

**ARCHAEOLOGY, LAW AND RESEARCH: THE PROCESS AND
PRODUCT OF INTEGRATING THE
INTERDISCIPLINARITIES**

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Abstract

Being embedded in the past and continuing in the present, both archaeology and law have common background of tradition. Their interdisciplinary approaches in research have benefited both the disciplines. Not only the similarities about thinking process and the ways of multi-method research but also their engagements in values, culture and tradition have brought them together with synergy. Four principal areas of their interaction include those that occur in the realms of society and culture, in identification of the idea and image of justice, in resolving disputes on places of worship and in making archaeological research viable through legal protection of cultural property. The products of such interdisciplinary process are valuable. They throw light on features and reasons behind composite culture; nuances of gender injustice; and imperatives of concordance in multicultural society. They artistically depict philosophical basis of justice, and enable objective determination of facts on the basis of which legal disputes on titles could be decided. They emphasise the need for bringing human rights discourse and respect for culture in the matter of protection of cultural property. In expanding the knowledge of law and archaeology these factors should act as great incentives.

I Introduction

RESEARCH INTEGRATES multiple disciplines in the course of its journey. It is interesting to watch the basis, process and impact of such integration of highly interdisciplinary subjects like archaeology and law. Archaeology deals with cultural heritage of a country in the form of ancient monuments, archaeological sites and remains, antiquities and art treasures, which provide great scope for research. India's past stretches over 5000 years, and provides rich material in knowing the civilization evolved and flourished in the past. Scientific excavations, finding the artefacts, inscriptions, coins

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and art works of the past unravel huge information about their makers, skill of the artisans and aesthetic quality of the work; faith, belief and practice of the ancients; traits of culture; levels of technological development; and the political, economic and social conditions of the time. Systematic and scientific conducting of the process of data collection by multi-method research and drawing pertinent and valuable inferences by verification of conjectures or hypothesis form the essence of archaeological research. It combines past and the present, science and art, history and sociology, and culture and anthropology in its course of action. From the Paleolithic age to the modern times, from Harappa-Mohenjadaro to Victoria Museum, the archaeological findings have expanded the horizons of historical knowledge and reconstructed the picture of composite culture. In so far as law is concerned, it is a norm born out of social reason, product of culture, expression of sovereign wish, ensurer of order, moulder of individual and community behavior and regulator of economic relations.¹ Legal research, today, combines various methods of research and uses varieties of approaches and tools whether its own or borrowed from sister social science disciplines.²

About the relationship between anthropology and law in the context of research, following aspects need to be considered. *Firstly*, as a part of culture, law's values, origin, social significance and changing pattern can be better understood by knowing the archaeological and historical reconstruction of the past. Hence, legal research cannot afford to be oblivious to the knowledge generated through inter-disciplinary study of law and archeology. Aspects of composite culture, position of women, extent of social participation in production of cultural property and the predominance of the idea that concordance alone is appropriate in a multireligious system can be better understood through anthropological studies. Anthropology sheds light on history and tradition from which law picks up its roots and strength. *Secondly*, anthropological study enlightens about the idea, image, task and seats of justice by focusing on symbols and architecture of courts. Archaeological Research (AR) can throw light on the justice delivery system, the symbol of justice as expressed in the form of idol of goddess of justice, scale of justice, the scene of court hall, fables of justice administration and the approaches of society towards judges and adjudicating task. These provide rich materials to know about the law making, rule applying, justice delivery system and people's belief and approach towards them in the past. *Thirdly*, in resolving some of the legal disputes, the most famous example could be that of Ayodhya Ramajanma bhoomi, archaeological research renders great help. *Fourthly*, law has provided for safety, conservation and upkeep of the ancient monuments, archaeological sites, antiquities and art treasures to satisfy the inter-generation equity in the matter of cultural heritage. This has helped the cause of archaeological research and safeguarded the posterity's

1 P. Ishwara Bhat, *Law and Social Transformation in India* 1-5 (Eastern Book Co, Lucknow, 2009).

2 P. Ishwara Bhat, *Idea and Methods of Legal Research* 30-31 (Oxford University Press, New Delhi, 2019).

access to cultural resources. This adds to the competence of archaeological research in exploring further and consolidating comprehensive understanding of humanity. While the first three deal with archaeology's contribution to science of law, the last one speaks about law's contribution to archeology.

This paper intends to survey and evaluate the mutual relation between archaeology and law in the context of research. Its focus is on both the process and product of such combination. It argues that as both are highly interdisciplinary subjects, their integration for the purpose of research has great potentialities of mutual reinforcement.

II Nature of archaeology

Etymologically, archaeology means science of the ancient.³ Originally, it was regarded as a method of reconstructing the past from the surviving traces of former societies.⁴ For example, excavations in Harappa and Mohenjadar, Lothal, Kalibangan, Brahmagiri, Arikamedu, Kapilavastu, Nagarjunakonda, Talakadu and so on have explored new knowledge about the past and reconstructed the Indian history.⁵ Archaeological Survey of India, established by Alexander Cunningham in 1861, made enormous contributions by its country-wide survey of monuments, archaeological sites and collection of artefacts, from the earliest times to the present to build up history with a convincing and full-fledged cultural time table.⁶ Margarita Dias-Andreu described archeology as “a historical and cultural product, a socially created set of practices and body of work that cannot be isolated from the contemporary socio-cultural and historical framework in which it is and was formed.”⁷ It is a multivariate concept influenced by nationalism, colonialism, and anti-hegemonic analysis of post-colonial studies.⁸ Michel Foucault said that archeology is about examining the discursive traces and orders left by the past in order to write a history of the present; it is about looking at history as a way of understanding the processes that have led to what we are today.⁹ He considered it as a

3 The Greek word 'Archaioi' connotes ancient and 'logy' connotes science.

4 See K V Raman, *Principles and Methods of Archaeology* 1 (Parthajan Publications, Madras, 1986, 1991) ; See also, William S Dancey, *Archaeological Field methods: An Introduction* 1 (Surjeet Publications, Delhi, 1985).

5 Great names of the Indian archaeologists include Alexander Cunningham, Lord Curzon, James Burgess, John Marshall, Mortimer Wheeler, M S Vats, H D Sankalia, M S Nagaraja Rao, K V Ramesh, S Shettar and others. See Upinder Singh, *The Discovery of Ancient India: Early Archaeologists and the Beginning of Archaeology* (Permanent Black, New Delhi, 2004) in general.

6 Dilip K Chakrabarti, *India: An Archaeological History* 8-11 (Oxford University Press, New Delhi, 1999); see also, F Raymond Allchin and Dilip K Chakrabarti (eds) *A Source-book of Indian Archaeology* 36-40 (Munshiram Manoharlal Publishers, New Delhi, 1979).

7 Margarita Diaz-Andreu, *A World History of Nineteenth Century Archeology: Nationalism, Colonialism and the Past* 5 (Oxford University Press, Oxford, 2007).

8 *Ibid.*

9 Michel Foucault, *Archeology of Knowledge and the Discourse on Language* tr. A M Sheridan Smith 4, 135 (Pantheon Books, 1972).

method that employs discourses in the conditions of their emergence and transformation.¹⁰ It has both philosophical and pragmatic dimensions.

Its focus is on various aspects of the past life ranging from geographical setting, architecture (civil, defence and religion), customary practices, trade, transport and exchange, art and religion, domestic equipments to flora and fauna.¹¹ For reconstruction of the past, archaeologists made use of natural sciences such as physics, chemistry, mathematics, biology, geology, anthropology and astronomy.¹² Although its close association was with history,¹³ it began to focus on economics, ethnology, environment, culture, anthropology, religion and variability of human behavior.¹⁴ This has expanded its scope and content. Insofar as its data collection method is concerned, again, big changes have taken place. From reliance on spades, pick-axes and traditional equipments to the use of modern technology like remote sensing, GPR (Ground Penetrating Radioactive) survey, aerial survey, under-water study, chemical date finding, magnetic survey, drills, geo-chemical method, electricity resistivity survey, *etc.*, a great stride has taken place in expanding the competence and scope of archaeologist's work.¹⁵ About the nature of archaeology as a discipline of knowledge, the Supreme Court in *M Siddiq* or the Rama Janmabhoomi case 2019 has observed:¹⁶

Archaeology as a science draws on multi-disciplinary or trans-disciplinary approaches. In considering the nature of archaeological evidence, it is important to remember that archaeology as a branch of knowledge draws sustenance from the science of learning, the wisdom of experience and the vision which underlies the process of interpretation. As a discipline, it nurtures a trained mind. It relies on cross-fertilization with other

10 *Ibid.* Also see Giorgio Agamben, *The Signature of All Things: On Method* 93-99 (Zone Book, New York, 2009).

11 C Magabandhu, *Archaeology of the Satavahana Kshatrapa Times* (Sundeep Prakashan, Delhi 1985); Michael Willis, *The Archaeology of Hindu Ritual: Temples and the Establishments of the Gods* (Cambridge University Press, 2009)

12 *Supra* note 4, K V Raman, 4-8.

13 *Supra* note 2 at 198-229.

14 *Id.* at 9-13.

15 *Supra* note 4, K V Raman, 71-78; William S Dancey, 128-134; R V Joshi and B C Deotare, 'Phosphate content of Anthrosols (Archaeological Deposits) in Different Cultural Periods in India' 377-381; S R Rao, Mining and Metallurgy of Copper in Ancient India 383-398; B Lal, An Enquiry Arising from Chipping marks Noticed on Weights from Ayodhya 399-400; KTM Hegde, 'Scientific basis of Technology of three Ancient Indian Ceramic Industries' 400-410; Romila Thapar, "Archaeological Artifacts and Literary Data: An attempt at Co-relation" in B MPande and B D Chattopadhyaya (eds), *Archaeology and History: Essays in Memory of Shri A. Ghosh* 411-415 (Agam Kala Prakashan: Delhi, 1987)

16 *M Siddiq (D) through LRs v. Mahant Suresh Das*, AIR OnLine 2019 SC 1420; Civil appeal number 4768-4771/2011 Supreme Court judgment dated Nov. 9, 2019 para 485.

disciplines such as history, sociology and anthropology. This is not a weakness but strength. Archaeology combines both science and art. As a science, it is based on the principle of objective evaluation. As an art, it relies on a vision which is realised through years of commitment to the pursuit of knowledge based on the histories of eras.

Archaeology as a discipline cannot be belittled as unreliable.

Archaeology, like law, is an inferential knowledge. Interpretation of the data collected – monuments, layers, artefacts, coins, figures, inscriptions *etc* – enables the archaeologist to reconstruct history. SupriyaVarma views that since the data does not speak for itself, inferences are to be made on the basis of certain principles and methods that are followed in archeology.¹⁷

Conceptually, archaeology has undergone a big change with regard to its functions and aims. L R Binford identifies three ultimate goals of new archaeology: (i) the reconstruction of culture history; (ii) the reconstruction of past lifeways; and (iii) the study of cultural process.¹⁸ These goals go beyond narrating the events and ask for testing propositions; call for generating inductive inferences; and build the relationship between researcher's observations to the operation of past cultural system. The study of variation in human behavior, their adaptability and the way in which cushioning effect of culture shapes human adaptability demands comprehensive understanding of the process involved in normative structure's influence on human behavior.¹⁹ This is one of the the points where legal research and archaeological research work jointly. Third, the intra-group and inter-group relations, formation of tradition and its change process or change-management which are matters of great interests for new archaeology are equally significant matters for legal research. Thus, archaeology's engagement in culture study has compelled the legal researcher to turn at archaeology.

III Features of archaeological research and comparison with legal research

The purpose of archaeological research is exploration, analysis and description. In the beginning, archaeology confined to determining the time frame of the material, classification of artefacts and geographical location. Culture history being its focus now, it has vast jurisdiction and wide work field.²⁰ Unlike legal research, it has no aim of social reform, engagement in policy formulation or remediating action. Its only futuristic concern is about better conservation of archaeological resources for posterity.

17 *Id.*, para 483.

18 L R Binford, *New Perspectives in Archaeology* 5-10 (Chicago, 1968) cited in K M Srivastava, *New Horizons of Indian Archaeology* 19 (Books and Books, New Delhi, 1988).

19 H D Sankalia, *New Archaeology: Its Scope and Application to India* 22-32 (D N Majumdar Lectures 1974 Ethnographic and Folk Culture Society, Lucknow, 1977); K M Srivastava, 20-26; William S Dancy, 1-2

20 *Supra* note 18.

It combines natural science method with social science method, and has the advantage of their synergy. Because of its scientific task, it postpones offering of conjecture/hypothesis to a mature or advanced stage of research.²¹ There are varieties within archaeological research methods as the researchers make use of different techniques of data collection like surface survey, excavations, marine archaeology, and deal with varieties of artefacts like coins, idols, monuments, building materials, pottery, bones, daily use materials, implements, weapons, religious objects, fossils, art works *etc.* Epigraphy, numismatics, indology, stratigraphy and so on have emerged as components of archeology. Application of physics, chemistry, mathematics, biology, geology, paleontology, metallurgy, anthropology *etc.*, in the course of archaeological research has added to its competence and achievement. This is evident from the ways in which these sciences are used in application of dating methods, conducting excavations, studying the environmental archaeology and preserving the monuments and antiquities.²²

Thinking process in archaeological research starts in response to surprises and curiosities, proceeds with asking the research questions, framing the research problem, gathering data by preliminary studies, formulation of hypothesis, exhaustive collection and analysis of data and testing the hypothesis through inductive reasoning.²³ Its resort to deductive logic is sparse. There are many similarities between empirical legal research and archaeological research in the matter of use of inductive logic and stage of formulating the hypothesis. Archaeology's primary concern with the past and law's principal engagement with the present stand in contradistinction, although the continuous flow of time from the past to present and future is a factor that influences the streams of both the disciplines.

Regarding the relevance of objectivity and value neutrality, there is no difference between archaeological research and legal research. Avoidance of various types of biases is an indispensable requirement common to both.²⁴ The Supreme Court in *M. Siddiq* or the

21 See for discussion of scientific method, *Supra* note 2 at 44-49.

22 *Supra* note 4, K V Raman, 124-145, 93-122; William s Dancey, 127-171.

23 John Dewey, *How We Think* 14, 72-79 (DC Health and Co, Massachusetts 1933).

24 There is an interesting debate between James Fergusson and Babu Rajendralala Mitra (supported by Cunningham) about the issue whether the pre-Ashoka period had stone architecture of any type or whether it had only wooden structure but Greek architects after Alexander's invasion introduced stone architecture. Fergusson took the latter stand, rejecting Mitra's proposition that stone architecture was within the knowledge of Aryans. Fergusson writes about Mitra's view: "His patriotic soul was fired with uncontrolled indignation at the bare idea of his countrymen having a hint from foreigners, or borrowed single idea from such a people as the Greeks..." See James Fergusson, *Archaeology in India with special reference to the works of Babu Rajendralala Mitra* 9-11 (K B Publications, New Delhi, 1974 first Indian reprint).

Rama Janmabhumi case 2019 had observed in relation to the steps of care to be taken in dealing with subjective and objective elements in course of archeological research:²⁵

The archaeologist must deal with recoveries as much as the 'finds' from them. Interpretation is its heart, if not its soul. Interpretations do vary and experts disagree. When the law perceives an exercise of interpretation it must recognize margins of error and differences of opinion. Archaeological findings are susceptible of multiple interpretations. This may in part be a function of the archaeologist's perception of the past and what about the past the archaeologist seeks to decipher. Tradition based archaeology may seek facts about the past. An archaeologist, on the other hand may set about to validate a belief about the past. An archaeologist may approach the task with an open mind to unravel features that are unknown. Guided by the underlying approach to the discipline, the archaeologist will bring to bear on the task at hand the purpose underlying its own origin. So long as we understand the limits and boundaries of the discipline, we can eschew extreme positions and search for the often elusive median.

The concern for objectivity in research activity is implicit in this proposition.²⁶ About the method or combination of methods followed in archaeological research some important aspects can be highlighted.

i. Interdisciplinary character of archaeological research

AR requires data collection through various means such as survey and excavation. Survey calls for good geographical understanding of the site; study of physical features such as hills, river, valley, lakes and rocks; comprehension of ethnographic data; knowledge of historical literature; reading of previous works and local tradition; and skill to use various tools for exploration.²⁷ Scientific aids which help survey are magnetic survey, electricity resistivity survey, probe survey, drills, exploration by sound, geo-chemical method, aerial survey and photography and crop marks. Excavation is an elaborate and careful process of unearthing of archaeological findings and expects application of dating method, classification of artefacts, stratigraphical method and trench formation technique.²⁸ It starts with application of various tests and choice of excavating sites.²⁹ Dating of artefacts and strata requires application of geology,

25 *M. Siddiq* 2019 para 487.

26 About objectivity that shall be ensured in research see B Surendra Rao, 'The Spirit of Research' 1 (1) *CMR University Journal for Contemporary Legal Affairs* 56-63 at 62 (2019).

27 *Supra* note 4, K V Raman at 58-75.

28 *Supra* note 4, William Dancey, 127.

29 *Id.* at 128-15.

anthropology (physical and cultural), physics (radio carbon dating, thermoluminescence dating, archaeomagnetism), chemistry (fluorine, uranium and nitrogen dating, phosphate analysis) and palaeontology (fossil study).³⁰ Botany and zoology help in the study of flora and fauna of the past and human relation to the same whereas metallurgy enables understanding of the metal used and the process and place of getting it.³¹ Knowledge of literature, history and arts helps in culture study in archaeology. Use of statistics has given more scientific input for AR.³² Archaeology itself includes epigraphy, numismatics and excavation. Consequently, interdisciplinary study becomes inevitable for archaeology.

ii. Multi-method research

Combination of doctrinal method of literature review with empirical or field work becomes indispensable for AR. Romila Thapar in her research on pottery used in agnichayana for sacrificial fire in Ganges valley co-related the findings with literary data like satapathabrahmana and concluded that the said pottery was not painted grey ware or other sophisticated type of pottery but a crude type resembling the Neolithic style and was produced by the dvija caste.³³ In a study relating to the extent of human habitation in various historical sites, Joshi and Deotare collected and analysed 500 samples from various sites which had different quantum and duration of human habitation and subjected them to phosphate content test.³⁴ They cross checked the findings by resort to other archaeological evidences such as the house types, antiquities, and agricultural products collected during excavation. V S Wakankar, builds culture history of the tribal communities from the rock art by verifying them in the light of literary sources and other archeological evidences like pottery.³⁵

iii. Significance of research design

Choice of the topic, venue, methods of study and tools of data collection in AR needs to be properly planned. Research design systematizes the work. For example, a research work on archaeology of Satavahana during Kshatrpa times proceeds with a good research design by locating the geographical and archaeological setting, focusing on civil, defence and religious architecture, tracing trade, transport and exchange, relating art with religion, describing the domestic equipments and explaining the flora and

30 K V Raman, *supra* note 4 at 93-105.

31 C Margabandhu, 330-338.

32 H D Sankalia, *supra* note 19, 54-59.

33 Romila Thapar, *supra* note 15.

34 See R V Joshi and B C Deotare and S R Rao, *supra* note 15.

35 V S Wakankar, 'Rock Art of India' B M Pande and B D Chattopadhyaya (eds) 583-597 (1987).

fauna details.³⁶ But strict adherence to the research design may not be possible in field work.³⁷ Depending upon exigencies of excavation and field work, necessary modification may have to be done.

iv. Hypothesis and analysis

Raising research question and formulating hypothesis give a shape and direction to AR. K M Srivastava writes that after a study of certain data already available, archaeologist formulates hypothesis in his mind and initiates the work. Hypothesis is central to the research work, concerning which new perspectives should be explored, but never to be supported through playing with the evidence.³⁸ H D Sankalia elaborates about the need for proper hypothesis while conducting AR on variability of human behavior in changing cultural context. He gives the example of hypothesis about the use of sling balls and egg shaped baked pellets made out of clay during Indus Valley as weapon of offence or defence or for hunting.³⁹ Responding to Mackay's research questions, he puts forward a hypothesis that they were stored as ammunitions for warfare.

v. Scientificity in data collection and classification

Great amount of care needs to be taken in conducting excavation. Testing the subsurface of the site by various means and formation of vertical or horizontal trenching by appropriate methods are the preliminary steps involved in excavation.⁴⁰ Special care should be taken in excavation of stupas, burials, monuments and ancient towns.⁴¹ Excavation should be equipped with necessary tools and expert personnel. Cleaning and classifying the artefacts with appropriate recording and photography is essential.⁴² Location and recording of religious artefacts gathered from houses might support type of religious practice of the inmates. Absence of such recording makes the research inquiry futile.⁴³ Differences in the house hold objects of common people and the nobles can be noted only when they are properly classified. Mention of the strata from which artefacts are gathered can enable suitable inferences. Field note book containing details is valuable evidence that shall be carefully maintained.⁴⁴

vi. External criticism and test of authenticity

'External criticism' aims at knowing the authenticity of the material taken for analysis. It looks at the outer form of the material, the place and layer from which it was

36 C Magabandhu, *supra* note 11 at 2-6.

37 William S Dancey, *supra* note 4 at 37.

38 K M Srivastava, *supra* note 18 at 27.

39 H D Sankalia, *supra* note 19 at 68-69.

40 *Supra* note 4.

41 K V Raman, *supra* note 4 at 112-123.

42 *Id.* at 144-148.

43 H D Sankalia, *supra* note 19 at 66-67.

44 K V Raman, *Supra* note 4 at 149-150.

obtained and the date and time of such recovery. For example, when the excavation comes across filled up soil from which an artifact is traced, the artifact so located in doubtful circumstance is not a genuine object belonging to that place. When the so-called objects of religious worship are gathered from a ditch rather than a house or temple their 'religious' character is doubtful.⁴⁵ Location of aristocratic domestic equipments or utensils from the houses of nobles has special significance in contrast to common types of equipments found in the houses of common people.⁴⁶ External criticism examines the contextual and situational aspects for testing authenticity of the material going to be considered. Its concern is about apparent features rather than the content.

vii. Internal criticism and cross verification

After a thorough external criticism, the researcher should subject the archaeological evidence to internal criticism. Internal criticism focuses on content of the matter, its quality, inconsistencies and incongruities within it or contradictions with other sources. For example, after confirming through external criticism that Ashokan rock edict at Koppal is authentic, the researcher has to study the content of the rock edicts. In the said inscription, Ashoka speaks about himself, pledge of improving the position of communities at the bottom of social strata, his enhanced concern for people who could not have access to god or heaven due to their caste constraints, and the need to follow ethical lines in order to get salvation like people of the upper caste.⁴⁷ Evaluating these propositions by the application of test of congruity and comparison is the task of internal criticism.

viii. Drawing inferences

Inferences connect the dots and help in building up a theory. That is a careful and meticulous application of inductive logic.⁴⁸ S. Settar's magnum opus on pursuing and inviting death gathers data from religious books, literature, lithic records and

45 H D Sankalia, *supra* note 19 at 65-67.

46 *Id.* at 69-70.

47 S Settar, 'Ashokan edicts now tell us more' *Deccan Herald*, Mar. 21, 2020.

48 Sir Mortimer Wheeler advises, "The reading of a section (of layers) is the reading of a language that can only be learned by demonstration and experience. A word of advice to the student. However practiced, do not read too hastily. Be your own devil's advocate before passing judgment. And, wherever possible, discuss your diagnosis with others – with colleagues, with pupils, with your foreman. (The testimony of one person is no testimony; declares Hywel Dda, the wise Welsh law-giver.) Be humble. Do not ignore the opinion of the uninstructed. Everyone knows as much as the savant. The walls of rude minds are scrawled all over with facts, with thoughts'. Emerson said so, and he was right. Even if you do not accept the views of those you question, the mere act of questioning is at the same time a restraint and astimulus." *Archaeology from the Earth* (Clarendon Press, Oxford, 1954) cited in para 486 of the Supreme Court judgment, *M. Siddiq*.

archaeological remains, uses empirical data collected through field work and interviews, and draws inferences about the mature intellectual exercise permeated through social, religious, and philosophical sinews which condemned suicide and commended wisdom-based pursuit of death by laying down the procedure to be followed.⁴⁹ On the basis of study of 150 well-documented case histories of ritual deaths that occurred between 6th and 19th Century AD he concludes that the monks who braved death by starvation either as members of sangha or as individual and those who nervously withdrew from death after inviting it stood as a part of the replica of socio-religious experience and attitude of the community over times.⁵⁰ H D Sankalia's inference on the basis of inadequacy of evidence about *linga* and *yoni* worship which Marshall thought to be prevalent in Indus Valley is also on the basis of inductive reasoning.⁵¹

The above characteristic processes have distinct impact upon the quality of research product. Whether it is reconstruction of culture, dealing with the imagery of justice or resolution of legal disputes, the process of AR delineated above have potentiality of influencing the worthiness of research product. Further, these have both similarity and differences with the features of legal research procedures. AR has great content of interdisciplinarity, and has to traverse the path of scientific method.

IV Archaeology and law in the realm of society and culture

Culture is a feature of society, and a common ground for both archaeology and law. It is a myriad manifestation of group conscience through intellectual efforts and artistic works. Reconstructing the culture history by archaeology is a phenomenon that fills the gap in the knowledge about 'composite culture' contemplated in fundamental duties under the Constitution and in understanding the nuances of law-society interaction. How the collectivity of people participated, what was the approach towards women and whether tolerance of faith emerged as the major theme are also some of the matters to be discussed in this section by reference to the archeological works.

Understanding the basis and characteristics of composite culture

Following are some of the evidence of archaeological reconstruction of composite culture:

- i. The terracotta figurines of goddesses of Kulli, Zhob, Harappa and Kaushambi from a period ranging from 2500 BC to 100 BC depict continuity of the idea of worshipping Mother Goddess and bull in different places at different stages

49 S. Settar, *Inviting Death: Indian Attitude towards Ritual Death* (Rediff Books, 1989).

50 *Ibid.*

51 H D Sankalia, *supra* note 19 at 65-67.

of history.⁵² Continuity of worshipping the nature and Goddesses in various forms at different stages of history as evident from ancient temples and archetects has shown common phenomenon of respecting biological evolution and the protection needed for the same. Practice of having bangles and ornaments on idols, depiction of birds and animals as part of the environment or as objects of worship and use of varieties of musical instruments continued for centuries.⁵³

- ii. The civic life of Indus Valley culture had the support of neighbouring agrarian culture and trade with people of civilizations in the Middle East. Tracing of Indus valley seals in Mesopotemia, granaries and market in Harappa and Mohenjadaro and simiarpainted grey ware pottery inwestern half of Ganges valley and Deccan plateau have shown interconnections of Harappa culture.⁵⁴
- iii. Interaction of cultures - urban and tribal, Indian and foreign, the commons and the enlightened, orthodox and the radical – has tasked the shaping of Indian culture by providing for diversity and unity. Such interactions took place in Ramayana.⁵⁵ Prevalence of Ramayana's diverse versions, depiction of its theme in different arts, archictcture, sculpture and painting has demonstrated mingling of different styles of its narration.⁵⁶ Mahabharata depicts confluence of diverse regional cultures, and its depiction in locally varying artistic and architectural styles has added to composite character.⁵⁷ Artistic and architectural delineation of Buddhism and Jainism in different styles of representation with a common or multiple messages has proved the composite character of culture.⁵⁸ Mutual impact between vedic and non-vedic artistic presentations have synthesized the culture. Archaeological evidences about this can be found in the ancient monuments of temples, Jain basadis and Buddhist viharas.⁵⁹

52 A L Bhasham, *The Wonder that was India* 13-14 (Grove Press, New York, 1959 Indian reprint: Surjeet Publications, Delhi, 2007); the terracotta images of Durga worshipped by the lower classes of people continued the cult of worshipping Mother Goddess. The sculptures of bulls are commonly present in Shaiva temples in South India.

53 *Id.* at 367-369.

54 *Id.* at 26-28.

55 In Kuvempu's *Sbri Ramayanadarshanam* (Kannada) this approach is visible.

56 Anand K Coomarswamy, (I) *Rajput Paintings* 1-12 (1939). Mira Seth, *Indian Painting: the Great Mural Tradition* 98-115 (Harry N Abrahams, 2006).

57 The mural sculptures of Vijayanagara temples, Pallava temples, Chalukya temples and Oriya temples, paintings of Ravi Varma and miniature paintings of Rajputs have depictions of Mahabharatha stories.

58 *Supra* note 52 at 371-372.

59 *Id.* at 362-365.

- iv. The impact of Greek, Kushana, Arabic, Mughal, Persian, British, French and Portuguese cultures upon the Indian art, architecture, sculpture, painting, literature, language, and so on, has been wide and deep. Regarding Mauryan pillars found near Patna, A. L. Bhasham observes, "They are the work of craftsmen who had learnt much from Persia, and perhaps a little from Greece, but had given out distinctive Indian characteristics."⁶⁰ The carvings on Shaka gold coins had Indian influence.⁶¹ The Kanishka statue reflected central Asian influence on the style and delineation.⁶² The syncretic school of Gandhara had combined Greek, Roman and Buddhist styles and the craftsmen versed in Roman sculpture produced devotional Buddha figures depicting scenes from Buddha's life according to their models of gods of the Greco-Roman world.⁶³ The Mathura sculptors shaped the images of Buddha getting inspiration from burly yaksha figures of the earlier centuries and from the statues of Jaina Tirthankaras.⁶⁴ Bhasham holds that in spite of these influences, the Gandhara and Mathura styles had elements of originality and were not mere imitations.⁶⁵ The sculptures of the Gupta period, while producing the Vedic Gods or Buddha images had similarity of approaches in exhibiting minutely carved jeweled collars and belts. But remarkable variety was also there in view of multiplicity of gods and diversity of themes.⁶⁶ The temples of Aihole and Badami exhibit the influence of both the Gupta and Amaravathi style.⁶⁷ The sculptures of Bhubaneswar, Konark and Khajuraho have characteristic beauty, wonderful delicacy and grace because of the refinements in style over the years.⁶⁸ While Pallava temple architecture and rock arts had established a distinct school, it had impact upon sculpture in the Western Deccan, especially carvings of Ajanta and Ellora caves.⁶⁹

Insofar as architecture is concerned, influence of different cultural styles and evolution of new plans contributed to composite character of architecture. Over the years, stupa architecture became more and more decorated and artistic gathering ideas from other examples.⁷⁰ Cave temples of the Western Deccan

60 *Id.* at 348.

61 Romila Thapar, *History of India* 97 (Penguin Books, Middlesex, 1966).

62 *Supra* note 52 at 368.

63 *Ibid.*

64 *Ibid.*

65 *Supra* note 52 at 369.

66 *Id.* at 371.

67 *Id.* at 372.

68 *Supra* note 52.

69 *Ibid.*

70 Romila Thapar, *supra* note 62 at 127.

were the products of experiments with different styles and innovations contributing to common traits and divergences.⁷¹ The architecture of temples in Takshashila, Jandial and Kashmir were influenced by Zoroastrian, Hellenic and Gothic styles.⁷² The temple styles of Chola, Pandya, Chalukya, Rashtrakuta and Hoysala were diverse in some aspects and common on other aspects, each subsequent dynasty innovating and contributing new ideas.⁷³ The early Chalukya temples resembled temple styles of the Gupta period, but contributed new pattern in course of time.⁷⁴ Hoysala temples were experiments with elaborate and brilliant decorations. Vijayanagara style carried the process of innovation by combining Chalukyan and Hoysala style by producing both grandeur and beauty in stone.⁷⁵ The Orissa school, Chandel-Bundelkhand school and the Western school of Rajsthan and Gujarat produced high tower stone structures with decorations took ahead the march of innovations and combinations.⁷⁶ Bhasham reasons that the architectural style of Jaina shrines of Mount Abu was probably influenced by the Muslim architectural style of domes and arches.⁷⁷ The cultural patriation that occurred to build Greater India – Thailand, Cambodia, Vietnam, Indonesia (Bali, Sumatra), China, Korea and Japan – had exported both the Buddhist and Hindu temple styles of architecture.⁷⁸ The monuments established by Muslim kings at Fatehpur, Agra, Delhi, Hyderbad, Vijayapura, Gulbarga, and so on have been part of the totality of Indian architecture. European architectural styles were introduced in the construction of public buildings like courts, chief executive offices, museums, schools, colleges and churches with Indian adaptations. When inter-cultural interaction occurs with mutual appreciation and respect, socially acceptable syncretism occurs. But forceful use of another community's archeological remains for construction one's own place of worship defies the idea of syncretism and becomes a bone of contention.⁷⁹

In the art forms of metallic works and paintings also composite character is explicit. The influence of mural paintings of Ajanta upon Ellora and both upon Badami and Tanjore paintings tell this story.⁸⁰ The spread of Islamic

71 *Supra* note 52 at 352-355

72 *Id.* at 355.

73 *Id.* at 356.

74 *Id.* at 358.

75 *Id.* at 359.

76 *Id.* at 360-362.

77 *Id.* at 363.

78 Romila Thapar, *supra* note 61 at 165.

79 This is explicit in the context of Ramajanma Bhoomi case.

80 *Supra* note 52 at 377-78.

influence revived the art of miniature painting.⁸¹ Jewellery works and ivory carvings have shown variations in regional styles. Love for music, nature and divine beings is reflected in coinage.

- v. Composite character of Indian culture can be seen in the matter of styles of music, dance and drama. Mutuality of influence of social customs, traditions, festivals and dress and also prevalence of divergence has also added to the compositeness of culture. Mutual give and take among Indian languages and borrowing from Persian, Arabic and European languages have also added to composite character of culture. Archaeological evidences to this effect can also be traced.

Knowing the position of women

While literature and Smriti writings do have contradictions about the position of woman, the archaeological evidences can depict the actual practice. The Harappa bronze statue of naked dancing girl with ornaments but 'provocative' posture is an object of interpretation going to the extent of suggesting practice of temple prostitution which was prevalent in contemporary civilization. A L Bhasham doubts about this proposition.⁸² The cave inscription of Ramagarh of Vindhya hills, thought to be written not long after the days of Ashoka, has two Prakrit inscriptions referring to the practice of 'slave-girl of the god' with whom young men fall in love. An inscription of the Chalukya King Vikramaditya VI refers to founding a temple to memorise his late mother, with quarters for the 'most beautiful temple-prostitutes in the country'.⁸³ The Maithuna sculptures of Konark and Khajuraho are sometimes doubted as advertising temple prostitution.⁸⁴ That the Indian concept of feminist beauty has undergone change from time to time, from thin figure to sensuous one, is proved by archaeological evidences. Beautiful apsaras trying to disturb the meditating Buddha and Bodhisatva, and king with more than one wife and paintings depicting harem give rise to distinct inferences.⁸⁵ A pillar inscription of circa 510 AD tells about the practice of Sati by a wife of tragic hero who died in a battle.⁸⁶ The practice of self sacrifice to please God has also figured in a pictorial stone inscription.⁸⁷ Archaeological evidence about sexuality

81 *Id.* at 379.

82 *Id.* at 21.

83 Epigraphica Indica, xiii, 36 cited by AL Bhasham.

84 *Supra* note 52 at 362.

85 *Id.* at 171.

86 "And he fought a great and a famous battle, and passed to heaven, a god among chieftains. His wife, loyal and loving, beloved and fair, followed close behind him into the flames" CII, iii, at 92 cited by AL Bhasham at 188. Also see D. C. Sircar, 'Inscriptions in Sanskrit and Dravidian Languages' 9 *Ancient India* (Bulletin of ASI, 1953) 212 at 217 reference to Sati Stone of Devagiri.

87 *Id.* D. C. Sircar at 217 and photographs of head offering inscriptions found in Mallam and Hrakkal Kalukuda in plate CXI.

and its diverse practices support literary sources on the subject as a normal behavior. Rohit Dasgupta refers to temple sculptures at Konark and Khajuraho and points out prevalence of whole range of sexual behavior including homosexuality.⁸⁸ The overall position of woman did not match the dignity of womanhood attributed in literature, in view of the practice of temple prostitution and sati.

Deciphering collective actions

The role of guilds and collective bodies in the cultural and economic life by contributing towards construction and maintenance of temples, stupas and viharas and to the indigenous banking and financial system is clear from some of the inscriptions.⁸⁹ The cave inscription of Nasik by a Shaka ruler refers to a large sum of money invested in weavers' guild the proceeds of which are meant for maintenance of the monastery and meeting various expenses of the monks. Romila Thapar infers political importance of guilds and their role as bankers, financiers and trustees.⁹⁰

Concordance among religious faiths

Concordance and harmony constituted the major policy of the ancient polity in the matter of inter-religious relations. A rock inscription of Ashoka states, "Its (Dhamma's) basis is the control of one's speech, so as not to extol one's own sect or disparage that of another on unsuitable occasion. On each occasion one should honour another man's sect, for by doing so one increases the influence of one's own sect and beliefs that of the other man, while, by doing otherwise, one diminishes the influence of one's own sect and harms the other man's... therefore concord is to be commended so that men may hear one another's principle."⁹¹ Similarly, an inscription installed by Hoysala king Vishnuvardhana at Belur temple in 12th Century AD offers a prayer, "May Hari, the ruler of three worlds worshipped by the Shaivites as Shiva, by the vedantins as Brahman, by the Buddhists as Buddha, by the Naiyaikas as the chief agent, by the Jainas as liberated, by the ritualists as the principle of law, may he grant prayers."⁹² Practical application of these principles can be found in Rayashettipura

88 Rohit K Dasgupta, 'Queer Sexuality: A Cultural Narrative of India's Historical Archive' 3 (4) *Rupkatha Journal on Interdisciplinary Studies in Humanities* 651-670 (2011) reference to lesbian and gay practices; also see Ruth Vanita and Saleem Kidwai, (ed) *Same-Sex Love in India: Readings from Literature and History* (Palgrave-Macmillan, New York 2000) ; see also, available at: <https://scroll.in/article/827274/how-to-spot-a-lesbian-in-sacred-indian-art> (last visited on Apr. 24, 2020).

89 *Supra* note 52 at 218.

90 Romila Thapar, *supra* note 61 at, 111-112.

91 *Id.* at 87.

92 Yam shaiva samupasateshivaitibrahmetivedantinah I Boudaha Buddha pramanapatavahak-artetinaiyayika II Arhanitihahajaina-shashana-rathakarmetimimamska I So yam vovidhaadhatuvanchitaphalamtrailokyanathoharihi (Belur temple inscription of Hoysala Vishnuvardhana, 12th Century AD).

inscription of Hoysala Someshwara in 1251 which resolved the disputes between Shaivites and non-Shaivites in the matter of religious worship.⁹³ Similarly, Vijayanagara King Bukkaraya's Shravanabelagola inscription of 1368 resolved the dispute between Jainas and Vaishnavas and established harmony by affirming the principle that there was no difference between Jaina and Vaishnava in the matter of status and importance of these religions.⁹⁴

Thus archeology unfolds through historical study many attainments and shortcoming of law. While attainments are traceable in collective actions supported by political rule and social acceptance, due to the deep seated patriarchic beliefs women's interests could not get just treatment. By bringing the values of composite culture, gender justice and tolerance to surface in intimate arts over the centuries, the process of archaeological research is prone to reap a good result.

V Archaeology's help in legal research on the idea, image, seat and task of justice

Public image of law and justice and of their role and action has a great significance in law-society study. Archeological evidences are ample, spread over various regimes and touch upon symbolic aspects and actual practices pertaining to court hall and prison system. The following archaeological factors can be considered from this perspective:

The image of Goddess of justice and symbols of scale, danda(mace) and dharmachakra(wheel of justice) represent people's perception of legal system's social function and operation. Bringing equilibrium by imposing punishment, providing remedy or balancing the evil with good is implicit in these symbols. Indian Goddess of justice, as depicted in the mural of the Supreme Court is a modified form of Dharma Devata and Dharma Moorthi described in ancient Indian writings and also the image of Greek Themis.⁹⁵ Dharma Devata was Yama, with his divine consort Shakti, together embodied as dharmachakra, with four faces looking at *Vedas*, good conduct, rules and conditions of dharmachakra.⁹⁶ Dharma Moorthi in sitting posture had three eyes and four hands showing neethi, holding a book, holding a noose and a sword for enforcing the commands.⁹⁷ Partially gathering inspiration from the Greek mythical figure Themis, who was holding scale to symbolize equilibrium between good and evil, and was also not blindfold, the goddess of justice in the Supreme Court mural is depicted as crowned Indian female deity standing with a scale raised by right hand to the level of keenly watching eyes, and holding a book by the left hand. The deity is calm and inspiring pleasant thoughts,

93 Jayatirtha Rajapurohita, *Kannada Tirpugalu* 10 (Institute of Kannada Studies: Mysore, 1977).

94 *Ibid.*

95 See for discussion, M Jagannadha Rao, 'The Goddess of Justice: The Constitution and the Supreme Court' in B N Kirpal *et al.*, (eds) *Supreme but not Infallible: Essays in the honour of Supreme Court of India* 87-96 (Oxford University Press, New Delhi, 2000).

96 Veda Bhashya of Narasimha cited by M Jagannadha Rao 88, *id.* at 88.

with long ears to hear the grievances, and determined to combat evils by virtue of crown.⁹⁸ This is in contrast to the post-sixteenth century wooden carving of northern Europe depicting goddess of justice blind folded and holding a scale by one hand and sword by the other.⁹⁹ Besides the Indian goddess of justice is a dharma chakra with 24 spokes and an inscription '*Satyamevoddharmyabam*' (Truth alone I uphold) and walking posture of Gandhiji with two charakas below, standing for human action. Together they symbolize broad access to justice and effective redressing of grievances. Justice Jagannadha Rao states that this philosophy has permeated the judgments of the Supreme Court over the decades while setting aside shackles of rigid procedure and expanding the access to justice.¹⁰⁰ There is also a scale of justice shown in the open book held by a child symbolizing young republic of India sheltered by Mother India in the bronze sculpture in front of the Supreme Court building.¹⁰¹

A sculpture installed in front of High Court of Madras represents the story of Manuneechi Cholan.¹⁰² It is elaborately portrayed in an ancient Thiruvavur temple with a big stone ratha and depiction of king personally driving a ratha to fulfil the vows of justice by running it over his own son in order to punish him for reckless driving resulting in the death of a calf.¹⁰³ The king had acted in response to ringing of the bell of justice by a bereaved cow whose calf was killed by racing of a ratha by the king's son. There is also a Manuneechi Cholan's tower of justice in the temple complex where a bell is hanged which any aggrieved person can access and ring the bell and claim justice. The story is narrated in Shilappadikaram and Periya Puranam. The story is that of a Chola King Ellalan [Elara] (250 BC), known for impartiality, fairness and justice who had erected a tower with a bell hanging with a rope facilitating any aggrieved person to invoke justice by ringing the bell. The installation of the picturesque statue narrating the story in front of High Court of Madras is reaffirming people's expectation and faith in impartiality and fairness in administration of justice. The Supreme Court in dismissing petition against appointment of Justice J S Khehar as Chief Justice of India referred to Manu Needhi Cholan story and the High Court of Madras sculpture

97 M Jagannadha Rao, *supra* note 95 at 88.

98 *Ibid.*

99 *Supra* note 95 at 89-90.

100 *Id.* at 91.

101 This was referred in *National Lawyers' Campaign for Judicial Transparency & Reforms v. J S Khehar*, MANU/SC/1730/2016.

102 Available at: [https://www.alamy.com/stock-photo-bas-relief-of-king-manuneechi-cholan-story-in-a-temple-pulicat-pazhaverkadu-83599816.html?pv=1&stamp=2&imageid=A6A9DF70-DD4C-4450-92D3-\(last visited on Apr. 25, 2020\).](https://www.alamy.com/stock-photo-bas-relief-of-king-manuneechi-cholan-story-in-a-temple-pulicat-pazhaverkadu-83599816.html?pv=1&stamp=2&imageid=A6A9DF70-DD4C-4450-92D3-(last visited on Apr. 25, 2020).)

103 Available at: <https://suri441.wordpress.com/tag/thiruvavurlast> (last visited on Apr.25, 2020).

and held that the tradition of impartiality by judges cannot be doubted.¹⁰⁴ As can be gathered from the judgment, in invoking and building people's confidence in the justice system, these popular imageries are significant.

In the magnanimous building of High Court of Bombay constructed in 1878 there are two life size female figures: goddess of justice with scale holding in hand and a sword in the other; and goddess of mercy with folded hands.¹⁰⁵ There is display of wolves and foxes with counsel's bands round their necks. The portrait of a monkey judge with one-eye bandaged holding a scale of justice in a manipulative manner mocks at the justice delivery system.¹⁰⁶ The monkey judge's story appears to be drawn from *Aesop's* tales. Two litigant cats entrust upon the monkey judge the task of distributing equal share of stolen butter. Taking and consuming portion of butter from each pan alternatively in order to make the share equal, the monkey goes on consuming the substantive portion to itself by its repeated acts, and the little remainder is also ultimately claimed by the monkey itself as the judge's fee to the dismay and disappointment of anxious cats. This is a strong and meaningful satire on the working of the judicial system where 'the victorious loses because of the cost and delay, and the loser almost dies.'¹⁰⁷ Everything is done with the help of 'judicial' scale. The popular questions raised about the image of scale may be remembered here: does a scale know poverty of the house? Is the scale that weighed gold equivalent to gold weighed? Will not deflection of the scale's needle prick the purse of a party and hand of the weighing man?¹⁰⁸

The symbol of scale of justice as evenly balanced instrument to strike equilibrium between evil and the good appears in several objects such as coins, emblems and as designs on court walls cutting across dynasties. The coin issued in the name of Nur Jahan, wife of Jahangir, in early 17th Century had the engraving of scale of justice.¹⁰⁹ Jahangir's concern for re-rendering justice is visible from his order for fastening of chain of justice so that the oppressed might attract the attention of authorities by

104 *National Lawyers' Campaign for Judicial Transparency and Reforms v. J S Khehar* MANU/SC/1730/2016, where R K Agrawal J observed, "The Judges of all the courts, since its very inception, have always maintained this great tradition of the chozan King and are rendering even justice to all concerned, whosoever he or she may be, irrespective of the fact whether they are rich or poor, and whether they occupy a high or low status in the society." Para. 5.

105 Supreme Court of India, *Courts of India: Past to Present* 293 (Publications Division, Government of India, 2016).

106 *Id.* at 298; it is said that a Parsi sub contractor who constructed the building depicted his experience of defeat in a litigation against a European contractor.

107 A popular proverb in Kannada

108 Proverbs in Kannada cited by K P Balasbramanya in 'Modern Kannada literature and law' in P Ishwara Bhat (ed) *Nyaya Chintana* [Kannada] (KSLU, Hubballi, 2020). Does the scale know the sensitivity and emotions of human parties?.

109 *Supra* note 105 at 44.

shaking the chain.¹¹⁰ A beautiful painting of his attack against poverty (dark and old) by archery standing on a globe where lion and lamb happily cohabit, and a chain of justice (*janjeer-e-adal*) descending from heaven speaks about royal concern for protection of the poor and the exploited.¹¹¹ Miniature painting of Shah Jahan by Hashim (1618-1619) depicts the emperor standing on a globe marked by scale of justice where a lamb and lion huddle together.¹¹² The Khas Mahal of Red Fort (17th century) has also scale of justice as the Mughal ideal.¹¹³ The Pie coin of the East India Company had also the depiction of scale of justice.¹¹⁴ High Court of Rajasthan's stone carved decorated window has a scale of justice at the centre.¹¹⁵

The dharma chakra (wheel of justice) is a symbol which stood for dynamic process of upholding dharma. Truth, goodness and equity are implicit in its broader action whereas motion, progress and welfare of all are its objectives.¹¹⁶ From the times of Ashoka the figure of dharma chakra had occupied people's imagination. It found a place in the national flag and in the Supreme Court mural. It did not miss its place in the grand buildings of High Courts of Calcutta and Orissa constructed in European style.¹¹⁷ The chariot wheel of Manu Needhi Cholan had also the task of doing justice. The wheel of justice symbolizes continuous process of social transformation to remedy injustices.¹¹⁸ Closely connected to Chakra was Danda (mace), which represented power, an instrument for enforcement of the command of justice. Dandas of various kings had different designs and symbols.¹¹⁹

The royal adjudicator was expected to act with knowledge, wisdom and humanism, a notion consciously prevalent from the times of Indus Valley.¹²⁰ The inscription of Shaka ruler Rudradaman refers to king's duty to have strong attachment to dharma and good knowledge of all subjects and skill of keeping his treasury resourceful and his armed forces fully equipped.¹²¹ Reverence to the wise counseling of the learned in

110 *Id.* at 49.

111 *Id.* at 46.

112 *Id.* at 52

113 *Id.* at 55.

114 *Id.* at 85.

115 *Id.* at 380.

116 *Supra* note 95 at 91.

117 *Supra* note 105 at 316 and 338.

118 Gary Jeffrey Jacobsohn, *The Wheel of Law: India's Secularism in Comparative Constitutional Context* (Princeton University Press, 2003) 156; M. Veerappa Moily, *The Wheel of Justice* (Mohan Law House, New Delhi, 2018)

119 *Supra* note 105 at 95.

120 *Id.* at 41.

121 *Supra* note 61 at 98-99.

dharmashastras was an imperative as reflected in the Martur stone inscription which stated that the jeweled crown of Chalukya king Vikramaditya VI touched and illuminated the feet of Vijnaneshwara, the famous author of Mitakshara.¹²²

According to the ancient prescription in Smritis, the hall of justice (dharmadhikarana) was expected to be an awe-inspiring east-facing court hall, which had not only the facilities to all the participants but also had pictures and idols of deities and decorations with flowers and jewels that commanded respect.¹²³ The court atmosphere had to be pleasant and intimate. From literary sources it is possible to gather that the cane seats of judges (dharmaasana) and the king were placed at high pedestal.¹²⁴ Asar Mahal of Bahmani Sultanate (15th Century AD) was a court house with high pillared grand and spacious structure.¹²⁵ Royal palaces of Jodhpur, Udaipur and Mysuru have such court halls. The Supreme Court's architecture is unique with a design of scale. In front of the court building there is a sculpture of mother India sheltering her child, the young Republic, with an open law book at hand. All the high court buildings have grand and magnificent buildings with unique styles, inspiring confidence. The castle like building of High Court of Bombay, semi-Gothic style of High Court of Calcutta, High Court of Madras with attractive sculpture of Manu Needhi Cholan, High Court of Karnataka and High Courts of Nagpur are known for architectural beauty. Inside the court hall the architecture is hierarchical and showing dominance of judicial power and lacks level playing field. Added to this is the language difficulty and technicality of court proceedings. Understood in larger sense, the court architecture is not client friendly.

The architectural remains of cells and jails of the past throw light on the type of criminal justice system prevalent in the past. Tipu Sultan's (18th Century AD) underground jail with a dimension of 30.5 meters long and 12.5 meters width was built in bricks and mortar.¹²⁶ There are stone slabs at waist height attached to three walls to which the prisoners could be chained. It is a dungeon that could be converted into water jail for torturing the prisoners. It was used for putting the prisoners of war and notorious criminals in detention. It is called as Colonel Bailey's dungeon as he died in the prison in 1782 after several years of detention. Other British prisoners included Captain Baird and Rulay and Colonel Sampson, Scurry, Fraser and Lindsay.¹²⁷

122 Martur Inscription of 1123 AD now placed in Vijnaneshwara Bhavana, Martur near Kalburgi.

123 Smriti Chandrika II. 19 cited by P V Kane, III *History of Dharmasastra* 277 (Bhandarkar Oriental Research Institute, 3rd edn., Poona 1993); Brihaspati Smriti 279 cited by M Rama Jois, *Legal and Constitutional History of India* 498 (Universal Law Publishing Co, New Delhi, 1994, 2008).

124 P V Kane, 277 reference to Mrichhakatika and Kadambari.

125 *Supra* note 105 at 54.

126 Available at : <https://www.baijuseph.com/India/Karnataka/Tipu-Sultan-Memorial/Tipu-Sultan-Baileys-Dungeon/> (last visited on Mar. 23, 2020).

127 Poornima Dasharathi, 'Srirangapatna: Through Prisoners' eyes', available at: <http://www.indiatogether.org/tipu-society> (last visited on May 25, 2020).

Another jail of historic fame is cellular jail of Port Blair, Andaman. Having been completed the construction with unique star design in 1906 the cellular prison has 693 cells with 13 feet X 7 feet dimension for each cell typically meant for solitary confinement.¹²⁸ With no facilities inside the cell it was a place of torture by the British upon the freedom fighters of India.¹²⁹ These archaeological evidences speak loudly about the rough and harsh punitive system prevalent in the not so distant past. In contrast, educative value of a mural sculpture on the entrance of jail warden's office in Locken Hill city can be noted. It depicts the story of Roman Charity: Pero and Cimon. The story is based on Roman Historian Valerius Maximus' narration of an event happened in ancient Rome.¹³⁰ For stealing bread to escape from starvation death, Cimon was imprisoned and condemned with starvation death. Pero, his daughter and mother of a baby, visits the jail everyday and breastfeeds her father and saves his life. When tried for violation of prison rules, the judge acquits her appreciating the compassionate conduct of humanism and motherhood and releases Cimon as a consequential relief.

Thus, archaeological evidence range from symbols to solid buildings used for administration of justice, and speak about the overall good that was aimed at and aberrations of political persecutions. Archaeological research with a sociological insight connects the people's faith in the judicial system by virtue of its adherence to higher values like expanded access to justice, fairness and speedy and effective remedy.

VI Archaeology's aid in resolving legal disputes

In determining the title dispute stretching over several centuries on any land, building or place of worship, archaeology supplies valuable input. Similarly, archeological evidences throw light on existence of any specific religious practice or social custom. The doctrine of *res gestae* in law of evidence takes the inquirer to the whole gamut of facts linked to the transactions around one or series of events. The totality of facts available in various stratas of the disputed place found through excavation, the implications of structures, artefacts and inscriptions or other markers collected in the course of study, and the inferences that can be drawn on them help in reconstructing the historical development in true perspective. Objectivity involved in appreciation of

128 Available at: <https://www.culturalindia.net/monuments/cellular-jail.html> (last visited on Mar. 25, 2020).

129 Robyn Wilson, 'Inside Cellular Jail: the horrors and torture inflicted by the Raj on India's political activists', available at: https://www.independent.co.uk/news/long_reads/cellular-jail-india-integral-country-fight-freedom-independence-british-colony-andaman-and-nicobar-a7883691.html visited on Last visited on May 23, 2020

130 Valerius Maximus, *Nine Books of Memorabel Acts and Sayings of the Ancient Romans*, Book V. 5.4.7; the story was retold by Pliny the Elder (23-79 AD); see Mary Beagan, *The Elder Pliny on the Human Animal: Natural History*, Book 7 314 (Oxford University Press, 2005); see also, available at: https://en.wikipedia.org/wiki/Roman_Charity (last visited on May 24, 2020). The theme has been a subject of paintings and films.

probative value of data should guide the researcher. The cardinal philosophy of the Indian Evidence Act, 1872 about appreciation of evidences, separating of the relevant from the irrelevant, and determining of the believability or reliability (belief–worthiness) of evidences, is to insist on the best evidence, adherence to relevancy and admissibility, and proper exercise of discretion in appreciation of evidence.¹³¹ The quality of the judicial process depends upon the quality of the evidence placed before the court. Scrutiny of the credit worthiness of evidence adds to the process of appreciation of evidence.¹³²

A landmark case that used archaeological evidences for determining a long-standing title dispute is the Ayodhya case.¹³³ Appeals before the Supreme Court against the judgment of High Court of Allahabad raised several issues. The main outcome of unanimous judgment of the Supreme Court was that the title to disputed land of 1500 square yards was decided in favour of the plaintiff representing Ram Lala on the basis of preponderance of probabilities. In order to do complete justice five acres of land was to be allotted by the central or state government to the Central Sunni Waqf Board in appropriate place in Ayodhya. The land acquired under the Ayodhya Act, 1993 was to be entrusted to the temple trust to be constituted for the purpose. The court reiterated the principles of secularism based on equality, human dignity and freedom. This paper confines the discussion to the ways in which the archaeological evidences and archaeological research were treated by the high court and the Supreme Court.

- (i) The inter-disciplinary approach is explicit in the judgment which used data from archaeology, epigraphy, history and religion. The court acted upon archaeological, documentary, literary, oral evidences and laws on various complicated issues. Opportunity for cross checking or verifying by references to multiplicity of sources (by resort to multi method research) was available in determining preponderance of probabilities. Voluminous judgment (more than 4300 pages) of the High Court of Allahabad, vast body of records and literature and arguments advanced by eminent advocates for more than 40 days provided vast array of information.
- (ii) The high court had given utmost attention to ensure scientificity in data collection in the course of archaeological methods of data collection. Before conducting excavation of the disputed site by Archaeological Survey of India (ASI) the court directed for survey of the site by using Ground Penetrating Radar or Geo-

131 J H Wigmore⁴ *Evidence* 1173 (Boston: Little Brown Co., 1940); William Twining, *Rethinking Evidence* 112-34 (Oxford: Basil Blackwell, 1990); Woodroff and Ali, *I Law of Evidence* 19th edn., 79 (New Delhi: Lexis Nexis Butterworths, 2013).

132 A Zuckerman, *The principles of Criminal Evidence* 240 (Oxford: Oxford University Press, 1989).

133 *Supra* note 16.

Radiology System after duly calling for objections and hearing of objections (October 23, 2002).¹³⁴ The corporate body which conducted GPR on behalf of ASI submitted a report on February 17, 2003. The report showed anomalies suggesting wall foundation of the disputed structure coinciding with stratigraphic units pointing out successive construction periods rather than being contemporary; a flooring structure with stone slab beneath the demolished building; buried mound structure with internal structure indicative of collapsed material; and association of contemporaneous structure with ancient structure. It suggested for excavation to throw light on anomalies. The High Court directed ASI to conduct excavation with precautions: not to disturb the area where idol of Lord Ram was installed; not to prevent worship; record the nature of excavation found at the site; seal the artefacts found in the presence of the parties and their counsels; maintain the depth of the trenches and layers where artefacts were found; mandatory photographing and videographing the process; and ensuring the maintenance of adequate representation of both the communities in the functioning of ASI team and labourers.¹³⁵ The ASI planned for excavation, laying trenches throughout the disputed area except the place of deity, conducted the work instages – eastern, southern, western and northern area and the circular shrine in the centre - and completed the work in five months and submitted thereport within fifteen days from the completion of excavation. Samples of plaster, floors, bones, charcoal, palaeo-botanical remains were sent for scientific analysis. Excavated materials including antiquities, objects of interest, glazed pottery, tiles and bones recovered from trenches were sealed in the presence of parties and lodged in government's strong room. Latest techniques of lay out of trenches were used in order to fix pegs and avoid collapse of trenches.

- (iii) Area-wise excavation could systematize the unearthing and analysis of data. In the eastern area, remnants of gateway, 14 extant courses of reused brickbats and calcrete stone blocks and marble dedicatory slabs of the second half of 20th century

134 According to the high court, "The nature of superstructure to a great extent is related to the foundations...If any foundation is existing of any construction, it may throw light as to whether any structure existed and if so what would have been the possible structure at that time." *The Sunni Central Board of Waqfs v. Sri Gopal Singh Visharad* 2010 ADJ 1 (SFB) (LB) order dated Oct. 23, 2002 cited in para 481 of the Supreme Court judgment.

135 *Id.*, para 3909, S Agarwal J observed, "We have carefully perused the site note book, day-to-day register and also more than twenty five video cassettes as well as photographs but find nothing unusual which may create any suspicion in what ASI said in respect of pillar bases in report." The 50 pillar bases, wall structures, numerous temple objects, divine couples and architectural members were in support of the proposition about use of the disputed site for Hindu religious purposes in the long past at 2412. The Supreme Court in *Karnataka Board of Waqf v. Government of India* 2004 (10) SCC 779 para 8 had observed, "Reliance on borderline historical facts will lead to erroneous conclusions"

were identified.¹³⁶ In the southern area excavation of 23 trenches 50 pillar bases of an earlier period and also a circular shrine on its outer part with a chute on northern side for draining water, probably used for *abbishek* was found. In the western area brick wall of nearly 50 courses was found. In the northern area a brick shrine with pranala for draining water was found. Regarding the structures excavated, significant finding was massive structure below the disputed structure; seventeen rows of pillar bases; decorated sandstone over pillar bases having floral motifs on the four corners; central five rows consisting of 25 pillars; and the circular shrine.

- (iv) Strata-wise excavation up to a depth of 10.8 meters has disclosed facts on earliest dating and enabled period-wise data analysis.¹³⁷ ASI report makes a good stratigraphic study with useful finding. The earliest human activities were traceable to 13th Century BC by application of Radio-Carbon date determination of pottery excavated. The first period (6th to 3rd Century BC) found no structural activity but yielded discs, ear-studs, wheel made in a disc, broken animal figurine in terracotta, iron knife, glass beads, greenish glass with Ashokan Brahmi engraving. The Sunga level (2nd Century BC) witnessed first structural activity in stone and brick and yielded terracotta figurines, wheel, broken bangle and fragment of sealing with brahmi letter 'sri'. The Kushan level (1st to 3rd Century AD) showed huge kiln, animal and human figurines in terracotta, copper rod, hair pin in bone, and a brick construction of 22 courses. The Gupta level (4th to 6th Century AD) exhibited terracotta figurines and a copper coin bearing image of king and garuda with a mark srichandra. ASI had indexed the coin as 3.75 m. layer 8, G 7, Rg. No.1030. The Rajput level (7th to 10th Century AD) gave knife-edge bowls and marks of circular subsidiary shrine. The medieval Sulatane level (11th to 12th Century AD) showed brick crush thick floor and north-south brick wall. The medieval level (12th to beginning of 16th Century AD) sub-period A produced a massive wall in north-south orientation; sub-period B showed circular depression in the centre of the pavement; and sub-period C witnessed foundations to support pillars or columns whereas floor around the pillar bases found broken with disturbed condition. The Mughal level indicates retention of north-south wall and deposit of ashy materials. The late and post-mughal level witnessed erection of enclosure wall without foundation and dead bodies buried in the north and south beneath the sealed layer. ASI infers existence of the 'Massive Structure below the Disputed Structure' with 17 rows of pillar bases, each row having 5

136 *Id.*, para 446-447.

137 *Id.*, para 448-450.

pillar bases.¹³⁸ In brief, stratigraphical study has given a comprehensive view of the structural developments over the centuries.

- (v) The way in which external criticism approach is handled by the high court and Supreme Court is admirable. Two examples can be given to support this point. First, both the High Court of Allahabad and the Supreme Court rejected the documentary evidences about three inscriptions attributed to Babur or Mir Baqi, which were said to have disappeared after communal riot of 1934.¹³⁹ The inscriptions, according to the literary works of Fuhrer and Beveridge and Epigraphia Indica of 1964-65 (authored by M Ashraf Husain and Z A Desai), stated about the person who got the construction of Babur Masjid done. The versions given by Fuhrer and Beveridge were incomplete and inaccurate and that of Epigraphia Indica was based on so-called inked rubbing of unknown person. Justice Sudhir Agarwal of the High Court of Allahabad considered the latter one as fallacious and misrepresenting and liable to be rejected. Beveridge's version was based on hearsay. The other two judges also rejected the authenticity of the inscriptions. The Supreme Court concurred with the finding of the high court as the original inscriptions were not traceable and the literary versions about them were not only secondary but also unreliable because of the above defects.¹⁴⁰ Second, the Supreme Court disbelieved the recovery of Vishnu Hari inscription from the site as the eye witness, a journalist who went to the place of disputed structure to gather news about destruction of the DS on December 6, 1992, had made inconsistent statement about the location at which the inscription was found falling from the wall and the circumstance of invisibility due to dust, and the court declined to accept it as evidence.¹⁴¹ The 27 verses of Vishnu Hari inscription were in fairly chaste Sanskrit language of 12th Century AD. The expert Epigraphist K V Ramesh, who had translated the inscription and reported about its authenticity and date as 12th Century AD. The inscription had stated that Meghasuta of Gahadavala dynasty had constructed lofty stone temple for god

138 ASI concluded, "Now, viewing in totality and taking into account the archaeological evidence of a massive structure just below the disputed structure and evidence of continuity in structural phases from the tenth century onwards upto the construction of the disputed structure along with the yield of stone and decorated bricks as well as mutilated sculpture of divine couple and carved architectural members including foliage patters, *amalaka*, *kapotapali* doorjamb with semi-circular pilaster, broken octagonal shaft of black schist pillar, lotus motif, circular shrine having *pranala* (waterchute) in the north, fifty pillar bases in association of the huge structure, are indicative of remains which are distinctive features found associated with the temples of north India." Para 450.

139 *Supra* note 16, Heading 'G. Three Inscriptions' para 54-69.

140 *Ibid.*

141 *Supra* note 16 at para 539-548.

Vishnu Hari in the city of Ayodhya in Saketa Mandala. About the genuineness of the inscription and expertise of Ramesh, the High Court of Allahabad had expressed approval. But apparently applying external criticism approach, the Supreme Court observed, “Since the recovery of the rock inscription from the disputed structure is not borne out from the evidence, a crucial link in the case which has been sought to be made out on the basis of the inscription, by the plaintiffs in Suit 5 is found to be missing. The rock inscription would indicate the existence of a Vishnu Hari temple at Ayodhya, having been constructed in twelfth century A.D. But once the recovery of the inscription from the site in question is disbelieved, the inscription cannot be the basis to conclude that the Vishnu Hari temple which is referred to in the inscription was a temple which existed at the very site of the demolished structure.”¹⁴²

- (vi) The Supreme Court applied internal criticism approach in rejecting the claim of Central Sunni Waqf Board that the squarish circular central place resembling shrine is Idgah where mortal remains are kept. The ASI had reported about existence of an underlying massive structure with a central circular shrine of small size (a square of 4.4 feet from within) with a pranaland space around for movement. Then there arose rival contentions: Hindu parties arguing that it is a Hindu shrine while Muslim parties arguing that it is a Muslim tomb. The high court reasoned that the circular shrine was too small a structure for a tomb; that there was no trace of an arch (hook shaft etc) required to construct a dome; and that gargoyles or pranals for draining water is not a feature of Muslim tomb. On the other hand, facility for draining of water and space around the shrine for parikrama suggested about Shiva temple.¹⁴³ The Supreme Court also noted that besides being far-fetched hypothesis, the nature of recoveries belied them.¹⁴⁴
- (vii) Drawing of inference on the basis of fair estimation of facts and evidences is essential part of archeological research.¹⁴⁵ The judgment gives numerous examples of drawing inferences on the basis of elaborate reasoning. Few may be taken for illustration. ASI refers to large number of architectural fragments recovered in course of excavation: Amlaka pillar, Ghata Pallava base, Kirtimukha, square slab with Srivatsa motif, fragment of lotus medallion, divine couple seated in alinganamudra, broken doors, pillars, pilasters, globular stone disc resembling shikhara or kalasa.¹⁴⁶ Cumulative analysis of all these led to an inference that they belonged to the time span of 10th to 12th Century AD typical of temple

142 *Id.*, para 548.

143 *Id.*, para 3931 to 3952 of High Court of Allahabad judgment referred in para 467 of the Supreme Court judgment.

144 *Id.*, para 499.

145 *Id.*, para 491.

146 *Id.*, para 502-504.

architecture. The expert witness pointed out the possibility of these finds as part of palace, Buddhist or Jain structure.¹⁴⁷ Delineating artefacts of Muslim architecture, which were small in number, ASI inferred that the fragmented artefacts were of non-Islamic origin. The second example of inference is about leaving the question of demolition –whether the mosque was constructed after demolition of existing structure or not - unanswered. ASI had given sufficient indication that the disputed structure had no foundation of its own but was raised on the existing wall. The floor of the disputed structure was just over the floor of the earlier building. The use of existing pillar and absence of clear evidence about demolition made the ASI to abstain from replying about demolition or dilapidation due to natural causes. The third example of inference is about the non-Islamic character of the underlying structure upon whose foundation the Babri mosque was constructed. The fact that the disputed land was not vacant land, the walls of disputed structure coincided with the underlying structure, the excavation had unearthed features of Hindu religious structure and the architectural fragments were dominantly non-Islamic origin persuaded the ASI and the judiciary to arrive at an inference about non-Islamic character of the underlying structure upon which Babri Mosque was constructed.¹⁴⁸ The court's inference was subject to caveat that there was gap between Shiva shrine of 9th century and the underlying structure of 12th Century; that there was no specific finding about existence of temple devoted to Lord Ram; and that the ASI did not conclude on the issue whether there was demolition of a temple before construction of the disputed structure.¹⁴⁹ Cross checking the archaeological evidence with literary sources has also been attempted.¹⁵⁰

From the above discussion, it can be concluded that steps of archaeological research adopted by ASI and the judiciary conform to scientific line of investigation fulfilling the requirement of objectivity. Basing the decision on settled principles of law and evidence rather than faith was a delicate task that the judiciary undertook.¹⁵¹ Adherence to good process yielding a better product is imperative and evident in this sphere too. Referring to overall arguments stretched over history, archeology, religion and law, the court convincingly observed, “For a case replete with archeological foundations, we must remember that it is the law which provides an edifice upon which our multicultural

147 The Supreme Court observed, “The excavation in the present case does in fact suggest confluence of civilizations, cultures and traditions.” Para 504.

148 *Id.*, para 507-508.

149 *Ibid.*

150 *Babar Nama*, *Ain-i-Akbari*, *Ramcharit Manas*, travelogues of William Finch (1608-1611), Joseph Tieffenthaler (1740), Francis Buchanam (1762) memoirs of Francois Martin (1670-1694), works on Aurangzeb by Sir Jadunath Sarkar and Stanley Lane Poole, and William Erskine's book on Babar are some of the valuable literary resources used to find answers to certain key issues.

151 *Supra* note 16, para 796.

society exists.”¹⁵² Prevalence of constitutional values of human dignity, justice, equality and fraternity over this process and its outcome is a logical development.¹⁵³ The court has, in the words of Upendra Baxi, ‘momentously done its best’ in the circumstance of the case which needs to be looked from the perspective of constitutionalism.¹⁵⁴

VII Legal framework helping archaeological research

Social interests in preservation of archaeological resources reflect that they are the precious possessions of humanity, products of creative human genius, nation’s live memory and identity, expressions of faith and the remnants that inspire the future generations. Lord Curzon wrote:¹⁵⁵

We have a duty to our forerunners, as well as to our contemporaries and to our descendents, - nay, our duty to the latter two classes in itself demands the recognition of obligation to the former, since we are the custodians of our own age of that which has been bequeathed to us by an earlier, and since posterity will rightly blame us if, owing to our neglect, they fail to reap the same advantages that we have been privileged to enjoy. Moreover, how can we expect at the hands of futurity any consideration for the production of our time – if indeed any are worthy of such – unless we have ourselves shown a like respect to the handiwork of our predecessors?

This position demands from law, a policy of protecting these resources in eternity through their systematic conservation as against smuggling, exporting and deliberate destruction, and towards ensuring inter-generation equity. Janet Blake argues that protection of cultural heritage saves the individual and group identity of the local and national community from effacement, and has strong links with human rights such as expressional freedom, right to cultural diversity, right against discrimination, religious freedom, minority rights and rights of indigenous people.¹⁵⁶

A brief literature survey on competing claims on cultural property and wrongs against cultural property will reveal intricacies of human right conflicts and the need to address the issue by respecting cultural expression and identity of the community attached to

152 *Id.*, para 795.

153 *Id.*, para 78, 84, 794.

154 Upendra Baxi, ‘Ayodhya Verdict Must Be Seen Dispassionately From The Prism of Law, Constitutionalism’ *The Outlook* Nov. 25, 2019; Upendra Baxi, ‘Award of five acres of land for masjid in Ayodhya is an effort to do complete justice’, *available at*: <https://indianexpress.com/article/opinion/columns/ayodhya-verdict-babri-masjid-ram-janmabhoomi-supreme-court-6115052/> (last visited on Apr. 24, 2020).

155 Lord Curzon, ‘On Archaeology in India in Archaeological Survey of India Annual Report 1902-03 Calcutta 1904.

156 Janet Blake, *International Cultural Heritage Law* 27-295 (Oxford University Press, Oxford, 2015).

it rather than commodifying it through undue emphasis on economic aspects. Two scholarly compilations can be taken up for analysis. Elazar Barkan and Ronald Bush, in their introductory note on the first one, initiate the discussion by stating that cultural property because of profound sense of belonging consolidates the indigenous people or ethnic group.¹⁵⁷ The ancient Sicily's artifact, 'Steinhardt phiale' the golden bowl of 3rd Century BC, when claimed for restoration by Italy against the artifact collector and American museum, became a bone of contention between culture and property right and between intercultural movement and national possession.¹⁵⁸ Sale of Pantheon marbles of ancient Athens in the 19th Century to the British museum gave rise to rival arguments of rescuers of cultural property by both Greece and the Britain.¹⁵⁹ Conflict of claims arose between Maya indigenous culture and Mexico centred national culture over the custody of Maya relief sculptures.¹⁶⁰ Over the skeleton of Kennewick man who lived 9300 years ago, found near Columbia River of Washington, a conflicting claim arose for possession by indigenous community and for conducting anthropological research.¹⁶¹ While the first two tilted in favour of property right, the rest have favoured the claims of indigenous communities as per relevant statutes.

The articles in the second compilation engage in unraveling the relation between archaeology and criminology in the matter of looted antiquities. Removal of antiquities from their places of origin wound the cultural tradition of the concerned communities for which restoration is the appropriate answer.¹⁶² If the legal frameworks of the source country and market country are rigid and international cooperation is adequately available, restoration takes place. The source states being the third world countries and the market states belong to the Europe and North America, lapse of time and technical procedural issues are the pretexts with which the claims of the losing state are dealt.¹⁶³ Loopholes in the export/import law, presence of habitual offenders, lack of emphasis on regulation in the market country, involvement of experts in estimation of antiquities, developmental projects greatly contributing to the supply side, are some of the reasons

157 Elazar Barkan and Ronald Bush (eds.), *Claiming the Stones, Naming the Bones: Cultural Property and Negotiation of National and Ethnic Identity* 1-15 (Getty Research Institute, Los Angeles, 2002).

158 Elazar Barkan and Ronald Bush (eds.) *Objects and Identities: Claiming and Reclaiming the Past* (2000).

159 Elazar Barkan and Ronald Bush, (eds.) '*Appropriating the Stones: The "Elgin Marbles" and English National Taste*' 51-96 (Los Angeles, 2002).

160 Elazar Barkan and Ronald Bush (eds.) '*Latin America, Native America and the politics of Culture*' 97-115 (2002).

161 Douglas W Owsley and Richard Jantz, 'Kennewick Man: A Kin Too Distant' 141-161; Patty Gerstenbith, 'Cultural Significance and the Kennewick Skeleton: Some Thoughts on Resolution of Cultural Heritage Disputes' Elazar Barkan and Ronald Bush, (eds.) 162-200.

162 Simon Mackenzie and Penny Green (ed), *Criminology and Archaeology: Studies in Looted Antiquities* 1-12 (Hart Publishing, Oxford, 2009).

163 *Ibid.*

contributing to looting of artefacts.¹⁶⁴ The scholars recommend for comprehensive strategy and interdisciplinary approach in using both the fields of knowledge. In order to deal with various kinds of attacks on cultural property across the globe, human rights approach through international law, constitutional law, legislation and judicial decisions has been of great help for archaeological explorations and research.

According to the UNESCO Convention 1970 Cultural Property constitutes one of the basic elements of civilization and national culture, and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting. It increases knowledge of human civilization.¹⁶⁵ In order to protect cultural property against illicit transportation, article 5 provides that while organizing the supervision of archaeological excavations, states shall ensure the preservation in situ of certain cultural property, and protect certain areas reserved for future archaeological research. The UNESCO Convention of 1972 on Cultural and Natural Heritage considers that deterioration or disappearance of any item of cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world.¹⁶⁶ It provides for elaborate definition of cultural heritage (article 1)¹⁶⁷ and research about conservation of cultural and natural heritage (article 5). The very idea that archaeological materials constitute mankind's heritage envisages a legacy from the past, to be held by the present generation in trust and to be safely handed over to the next generation that shall be meticulously protected against destruction, displacement and commercialization.¹⁶⁸ The UNESCO Convention of 2005 on Diversity of Cultural Expression provides for obligations of states to protect and

164 Kenneth Polk, 'Whither Criminology in the Study of Traffic in Illicit Antiquities?'; Neil Brodie, 'Consensual Relation? Academic involvement in the Illegal Trade in the Ancient manuscripts'; Roger Bland, 'The United Kingdom as a source country: Some Problems in Regulating the Market in the UK Antiquities and the Challenge of Internet' in Simon Mackenzie and Penny Green (ed) at 13-28; 41-58; 81-102.

165 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970.

166 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage 1972.

167 Monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features which are of outstanding universal value from the point of view of history, art or science;
Groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;
Sites: works of man or combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.

168 Janet Blake, *International Cultural Heritage Law* 7 (Oxford University Press, Oxford, 2015).

promote diversity in cultural expression by adherence to human rights principles.¹⁶⁹ This has the implication of recognizing right to culture. It reaffirms the importance of link between culture and development, support to economic processes related to cultural expressions, concept and practice of interculturality and sustainable development.

In the background of destructions of cultural property during wars and internal conflicts, Leiber Code of 1863, Brussels Declaration of 1874, Oxford Manual of 1880, Hague Convention of 1907, Hague Rules of Warfare 1922, Roerich Pact 1935, *etc.*, had obligated the nations not to indulge in destruction of cultural property of the vanquished nations.¹⁷⁰ The Hague Convention 1954 is a comprehensive code at present declaring that cultural property belonging to any people constituted cultural heritage of all mankind, and any damage to it is damage to the world culture contributed by various peoples. Since preservation of the cultural heritage is of great importance to all peoples of the world, it shall receive international protection. Articles 2,3 and 4 of the Hague Convention, 1954 and article 16 of the Protocol II to the Geneva Convention 1949 prohibit commission of any acts of hostility against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of people.¹⁷¹ Making inventory and registration of cultural property, display of flag for avoidance of destruction, evacuation and transportation for safe custody and refraining from hostility the surroundings of cultural property are some of the measures.¹⁷² Fostering the spirit of respect for cultural property by creation of public opinion is another policy under the international law.

At the domestic front, there is organized body of law for preservation of the archaeological resources. There is a fundamental right for any section of the citizens having a distinct culture of their own to conserve the same.¹⁷³ Right to live with human dignity has the dimension of protecting cultural creations which constitute its essential part.¹⁷⁴ There is a fundamental duty on the part of each citizen to value and preserve the rich heritage of our composite culture.¹⁷⁵ According to article 49 of the Constitution, "It shall be the obligation of the State to protect every monument or place or object of artistic or historic interest, declared by or under law made by Parliament, to be of national importance, from spoliation, disfigurement, destruction, removal, disposal or

169 The UNESCO Convention on Protection and Promotion of Diversity in Cultural Expressions, 2005, art.2.1 and 5.1.

170 P Ishwara Bhat, 'Protection of Cultural Property under International Humanitarian Law: Some Emerging Trends' 1 *ISIL Yearbook of International Humanitarian and Refugee Law* 47-71(2001).

171 *Ibid.*

172 *Ibid.*

173 Constitution of India, 1950, art. 29 (1).

174 *Id.*, art. 21.

175 *Id.*, art. 51 –A (f).

export, as the case may be.” The combined effect of these provisions is to recognize right to culture and entitlement to protection of archaeological works. Krishna Mahajan argues for shift from ‘monuments approach’ to right to culture approach.¹⁷⁶ The discussion in the Constituent Assembly on article 49 does not throw much light on its purpose.¹⁷⁷ The text suggests that the nation’s live memory of tradition, creativity and collective identity ought to be preserved in order to inspire the posterity. A nation cannot afford to lose the wealth of cultural property as its memory is intimate, societal or communitarian, and arouses respect and admiration. It is a means to know the past. Research and appreciation on these matters presupposes preservation of them.

Two central legislations that aim at their preservation are: the Ancient Monuments and Archaeological Sites and Remains Act, 1958 [AMASARA] (as amended in 2010) and the Antiquities and Art Treasures Act, 1972 [AATA] (as amended in 1976). The AMASARA lays down the procedure to declare any ancient monument as nationally important; acquisition of them by purchase, gift or guardianship; arrangement for preservation by contract with the private owners; and compulsory acquisition. Under section 18, “Subject to any rules made under this Act, the public shall have a right of access to any protected monument.” Restraints on construction activities in protected area, regulation of mining and large-scale developmental project activities in prohibited and regulated areas go a long way in protection of monuments. As can be seen in Narmada Bachao Andolan and other cases, safeguarding the cultural objects by shifting or by other methods in circumstances of developmental projects has resulted in their conservation. Law has also dealt with air pollution and chemical impact upon monuments in cases like Taj Trapezium. The high power authority established under the Act, *viz.*, National Monument Authority, has responsibilities of recommending, guiding and overseeing the working of competent authorities under the Act. Section 30 of the AMASARA penalizes acts of destruction, removal, injury, defacement, imperilment and other misuses of protected monuments, contravention of orders relating to preservation of protected monuments; failure to maintain protected monument; and removal of any sculpture, carving, image, bas-relief, inscription or any other object with imprisonment which may extend to two years.

The Antiquities and Art Treasures Act, 1972, aims to regulate trade in antiquities and art treasures, prevent smuggling and fraudulent dealings in antiquities and to provide for compulsory acquisition of antiquities and art treasures for their preservation in public places. The AATA provides for regulative measure in the form of licensing

176 Krishna Mahajan, *Legally Victimizing National Monuments* (Notion Press Inc, New Dehi, 2019); also see, Upendra Baxi, ‘When Monuments Become Documents’ *India Legal* 20 (Sep. 26, 2019).

177 It was confined to inclusion of the word ‘disfigurement’ and omission of Parliament’s role (which was brought back by 7th Constitutional Amendment). There was also rejection of the proposal to provide for state’s obligation to protect places of worship, which was rejected. CAD, Nov. 24, 1948 at 581, 593-4 vol. VII Book 2.

system regarding the business of selling antiquities. The criteria for grant of licence under section 8 include experience of the applicant with respect to trade in antiquities and the number of competing traders in antiquities in the area, whether village or town. The license holders are mandated under section 10 to maintain the records, photographs and registers, which shall be open for inspection by the licensing or other officers. Violation of condition of license is a ground for revocation of licence in accordance with the legal procedure (section 11). Trade in stolen antiques amounts to offence under the penal code, and is a ground for revocation of licence. Under section 4, the Customs Act, 1962 is applicable, which excludes illegal trading. Another method of safeguarding antiquities and art treasure against abuse is registration of them depending upon the necessity for conserving them and 'the need to preserve such objects in India for better appreciation of the cultural heritage of India' (section 14(2)). The fact of transfer of the registered antiquities shall be intimated within the prescribed time to the registering officer (section 17).¹⁷⁸ If the Central Government is of opinion that it is desirable to preserve any antiquity or art treasure in a public place, it may order for compulsory acquisition of the same subject to payment of compensation (section 19 and 20).¹⁷⁹ The words 'desirable to preserve' can be understood as covering the purpose of research as well. The law prescribes penalty of imprisonment which shall not be less than six months but which may extend to three years or with fine or both for illegal smuggling (section 25).

In both the above legislation, 'research' as a ground for regulating the archaeological activity is not explicitly figuring. In contrast, under articles 60 and 61 of the Slovenia Cultural Heritage Protection Act 1999, archaeological research may only be carried out by the authorized institution or under its permit. It contemplates the idea of 'protected excavation' which includes the design of suitable documentation which ensures scientific protection of the site and suitable protection of archeological findings. For use of metal detectors and equipment which may damage the archaeological sites prior permission shall be obtained and safety measures shall be followed. However, there are no specific provisions in the AMASARA providing for requirement of permission to be availed from the competent authority before involving in archaeological research, and the safety conditions to be categorically complied with in course of research. AATA also does not refer to research as a ground for preserving the antiquities. In both the above legislations, the approach is mechanical continuation of the colonial policy of protection of cultural property without linking them with human

178 Antiquities and Art Treasures Act, 1972, ss.14, 16 and 17 are not applicable to any antiquity kept in museum, office, archive or in educational or cultural institution. (s. 18)

179 In determining compensation, its period, rarity, and the artistic, aesthetic, historical, architectural, archaeological or anthropological importance of the antiquity shall be taken into consideration (s. 20(2)).

rights, community interest and civil society participation.¹⁸⁰ The absence of safeguard measures has been problematic as can be seen in the light of facts of cases discussed below.

The Places of Worship (Special Provisions) Act, 1991, has the impact of protecting the ancient monuments dedicated to worship deities. It imposes bar on the conversion of places of worship of any religious denomination or section of it into a place of worship of any religious denomination or a different segment of the same religious denomination (section 3). It preserves the religious character of a place of worship as it existed on August 15, 1947 (section 4).

Some of the Supreme Court and high court judgments throw light on types of violations of law and inadequacies in handling the matter keeping in view the best interests of conserving archaeological resources and antiquities. First is the *Narang* case¹⁸¹ where a person sought and got custody from a trial court apparently for the purpose research, two ancient artistic stone pillars of SurajKund temple which were seized after recovery from theft, replaced the same by fake ones and smuggled them to England. Although ultimately the objects were recovered in England and could be restored, the inadequacy of law in protecting the ancient artefacts by preventive measure is glaringly explicit in the case. The possibilities of abuse of archaeological resources during or in the name of research can be avoided by precautionary measures like permit system and monitoring.

Second is the High Court of Orissa *suo motu* cognizance of large quantities of sculptures lying in police malkhanas for years together after being confiscated during transit after theft and in the process of smuggling.¹⁸² Even after trial was complete, nobody was coming forward to claim the articles. The court ordered for handing over of the antiquities to museum for safe keeping on due recording, and observed, "Antiquities and art treasures are treasures which provide an insight to the social systems prevalent in ancient India, and their protection to trace the history of civilisation and the progress made are immense. These are not intended to be show pieces in the drawing-rooms of people."¹⁸³ After referring to the reports about ancient character of the articles ranging from 9th Century to 18th Century AD, the court observed, "The report is quite revealing and shows priceless nature of the objects. They can provide immense material for study of the Hindu and Buddhist culture in the State of Orissa. Courts Malkhanas are certainly not the places of storage of such articles. They should be in public gaze for the academicians and historians to make further study and provide valuable information, and materials which would be of immense help to the present and future generations."¹⁸⁴

180 See Upendra Baxi, *supra* 176.

181 *Ram Lal Narang v. State of Delhi (Admn)* AIR 1979 SC 791.

182 *Suo Motu in the matter of preservation of Antiquities involved in Criminal trials*, AIR 1999 Ori 53.

183 *Ibid.*

184 *Supra* note 182, para 8.

The judicial approach that ancient monuments, architecture, art and sculpture should be conserved as a part of composite heritage – natural and cultural – has helped archaeology to continue as a substantive discipline. The concern for protection of Taj Mahal from aerial pollution,¹⁸⁵ for restoration of Viceregal Lodge to its natural beauty,¹⁸⁶ and for protection of Jambunatheswara temple from unscrupulous mining activity¹⁸⁷ has acted in pursuance of both natural and cultural heritage. The approach in Taj Trapezium case although started on optimistic lines, as Krishna Mahajan notes, could not adequately proceed towards effective protection of the world renowned monument.¹⁸⁸ The administrative actions of safeguarding the ancient remains and places of cultural/religious importance can be found in various projects including Krishna Raja Sagar, Nagarjuna, Narmada Valley and Alamatti dam projects.¹⁸⁹ In *Narmada Bachao Andolan*, question was raised about possible loss of rich historical legacy in case of heightening of the dam.¹⁹⁰ The Supreme Court asked the states to survey the cultural sites and report about rescuing the heritage by relocation or other methods. Shoolapaneshwara and Hampeshwara temples were relocated to safe sites with the help of ASI, and other appropriate measures were taken.

On the whole, the international instruments, domestic laws and judicial decisions have built a comprehensive legal framework for safeguarding the cultural property and heritage, although there is scope for further strengthening of it.¹⁹¹

VIII Conclusions

Being highly inter-disciplinary subjects, archaeology and law have grown through inter-disciplinary and multi-method research. Both gather support from history, culture and tradition, and from the study of anthropology, sociology, philosophy, political science and economics. Archaeology has grown strong with its links with natural sciences. While there are similarities between research methods for archaeology and law, the distinct emphasis on scientificity, external criticism and internal criticism in the domain

185 *M C Mehta (Taj Trapezium Matter) v. Union of India*, AIR 1997 SC 552; WP (C) No. 13381 of 1984.

186 *Rajeev Mankotia v. Secretary to the President of India*, AIR 1997 SC 2766.

187 *K. Guruprasad Rao v. State of Karnataka*, AIR 2016 SC (Supp) 696.

188 Krishna Mahajan, *supra* note 176; see also *M C Mehta (Taj Trapezium Matter) v. Union of India*, AIR 1999 SC 3192; *M C Mehta (Taj Trapezium Matter) v. Union of India*, AIR 2002 SC 3696.

189 Restoration of access to Aikyasthala of Sri Basaveshwara at Kudala Sangama is one such instance.

190 *Narmada Bachao Andolan v. Union of India*, AIR 2000 SC 3751 para 140-141.

191 Reforming the domestic statutes with rights-centric approach, introduction of responsible participation by the non profit social organisations, treating cultural property differently from other properties seized during criminal trial, measures for speedy disposal of cases and suitable remedies will bring a sea-change in this regard. See for arguments Krishna Mahajan and Upendra Baxi, *supra* note 176.

of archaeological research has shaped its process. Application of this process in the inter-disciplinary research of archaeology and law has brought out quality product. Multi-method research has helped both archaeology and law by having the synergy of combining the means and cross checking the data by alternative sources. In both the spheres, the urge for finding and using most appropriate process or combination of processes has enhanced the worthiness of products.

Archaeology as an inferential science of the ancient and legal study as focusing on normative structure and its social base or dimension meet and interact at several spheres. Their mutual interaction through research has shown potentiality of creating knowledge that expands the understanding about socio-cultural basis of institutions in both the domains. The nuances and basis of composite culture, the ideology of cultural concordance, civil society activism and gender justice or its absence could be seen through archaeological eyes. The social foundation of justice system could be lensed by archaeological research focusing on the image of justice in varied forms.

Utility of archaeological research in helping the resolution of legal disputes on ancient place of worship has been realized in recent times. Archaeology's insistence on scientific evidence could countervail dependence on faith. *M Siddiq* case has amply established a fair outcome of research process emerging from scientificity and external and internal criticism within the framework of human dignity, justice, liberty, equality and fraternity.

How law helps the cause of anthropology through the instrumentality of rule of law and inter-generation equity is also a matter influenced by the process-product interaction. There is a need to amend the existing legal framework to accommodate research as well as avoid various types of abuses in the name of research. More components of human rights in the domain of cultural property jurisprudence would enrich both archaeology and law.