidence owing its discovery to some form of improper government activity, that is, whether the evidence in question is the fruit of the poisonous tree.

II. THE POISONOUS TREE PRINCIPLE

Several jurisdictions across the globe have introduced laws that exclude evidence obtained through illegitimate means, primarily obtained in violation of constitutional or fundamental rights. The first such rule was developed a century ago by the Supreme Court of the United States.[6] The doctrine, based on the protection given by the Fourth Amendment of the Constitution of the United States of America, was first applied in the case of *Nardone v. United States*[7]. It regulates the admissibility or rejection of the evidence produced in a court of law through its reliability and source. Forceful extraction of evidence through coercion, torture, inducement is made unreliable and hence, inadmissible. This encourages courts to discourage the use of improper practices to procure evidence during the investigation. The Court has further extended the rule to apply not only to the unlawfully acquired evidence but also to other evidence extracted from it as an indirect result of impropriety.[8] Therefore, both primary evidence and derivative evidence comes within this rule's scope, thereby providing an appropriate degree of protection for due process rights.

One of the oldest cases concerning the admissibility of unlawfully acquired evidence is *R v. Leatham*[9]. This was the case with allegations of corrupt practices, heard before a commission appointed under the Corrupt Practices Prevention Act, 1854. The agent produced a letter from the person suspected of bribery to his agent. This letter was requested and produced by the Secretary of the Commission on the information subsequently filed. An objection was

[5] Jain, S.N. "Admissibility of Illegally Obtained Evidence." *JOURNAL OF THE INDIAN LAW INSTITUTE*, vol. 22, no. 3, 1980, pp. 322–327. *JSTOR*, www.jstor.org/stable/43950696. Accessed 7 Jan. 2021.
[6] *Weeks v. United States*, 232 U.S. 383 (1914)
[7] 308 U.S. 338, (1939)
[8] *Silverthorne Lumber Co. v. United States*, 251 U.S. 285 (1920)
[9] (1861) 8 Cox CC 498

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presented as to the letter's admissibility because it was found as a result of an inadmissible statement made by the accused. In this background, Crompton J. said, *"It matters not how you get it; if you steal it even, it would be admissible,"* and the letter was admitted in evidence.[10]

This doctrine is entirely different from the exclusionary principle used in India. Consider a scenario in which police officers learn about the existence of drugs at a certain location from a witness they knew about because of a statement made during an illegal arrest. Although the argument itself will be removed from the prosecution's case, the fruits are borne from the statement, that is, the substances would still be inadmissible. This was the exact matrix of Wong Sun v. United States' case[11], and the Supreme Court dismissed all the evidence germinating from the unlawful arrest.[12]

However, like most of the rules in criminal law, this rule also has some exceptions that aim to balance fact-finding norms and the protection of the due process of rights of the accused. Which are as follows[13]:

1. Usage of unlawfully acquired evidence not for the reason of proving guilt but to question the integrity of the accused if he/she wishes to depose the accused.

2. Inevitable discovery: Under this exception, anything that the police will eventually have discovered, even without an unlawful search/seizure/method, is deemed admissible.

3. Good faith: An officer acting under the belief that he or she is permitted by law, for example, conducts a search assuming that the warrant is authorised but later revoked, is believed that he or she has acted in good faith and that any discovery is legally admissible.[14]

4. Independent Source: Evidence obtained by illegal means by an independent source or by a third party, which, at least in part, is not obtained from a tainted source.[15]

5. Attenuation: If the connection between an illegal search and legally admissible evidence is negligible, the evidence is admissible, even if the illegal search could have set in motion a series of events leading to the discovery of evidence.

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[10] Bharat Chugh & Taahaa Khan "Rethinking the 'Fruits of the poisonous tree' doctrine: Should the 'ends' justify the 'means'?" (The SCC Online Blog, 15 June 2020, https://www.scconline.com/blog/post/2020/06/15/rethinking-the-fruits-of-the-poisonous-tree-doctrine-should-the-ends-justify-the-means/> 1 January 2021

[11] 371 U.S. 471 (1963)

[12] Priyanka Preet, "Rethinking 'Fruit of the Poisonous Tree' Doctrine into the Indian Evidence Act" (The Criminal Law Blog, National Law University Jodhpur, 21 October 2019) <https://criminallawstudiesnluj.wordpress.com/2019/10/21/rethinking-fruit-of-the-poisonous-tree-doctrine-into-the-indian-evidence-act/

[13] *Id.* at [5]

[14] *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984)

[15] *People v. Arnau*, 58 N.Y.2d 27, 457 N.Y.S.2d 763, 444 N.E.2d 13 (N.Y. 1982)

III. THE EXCLUSIONARY PRINCIPLE IN INDIA

The doctrine has no strict applicability or parallel in India. Relevancy of the evidence is the only criteria regarding the admissibility of evidence in the Court of law. The source (or tree) from which the evidence (fruit) came holds no importance. Section 3(e) of the Indian Evidence Act, 1872 defines 'relevant' in context of facts and Chapter II of the Act further deals with relevancy of facts. So accordingly, there is no provision under the law that would bar the admissibility of unlawfully or illegally obtained evidence in India. Besides, Section 167 of the Evidence Act prohibits the reversal of any decision or a new trial in any case where the sole reason is an improper dismissal or acceptance of evidence if it appears to the Court that there is sufficient evidence to justify the decision or that it would not have changed the decision if the rejected evidence had been received.[16]

The Courts in India have complete discretionary power to admit evidence even if the source is unlawful or illegal like wiretapping, wrongful arrest, sting operations, etc. To establish the guilt of an accused even stolen evidence can be considered.

In *Radha Kishan v. State of U.P*[17], the Supreme Court held that as far as the illegality of the search is concerned, it is safe to assume that even if the search was illegal, the seizure of the Article is not vitiated by it. It was held that a search in contravention to Section 103 and 165 of CrPC could be resisted by the person whose premises is to be searched. Due to the illegality of the search, the Court may incline to examine the evidence regarding the seizure carefully. No further consequences could ensue beyond these two consequences. In the case of *Magraj Patodia v. R.K Birla and Ors.*[18], the Apex Court opined that the procurement of a document by unlawful or improper means would not bar its admissibility provided that its genuineness and relevancy can be proved. While examining the proof, the Court may take into consideration the genuineness of the circumstances under which it came to be produced in the Court.

The issue of illegal or improper method or mode of obtaining evidence doesn't have a direct effect on its relevance or content. Such evidence is bound to be looked into intricately with necessary inquiry to find out the reasons for adopting any such mode of obtaining evidence, without following the due process of law. This is a separate issue and it would not frustrate the ongoing trial proceedings.

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[16] Chitrangada Singh, "Dearth of discretion to refuse evidence obtained illegally in Indian Courts", http://www.legalserviceindia.com/legal/article-2545-dearth-of-discretion-to-refuse-evidence-obtained-illegally-in-indian-courts.html#:~:text=The%20doctrine%20of%20Exclusionary%20Rule, 1 January 2021

[17] 1963 AIR 822

[18] 1971 AIR 1295

The Supreme Court decisively while considering the admissibility of unlawfully obtained evidence in *R.M Malkani v. State of Maharashtra*[19] held that a tape-recorded conversation whose genuineness and relevancy has been proved, can be admitted even if it is procured by an unlawful or illegal search. There is no reason to exclude such evidence if the same is not tainted by coercion or unfairness. A Constitutional Bench clarified in *Pooran Mal v. Director of Inspection*[20] that Evidence Act or any other similar law in force in India does not exclude relevant evidence solely based on it being obtained in an unlawful or illegal search. Therefore, it would be wrong to exclude such evidence by invoking the spirit of the Constitution as there is no such construction of fundamental rights that can be construed to exclude evidence procured by unlawful activity.[21]

Manoharlal Sharma v. Narendra Damodardas Modi & Ors.[22] was another important case involving national and public interest. A group of writ petitions was filed in the Apex Court on the issue relating to the procurement of files relating to 36 Rafale Fighter Jets for the Indian Airforce. The Ministry informed the Court during the said proceedings that the Rafale Documents had been stolen from the Ministry of Defence and challenged its admissibility in the Court for being a violation under the Official Secrets Act, 1923. The Government didn't challenge the credentials of the document but only questioned the method adopted to obtain the documents by the reporter. The petitioners sought a review of the Hon'ble Supreme Court's verdict for the dismissal of all pleas against the jet's purchase relying upon the stolen documents. The Supreme Court took the contents given to it in the sealed cover at face value and based its decision on review and perusal of such documents. The bench, on perusing and hearing the Rafale review petitions, stated that it could not ignore the information that had been brought before it since the same would be relevant to the wider public interest. It can thus be inferred that a piece of particular evidence cannot be overlooked once it is produced in front of the Court. If the relevance and existence of such evidence are found probative to the facts of the case, the same can be admitted as evidence. The onus to deny the authenticity or veracity of such evidence then shifts on the accused.

Relevancy has been placed on a higher pedestal than the source in these judgements, and judges have been reluctant to go beyond the purview of the Evidence Act, which is deemed to be exhaustive.[23] It is interesting to note that the Indian Judiciary has often-cited English case

[19] 1973 (1) SCC 471
[20] 1974 SCR (2) 704
[21] *Ibid.*
[22] WP(Cri.) 225/2018; RP(Cri) 46/2019
[23] *Lekhraj v. Mahipal*, (1878) I.L.R. 5 Cal. 744, 754 (P.C.)

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laws in particular cases that are no longer used or are applicable in England.[24] Due to the fear of letting the guilty person escape the clutches of law on account of such technicalities, Indian courts might have set a dangerous precedent. There is no longer an incentive for police officers to comply with legal norms. Courts have turned a totally blind eye towards this serious procedural transgression in the collection of evidence by the police.

However, there are certain cases where the Courts have disallowed unlawfully obtained evidence if, in such cases, the strict rule of admissibility of evidence would act unfairly against the accused.[25] The precise contours of what would operate "unfairly" against the accused have not been laid down in any judgement by Indian courts and would depend on the facts of each case. This seems to have been motivated by the "Unfair Operation Principle" practised in the United Kingdom, which prohibits the admission of any evidence which runs contrary to the principle of basic fairness in a given case.[26]

The Supreme Court in *Selvi v. the State of Karnataka*[27], while testing the legality of polygraphs, narco-analysis, and other scientific tests, held that to prevent the use of violative methods instead of following the due process of law by investigators, right against self-incrimination granted by the Indian Constitution acted as a safeguard against torture and similar methods to extract information. The frequent reliance on the 'short cut' method for conducting a material investigation, in the Court's opinion, will eventually compromise the diligence required. The Court seemed to suggest, or at least foreshadow, the exclusion of unconstitutionally obtained evidence.[28]

IV. REASONS FOR EXCLUSION OF ILLEGALLY OBTAINED EVIDENCE

There are at least four agreed standards on the basis of which illegally collected evidence cannot be preferred by the courts. Which are as follows[29]:

The first is that the principle of reliability is based on the assumption that the assessment of the truth of the criminal charges is the primary objective of the criminal trial and that evidence should be accepted or excluded solely on the grounds of reliability. It is argued that information obtained through improper means, including torture, abuse, or a promise, cannot be considered reliable.

The second disciplinary principle requires that illegally collected information should usually

[24] Rahman, "Fruit of the Poisoned Tree: Should Illegally Obtained Evidence Be Admissible?" 1.
[25] *Umesh Kumar vs State of Andhra Pradesh* (2013) 10 SCC 591
[26] *Id.* at [5]
[27] (2010) 7 SCC 263
[28] *Ibid.*
[29] PL April S-38

be omitted, even though there is no question that it is credible, as the Court should use its position to prevent unethical criminal investigation practises. It is argued that if judges consistently remove inappropriately obtained evidence, the prosecution would avoid resorting to inappropriate tactics as they would cease to be useful.

Thirdly, the protection principle, which is based on the premise that the evidence obtained by infringement of the right of individuals provides prima facie justification for the exclusion of such evidence, as it is one of the methods by which infringement of the right can be remedied or vindicated. This idea is also endorsed by the decision of *Dragan Nikolic*[30] in the International Criminal Tribunal for Yugoslavia.

The fourth principle is the principle of judicial integrity, which is based on the assumption that, unless the courts refuse to admit illegally obtained evidence, they support the improper actions from which such improper evidence has been obtained. Consequently, in order to preserve their dignity and reverence for the administration of justice, the courts must be reluctant to accept such evidence. The thrust of the theory of judicial integrity is not on morality but on public trust in the integrity of the system. This is because the reputation of the courts is at risk not only for the convicted party to avoid the prosecution but also for the way in which the conviction is obtained.

Reference to the principles mentioned above is significant in that they not only offer a straightforward justification for the exclusion of illegally obtained evidence but also appear to serve as guiding principles with respect to which the power to exclude evidence may be exercised by the courts on a case-by-case basis. Consequently, it might be important for legislative reform to be accompanied by an effective policy statement.

The question as to how far there should be discretion in a criminal case with the Court to exclude evidence obtained unlawfully or improperly was taken into consideration in the Commission's 94th Law Report of its own accord. The Commission concluded by recommending that there was a dire need for conferring upon the courts a discretion to exclude improperly and illegally obtained evidence if such admission would bring justice administration into disrepute. In the Commission's opinion, the current situation in India where the "relevance" of the evidence of facts in issue is of principal consideration in a particular proceeding cannot be said to be satisfactory. The present Indian law has no specific provision to deal with situations where the impropriety and illegality are so outrageous and shocking that Judiciary would wish for the power to exclude such evidence, and that puts the

[30] IT-94-2

Court within very narrow confines. The legalistic approach reflected in the present Indian position is a major drawback. The need for reform in law is, therefore, manifest. At the same time, the Commission recognised that a provision for the mandatory removal of a piece of illegally obtained evidence would not be advisable, as it would fail to take note of the infinite variety of situations that may arise in life. The Commission preferred the conferment of discretion on the Court rather than a mandatory statutory provision. It finally recommended the addition of Section 166A into the Indian Evidence Act 1872. The said provision was drafted by keeping human dignity and social values forefront. The recommended Section 166A gives power to the Court, in a criminal proceeding, to refuse to admit evidence obtained by improper or illegal means, after considering the nature of such impropriety and illegality and the circumstances under which such evidence tendered was obtained. The Court may refuse to admit such evidence if it is of the opinion that its admission will bring the justice administration into disrepute.[31]

The law commission also suggested that to determining whether the evidence should be excluded or not, the Court shall consider all circumstances surrounding the proceedings and the manner in which the evidence was obtained, including but not limited to the following[32]:

a) the extent to which human dignity and social values were violated in obtaining the evidence;

b) the seriousness of the case;

c) the importance of the evidence;

d) the question of whether any harm to the accused or others was wilfully caused or not, and

e) the question as to whether the circumstances justify the action, such as a situation of urgency requiring action to avoid the destruction or loss of evidence.

This composite concept has to be applied with reference to the context of each case. That context has been spelled out under section 166A(2)(b) to (d), which intends to cover the seriousness of the case, magnitude of wilful harm, and importance of evidence, if any.

V. RIGHT TO PRIVACY VIS-À-VIS ILLEGALLY OBTAINED EVIDENCE

In *K.S. Puttaswamy v. Union of India*[33], one of the most celebrated and seminal judgment which has recognised the right of privacy as a fundamental right, entitled to protection as a

[31] Law Commission of India, "94th Report on Evidence obtained illegally or improperly proposed Section 166A, Indian Evidence Act, 1872" (October, 1983)
[32] *Ibid*.
[33] (2017) 10 SCC 1

part of the right of life and personal liberty under Art.21. Court also overruled certain judgments like *Kharak Singh*[34] and *R.M Malkani*[35] , which held contrary views. Unlike the US Constitution, no protection for privacy was available before this decision against unreasonable search and seizure. Therefore, the challenge to admit any unlawfully obtained evidence was put down. The non-compliance of the CrPC procedures did not hold back the courts from admitting such evidence if it was duly scrutinised and dealt with caution, and the enquiry was conducted against officials in breach of the same. But now, with there being a decision of the Supreme Court holding the right to privacy as an inherent part of Article 21, it directly questions the admissibility of unlawfully obtained evidence and calls for a reconsideration of the laws dealing with evidence and trial procedures.

Taking this move of accepting the right to privacy as an intrinsic fundamental right further, the High Court of Bombay in Vinit Kumar v. CBI set aside the interception orders and ordered the destruction of copies of the intercepted messages. The question here was whether the orders for the interception of telephone calls were ultra vires of Section 5(2) of the Indian Telegraph Act, 1885 and the Rules of the procedure and whether they breached the fundamental rights of the petitioner.

The petitioner relied heavily on the decision of the Supreme Court of the *People's Union for Civil Liberties v. Union of India*[36], which, far ahead of its time, acknowledged that making a telephone call in one's home or workplace without interference was part of the right to privacy. The Court acknowledged that following the dictum 'the ends justify the means' would lead to deciding that the authorities of the Government may disregard certain orders of the Supreme Court or necessary constitutional requirements in order to secure evidence against people. This judgement seems to put unconstitutionally obtained information on a higher pedestal than evidence that is obtained only unlawfully or illegally. In the *State of M.P. through CBI and Ors v. Paltan Mallah and Ors*[37], it was held that the evidence collected in the form of an unlawful search could still be accepted as evidence, given that there is no clear statutory infringement or violation of the provisions of the Constitution.

In the light of these judgements, Courts now have the discretion to exclude evidence under Section 5 of the Evidence Act by weighing it against Article 21 (Right to Privacy) and Article 20(3) (Right against self-incrimination) of the Constitution. This would create a position similar to that in America of effectively excluding unlawfully procured evidence based on the

[34] *Kharak Singh v. State of U.P.* (1964) 1 SCR 332
[35] *R. M. Malkani v. State of Maharashtra* (1973) 1 SCC 471
[36] AIR 1997 SC 568
[37] (2005) 3 SCC 169

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principle of judicial integrity, discipline, protectiveness, and reliability.[38]

VI. CONCLUSION

In India, there is a pressing need to adopt the doctrine of fruits of the poisonous tree. The basic premise is that other available protections are not adequate to dissuade officials from using illicit means to collect evidence. In India, either because of the lack of vigilance on the part of the individual or because of the psychological feeling that the officials or the department with whom the case is pending, or because of the lack of cooperation on the part of other institutional agencies, these conventional protections do not seem to be of any use and therefore it seems appropriate to follow the American exclusionary rule. This would be a constraint on the department committing illegalities during the search and seizure and, at the same time, the Court could decide on the admissibility of the evidence obtained by illegal means in individual cases on the facts and circumstances of each case. The present law must undergo reform in the light of the *Puttaswamy*[39] judgement. Even English courts are starting to strike a balance between the interests of the accused and the adverse consequences of infringements of constitutional rights such as privacy and liberty. The Courts now have full autonomy to remove proof under Section 5 by measuring it against Article 21 of the Constitution. In addition, a law must be in place to ensure the public that their civil liberties must be respected at all times. On a parting note, a legislative amendment would prove to be more successful, as common-law Judges are known to exercise their authority much more often if it originates from a statutory source.

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[38] Divya Aswani, "Doctrine of Fruits of Poisonous Tree", 26 April 2020 <https://www.legalbites.in/doctrine-of-fruits-of-poisonous-tree/> 4 January 2021
[39] (2017) 10 SCC 1

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