Thinking about Agency in the Formation of Tax Units: Commentary on *Commissioner of Income Tax v. Indira Balakrishna*, AIR 1960 SC 1172

By *Shreya Rao*[*]

Abstract: Since income tax is levied on a progressive basis (depending on the income of each taxpayer), how we define the taxpayer or "tax unit" is of critical importance. In the 1960 ruling of *Commissioner of Income Tax v. Indira Balakrishna*, the Supreme Court was required to interpret and define a tax unit known as an 'Association of Persons' (AOP) which had no statutory definition under income tax law. In doing so, it made certain gender-based assumptions regarding the nature of economic activity taking place within the household. In the (rewritten) feminist dissent, Maithreyi Mulupuru challenges these gendered assumptions by adopting a different approach to the definition of an AOP. This article is a comment on the feminist dissent. I argue that the rewritten judgment recognizes the agency of the taxpayers by recognizing that economic intent sufficient to constitute an AOP can exist, not just in the taxpayers 'coming together' but also in them 'staying together.' In doing so, the dissent considers the female taxpayers not merely as passive recipients of property but as active agents exercising volition over their economic affairs. By a deeper engagement with, and a more contextual analysis of the volition question, both in the articulation and application of the AOP definition, Mulupuru's dissent narrows the difference between the treatment of male co-heirs (taxable by virtue of their status as a HUF) and female co-heirs (taxable only upon specified kinds of action, as an AOP). At a broader level, the rewritten dissent demonstrates how an engagement with feminist methods is of value and vital even in seemingly neutral areas such as tax law.

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* DPhil Candidate in Law at the University of Oxford (shreya.rao@law.ox.ac.uk). Thank you to Pujita Makani for assistance with research on 'Association of Persons' and Aakash Mishra for assistance with research on joint tenancy and coparcenary. Thank you also to Priyank Kapadia, the anonymous peer reviewer, and Aparna Chandra for valuable inputs. Any inadvertent errors or omissions are mine alone.

A. Introduction

Feminist economics has made valuable contributions to how we think about the nature and value of non-market activities such as unpaid household work and caregiving.[1] The 1960 ruling of the Supreme Court of India in *Commissioner of Income Tax v. Indira Balakrishna*[2] demonstrates that assumptions about the economic passivity/non-productivity of women prevail even when they are economically productive in a conventional sense.[3] The judgment offers rich opportunities for a feminist rewrite, while also reminding us that tax law needs to be examined not only in relation to questions that may instinctively be associated with gender (the taxability of intra-spousal gifts,[4] for instance), but also in relation to areas which may be perceived to occupy 'neutral' territory, through an import of feminist perspective and methods.

Before we begin, it is useful to set out the broader context, of which we may highlight two aspects.

The first pertains to the dominant socio-economic circumstances prevalent when the ruling was pronounced. Women in India of the 1950s-60s were not visible participants in

1 See *Margaret Gilpin Reid*, Economics of Household Production, New York 1934; *Marilyn Waring*, If Women Counted: A New Feminist Economics, London 1989; *Katherine Moos*, Care Work in: Günseli Berik / Ebru Kongar (eds.), The Routledge Handbook of Feminist Economics, Oxfordshire 2021; *Riane Tennenhaus Eisler*, The Real Wealth of Nations: Creating a Caring Economics, Oakland 2007; *Haleh Afshar / Bina Agarwal*, Women, Poverty and Ideology in Asia: Contradictory Pressures, Uneasy Resolutions, London 1989; *Amartya Sen*, Capability and Well-being, in: Martha Nussbaum / Amartya Sen (eds.), The Quality of Life, Oxford 1993.

2 Commissioner of Income Tax, Bombay v. Indira Balakrishna AIR 1960 SC 1172.

3 So pervasive are the assumptions of passivity in this landmark ruling which influenced Indian tax law for decades, that the High Court and Supreme Court (benches comprising of only male judges) consistently refer to the income earning taxpayers by their marital status, as "the widows," rather than as "assessees" or "taxpayers". In another example of the (female) assessees being rendered invisible, the Bombay High Court, in criticising the obiter dicta by the Tribunal reasons that such observations have the tendency to 'harass him', result in issuance of a notice 'against him' and that 'he has to run the gamut of several income-tax authorities before ultimate he gets justice…'. See Bombay High Court Judgement, para. 10.

4 The impact of marriage on the taxability of a couple as a unit has tended to be subject to feminist enquiry in some jurisdictions. See for example *Anne L Alstott*, Tax Policy and Feminism: Competing Goals and Institutional Choices, Columbia Law Review 96(8) (1996). This specific issue has tended to be of lesser concern in the Indian context since we follow the individual filing system, and no special filing system for couples. Although there is a differential regime applicable to inter-spousal transfers under section 64 of the Income Tax Act 1961, its scope is limited to avoidance arrangements. Under this regime, an individual is taxable on income that maybe earned by their spouse if the income is received by the spouse from a concern in which the individual has a substantial interest, unless the spouse possesses technical or professional qualifications in relation to which the income is paid. The provision privileges formal "qualifications" over skill, and applies only within marital units and not other kinds of relations, but otherwise applies similarly to male and female spouses, whichever spouse has greater income.

the formal system of education,[5] and the Indian family system largely reflected patriarchal beliefs and practices.[6] The requirement to pay dowry deterred parents from providing girls with an education.[7] It was also widely perceived that well-educated girls were less 'feminine,' so parents often sought to educate their daughters only as much as was necessary to improve their matrimonial prospects.[8] Similar patterns were seen in the paid workforce. In 1961, only 27.96 % of the total female population were workers in the paid economy.[9] Poorer women, impacted by technological advancements in the industrial sector, were forced to migrate and take up occupations with low incomes.[10] Wealthier women were not allowed to work outside the confines of their home and therefore participated in home bound paid economic activity such as pawnbroking or running a chit fund.[11] In the late 1960s, 73.5 % of women aged 15-59 reported that household duties were their main activity,[12] which was reinforced by prevalent social attitudes.[13] Women were barely present in public institutions such as politics[14] and the judiciary. The first woman judge was appointed to a High Court only in 1959. The Supreme Court then had no women judges. All of these factors are likely to have influenced the perspective of the Supreme Court as regards whether the taxpayers in this case participated in economic activity.

5 In 1951, only 299 females were literate per 1000 males. Further, only 7.93 % of the female population were literate in 1951 which increased to a mere 12.95 % in 1961. Only 35 % of women had been educated at the primary level in 1960-61. These rates further fell drastically with respect to under-graduate and post-graduate qualifications. The traditional family roles of women took precedence over their education and skill-development. See Towards Equality, Report of the Committee on the Status of Women in India, Government of India (1975), p. 86.

6 *Leela Mullati*, Families in India: Beliefs and Realities, Journal of Comparative Family Studies 26(1) (1995), p. 16.

7 *M N Srinivas*, The Changing Position of Indian Women, Man, New Series 12(2) (1977), p. 233.

8 Ibid, p. 263.

9 Towards Equality, note 5, p. 32.

10 *Ujvala Rajadhyaksha / Swati Smita*, Tracing a Timeline for Work and Family Research in India, Economic and Political Weekly 39(17) (2004), p. 1675.

11 *Srinivas*, note 7, p. 226.

12 Towards Equality, note 5, p. 33.

13 *A Thanikodi / M Sugirtha*, Status of Women in Politics, Indian Journal of Political Science 68(3) (2007), p. 599.

14 Although the first woman to be elected in the parliament was in 1952 women played little role in politics between 1950s-1960s. See: United Nations Development Programme, Representation of Women in Politics in South Asia (2004). In the 1st Lok Sabha (1952-1957) only 4.4 % of the House was constituted by women. Women representatives in state legislatures during 1950s-60s were also low. In the first General Elections in Gujarat (1952) only four women candidates were elected to the Gujarat Assembly. In 1962 it increased to 15 but fell to 8 in 1967. In the case of Karnataka, the ratio of female to male representatives was also extremely low. In 1967, there were only 7 female candidates. In Maharashtra the number of successful women candidates improved from 5 in 1952 to 14 in 1957 but declined steadily thereafter. The Rajasthan Assembly had 24 women during 1957-1962 but it dropped to only 6 in 1967-68.

Secondly, the tax policy considerations governing how we define a 'tax unit' or a 'taxable person' are fundamental to our understanding of this case. Income tax is often levied on a progressive basis, i.e., at differential rates depending on the quantum of income earned by a taxable person. This is why the identification of who comprises a "taxable person" forms a vital aspect of how it is imposed. For example, the definition of "person"[15] under the Income Tax Act, 1961 ("ITA 1961"), contemplates different kinds of persons as taxable units including: natural persons such as individuals, legal persons such as companies, customary persons such as the Hindu Undivided Families ("HUF"), and finally, concepts which are unique to tax law, such as an association of persons ("AOP"). The idea behind these categorisations is that these taxable persons function as economically cohesive units and should be taxed accordingly.[16] However, there are no universally accepted norms on what standard of economic cohesiveness justifies taxability as a separate unit. For example, some countries tax couples or families as economic units, whereas others (like India) do not. The feminist enquiry regarding the definition of an undefined term such as AOP needs to be understood in the context of this broader debate.

B. Relevant Facts and Applicable Law

On November 11, 1947, a Hindu man died leaving behind three widows and two daughters. Under the principles of the Mitakshara school of Hindu Law on intestate succession as applicable at that point in time,[17] his widows inherited his estate as co-heirs. This meant that they enjoyed an undivided right over the entire property with no identifiable/divisible ownership in the property. Accordingly, the taxpayers jointly inherited certain immovable properties, shares, and money deposits, which generated income that was subject to tax.

The taxpayers filed two returns in relation to this income over two consecutive years. Oddly, they filed under the status of "individual" in one year, and as an association of persons (a collective unit) in the other. Both returns were filed by Indira, one of the three taxpayers, in one case on behalf of the "Legal heirs of Balkrishna" (the deceased), and in the second on behalf of the "Estate of Balkrishna." The revenue officer then sought to levy

15 See Income Tax Act 1961, s. 2(31).

16 The economic cohesiveness/unity of a group of persons would result in tax law applying progressive slab rates to the group as a whole, rather than each individual/ person separately. Therefore, the categorisation/definition of a taxable unit, and subsequent allocation of income to such a unit is essential to progressivity. See Part E of this paper for further discussion on this point.

17 Under Indian personal law, succession principles are religion specific. The taxpayers were governed by the Mitakshara school of Hindu law, and this case preceded the codification of Hindu law in 1956. The parties were therefore governed by the Hindu Women's Right to Property Act, 1937 in addition to uncodified but customary rules of succession applicable to their community. The uncodified rules of succession underwent some change pursuant to codification in 1956, when a reconciliation between different succession systems was attempted. See *Dinshaw Fardunji Mulla / Satyajeet A Desai*, Mulla Hindu Law, New Delhi 2016, p. 254 for further details on the Mitakshara school of Hindu law.

tax on the taxpayers as an AOP, whereas they argued that they should be taxable as separate individuals. The difference in tax treatment is that as individuals, they would have been entitled to individual tax slabs, whereas as an AOP, they would be subject to the same tax slab at a collective level, which would have resulted in greater tax payable.

The matter went up in appeal, and the tax tribunal (the last fact-finding body in the appellate chain) broadly ruled in favour of the revenue. While the text of the Tribunal ruling is not accessible, the Supreme Court recorded the Tribunal's decision that the taxpayers were to be treated as an AOP because the entire estate of the deceased was inherited and possessed by them as "joint tenants" and therefore, the mere receipt of income from jointly held property warranted their assessment as an AOP.

The assessees appealed to the Bombay High Court which reversed the Tribunal's ruling. In doing so, the Bombay High Court proposed the following definition of the term AOP:

> *"…what is required before an association of persons can be liable to tax is not that they should receive income but that they should earn or help to earn income by reason of their association, and if the case of the Department stops short at mere receipt of income, then the Department must fail in bringing home the liability to tax of individuals as an association of persons." [Emphasis supplied]*

The Bombay High Court therefore asked whether the taxpayers "earned or helped earn income" so as to constitute an AOP or whether they merely received income, and concluded that they did not earn income by reason of their association in spite of owning the property as joint tenants.

It was this definition of AOP that was challenged before the Supreme Court, by way of two appeals which arose from similar facts and questions of law and were therefore heard together.

C. The Supreme Court Ruling

Two aspects of the Supreme Court's ruling are relevant to emphasise. The first relates to the formulation of the definition of AOP while the second relates to the application of the proposed definition.

In its formulation, the Supreme Court broadly accepted the rule proposed by the High Court, although it did not expressly go into the distinction between earning and mere receipt of income. The Supreme Court first reviewed the legislative history of the term AOP, noting that the concept was first introduced into the ITA 1922 in 1924, by addition of "association of individuals" to the definition of "person." This was subsequently amended to AOP in 1939. The Court noted that the terms "association of individuals" and "association of persons" continued to remain undefined except through judicial pronouncements, and therefore, in the absence of a statutory definition, attempted to define the term. It began by referring to the Oxford dictionary meaning of the term "associate," meaning "to join in

common purpose, or to join in an action" and held that since the words occur in a section which imposes a tax on income, the association must be intended to produce income, profits, and gains. It also quoted, with approval, the ruling of Justice Costello in *In re: B. N. Elias*,[18] to infer that a requirement of joint management or joint enterprise was central to the definition of AOP. I will return to this point later.

I. Common Source of Income or Common Management?

An argument was made by the revenue, that since the issue pertained to the existence of a common source of income in which two or more persons were interested, it was immaterial whether there was a scheme of common management or not. Revenue argued that the AOP definition should cover all situations involving a common source until the parties involved came to an agreement by which they made their undivided shares separate before it emanated from the source. This alternative definition would have had merit if the intent behind including AOP as a separate tax unit was to prevent income shifting between the parties behind it.[19] This approach would have been in harmony with how we tax other tax units like discretionary trusts[20] or HUFs[21] which contain the potential for income shifting between members, and which levy tax at the entity level until the share of individual beneficiaries is partitioned or otherwise becomes clear. However, the

18 "It may well be that the intention of the legislature was to hit combinations of individuals who were engaged together in some joint enterprise but did not in law constitute partnership When we find that there is a combination of persons formed for the promotion of a joint enterprise then I think no difficulty arises in the way of saying that these persons did constitute an association." In re: B. N. Elias [1935] ITR 408.

19 Since income tax is levied on a progressive basis (i.e. at different rates depending on how much income a taxpayer has), allocating income to particular taxpayers, and preventing the shifting of income between taxpayers is frequently an objective of the manner in which income tax provisions are designed.

20 In the context of discretionary trusts, for example, the proviso to Section 41(1) of the ITA 1922 specifically stated that where incomes are "not specifically receivable on behalf of any one person, or where the individual shares of the persons on whose behalf they are receivable are indeterminate or unknown, the tax shall be levied and recoverable at the maximum rate, but, where such persons have no other personal income chargeable under this Act and none of them is an artificial juridical person, as if such income, profits or gains or such part thereof were the total income of an association of persons."

21 Under the ITA 1922, an HUF was a separate taxable unit under law, irrespective of whether the Karta "actively managed" HUF property. At the time when the ruling was delivered, female members were not considered coparcenors of HUFs, but were only entitled to maintenance rights. Therefore, different tax rules were applicable for family units comprising of male and female members, and units without a dominant male member. Although HUFs are still specifically considered to be separate taxable units (irrespective of the activity that takes place within them) female members are now considered to be coparceners, pursuant to some amendments to the law in 2005.

alternative definition was dismissed by the Supreme Court without adequate reasoning, as being neither conclusive nor determinative of the question at hand.[22]

II. AOP v. Other Tax Units?

Along similar lines, the revenue argued that in defining the term AOP, the Supreme Court should interpret the term ejusdem generis with the other forms of taxable units under section 3 of ITA 1922, namely companies, firms, and HUFs. The court was perfunctory in its dismissal of this argument, stating that these entities have "widely differing characteristics." While it is true that these are different kinds of entities, the question that would have been appropriate to ask would have been: whether the tax treatment of a system of joint tenancy applicable to female heirs should be the same as the treatment of a system of joint tenancy applicable to male heirs (such as an HUF[23], which, at the time, could only comprise of male coparceners)[24]?

On application, the Supreme Court began by examining the position of the taxpayers as co-heirs under Mitakshara law. It observed that as per applicable succession law, widows "take [property] as joint tenants with rights of survivorship and equal beneficial enjoyment."[25] In an explanation of the joint tenancy system, the court further stated that:

> *"[t]hough they take as joint tenants, no one of them has a right to enforce an absolute partition of the estate against the others so as to destroy their right of survivorship. But they are entitled to obtain a partition of separate portions of the property so that each may enjoy her equal share of the income accruing therefrom."*

The court also noted that on facts, the Tribunal found that the taxpayers did not exercise their right to separate possession and enjoyment and "chose to manage the property jointly, each acting for herself and the others and receiving the income of the property which they were entitled to enjoy in equal shares". This fact of joint management was undisputed.

22 However, see infra, note 44.

23 HUFs are taxed as a separate tax unit irrespective of the activity that takes place within the HUF. Their taxability is therefore based on status, whereas the taxability of female co-heirs under the AOP definition would have been based on a requirement of a certain kind of action. Also see Part E of this paper for a discussion on Body of Individuals ("BOI"). BOI was subsequently introduced into the law as a separate tax unit to include female co-heirs, with a lower requirement of positive joint management than the AOP.

24 A position now changed by the 2005 amendment to the Hindu Succession Act 1956.

25 It is relevant to note that the system of joint tenancy applicable to widows under the Mitakshara school is not the same as the English system of joint tenancy, or for that matter the system of joint tenancy under which coparcenary property was held by male inheritors (See Pothi v. Nagana, Appeal No. 119 of 1912 [1915] 28 MLJ 423). Hindu co-widows inherited a joint possession and undivided interest in the estate, with rights to manage and enjoy the estate during their lifetime but limited rights of alienation. This position underwent a change pursuant to the codification of the law in 1956 by additions of sections 14 and 19 to the Hindu Succession Act 1956.

At this point, the Court should have examined how the facts on joint management as recorded by the Tribunal as well as the relevant Mitakshara law rules[26] wove into the proposed definition of AOP. It did not do so. By way of example, with respect to the shares, dividends and interest on deposits, the Court held simply that "…there was no finding of any act of joint management" and that "[t]he only finding is that they have not exercised their right to separate enjoyment, and except for receiving the dividends and interest jointly, it has been found that they have done no act which has helped to produce income in respect of the shares and deposits." In language that was particularly telling, the Court further held that "…it is difficult to understand what act of management the widows performed in respect thereof which produced or helped to produce income."

A deeper and more contextual analysis may have cast further light on the nature and extent of management undertaken by the assessees, both factually and as a matter of law, even on application of the same definition. For instance, under the system of inheritance then applicable to co-widows, they would have been considered (to some extent) as fiduciaries with an obligation to reversioner estates.[27] Although they had rights of enjoyment during their lifetime, they were not permitted to alienate or diminish the property to the detriment of persons with a right of survivorship, thus obligation to preserve could itself be construed as an obligation of positive management.

D. The Feminist Judgment

The feminist judgment adopts a slightly different approach to both the articulation and application of the AOP definition, with significantly different consequences. It understands the exercise of agency more broadly than the original judgment, and finds agency both in the decision of the assessees to stay together, and in their management of the estate. In doing so, the feminist judgment rejects the passivity ascribed to the assessees in the original judgment and casts them as economic actors exercising volition over their economic affairs.

On the definition of AOP, the judgment relies on two cases which were also referred to by the Supreme Court in its original ruling. The first is the Calcutta High Court ruling in the case of in *In re: B. N. Elias and Others*, which held on the subject of what constitutes an association that, "[w]hen we find that there is a combination of persons formed for the promotion of a joint enterprise then I think no difficulty arises in the way of saying that these persons did constitute an association."[28] The feminist judgment agrees with the Calcutta High Court conclusion that the coming together of a group of persons for the purpose of a joint enterprise constitutes an association for the purposes of the ITA 1922.

26 Note that under Hindu succession law as applicable then, a Hindu widow's power to manage her estate was compared to the manager of an infant's estate, i.e. containing a fiduciary responsibility. See Kameshwar Pershad v. Ram Bahadur [1880] 6 Cal 843 and *Mulla / Desai*, note 17, p. 298.

27 Ibid.

28 [1935] ITR 408.

However, whereas the Supreme Court moved on from *In re: B. N. Elias* to then examine whether the taxpayers had combined in a joint enterprise to produce income, the feminist judgment first asks whether the association, or the purpose of coming together, must be voluntary. It asks whether "the fact that the coming together of a group was impelled by external factors indicate that they had not "associated" for the purposes of the Income Tax Act, 1922?" On this question, it relies on the Bombay High Court ruling *In Re Dwarakanath Harischandra Pitale*,[29] which dealt with a group of individuals who received property under a will. The Bombay High Court held that, "as soon as they elected to retain the property and manage it as a joint venture producing income, they became an association of individuals for the purpose of the Income Tax Act, 1922." [30] In other words, the feminist judgement finds that an AOP is constituted as soon as a combination of persons is formed for the purpose of a joint enterprise, irrespective of whether the combination was originally voluntary, so long as the persons choose to retain the property and manage it jointly.

This introduces what we may refer to as the volition question. Although the Supreme Court does not confront the issue of volition directly, underlying its emphasis on joint management, its requirement that parties "come together for the purposes of generating income," is an insistent suggestion that volition is important to the AOP definition, followed by a conclusion that the assessees did not have it. The feminist judgment addresses this by concluding that the volition sufficient for an association can exist not only in "coming together" but also in "staying together." This is significant, for reasons that are discussed in Section F below.

On application, the feminist judgment pays more attention to the observations of the Tribunal as well as the jural relationship of the parties under applicable law. It refers to the Hindu Women's Right to Property Act, 1937, under which the taxpayers were entitled to hold the property as joint tenants and notes the observations of the Tribunal on facts, that the taxpayers chose to continue to manage the property jointly. Therefore, since they were brought together as a matter of law and did not actively choose to partition or enjoy the property separately (which was established on facts), it holds that an AOP has come into place. Notably, (in relation to a provision which required separate ownership under section 9(3) of ITA 1922), it highlights the status of the heirs when it states that "the essence of

29 [1937] 5 ITR 716 (Bom).

30 The term "association of persons" replaced "association of individuals" pursuant to an amendment of the ITA 1922 in 1939.

Mitakshara survivorship is unity of ownership," as a consequence of which they cannot be considered to individually own the property.[31]

In sum, the feminist judgment softens the requirements of the AOP definition by articulating the volition question and ruling that "staying together" is as sufficient for an association as "coming together" is.[32] Then, while applying the definition, the rewrite conducts a deeper and more contextual analysis than the original judgment (which merely held that "it is difficult to understand what act of management was performed"). It does so by looking into the nature of ownership and the rights of heirs under succession law, as reinforced by the choice exercised by the taxpayers in staying together, to hold that an association came into existence.[33] By adopting this approach, the rewrite narrows the difference between the treatment of male co-heirs (taxable by virtue of their status as a HUF) and female co-heirs (taxable only upon specified kinds of action, as an AOP).

E. Indian Tax Law after *Indira Balakrishna*

As I have noted above in Section A, the tax policy considerations governing how we define a "tax unit" are fundamental to our understanding of this case. In defining artificial tax units such as an AOP, we need to consider economic cohesiveness, i.e. what would justify the taxability of a group of individuals as a single collective unit, rather than as individuals. However, there are no universally accepted norms on what standard of economic cohesiveness justifies taxability as a collective unit. Economic cohesiveness can either be read into status (as with a marital unit) or from action i.e. what the taxpayers did or did not do. To define a HUF as a tax unit is to proceed on the basis of status, to say that male coparceners[34] who collectively own property through a HUF are economically cohesive irrespective of what they do within the HUF. The Supreme Court in *Indira Balakrishna* did not define the AOP with reference to the status of the taxpayers as co-heirs, perhaps rightfully so, as it may have intended for the definition of AOP to be applicable in a broader

31 It is relevant to highlight that the Advocate General made this argument regarding limited ownership before the Bombay High Court, but withdrew it when the High Court pointed out that if the argument were to be accepted, the assessees may not pay tax at all, since income can only be taxed in the hands of an owner. However, the anxiety of the Bombay High Court seems misplaced, since the restrictions of limited ownership only applied in relation to disposition. Widows who inherited as co-heirs did have significant flexibility to use incomes generated from the property during their lifetime, subject to certain duties towards reversioner estates.

32 See the last paragraph of the rewritten judgment which states, "In a case where the actions that assessees may take in respect of the inherited investments are limited by law, their decision to continue as joint holders of the property and not to enforce partition is yet another factor in deciding whether they are earning the income as an association of persons or as individuals."

33 Specifically, it states that "The essence of Mitakshara survivorship is unity of ownership" and that "By holding the investments jointly and not enforcing a partition, assessees have continued the association that was constituted by the law, giving rise to an association of persons."

34 Since 2005, females are also considered coparceners in a HUF.

set of circumstances.[35] However, it then compounded the situation by its unstated insistence on the volition question coupled with its myopic approach to the question of activity within the AOP, concluding that "it is difficult to understand what act of management was performed." In doing so, it left open the question of threshold – what was the nature and quantum of volition and activity (be it management/ income generation motive, etc.) needed for an AOP, and why exactly did the taxpayers not meet it? The law is poorer and more disparate for its failure to do so.

For many years after *Indira Balakrishna*, the volition question continued to guide the inquiry of courts into the existence of an AOP, albeit inconsistently. Courts held that volition was critical,[36] but did not subject it to standards of free contractual consent - minors lacking legal capacity could still be a part of an AOP,[37] for instance, and volition resulting from coercive circumstances such as a direction of the court was still sufficient for an AOP.[38] On the question of the activity required within an AOP, courts tended to focus on either the income generation objective or joint management,[39] and differed on the extent

35 Ideally, the legislation itself should have included all persons with the status of co-heirs (such as HUFs and widows with limited estates) as similarly taxable tax units. If this had been done, the AOP definition could have been applicable to a narrower set of circumstances, to persons brought together by a voluntary or contractual arrangement, for instance, and would not have been required to be extended to different sets of persons, some brought together by the law and others by contractual arrangement.

36 See G. Murugesan & Bros v. CIT [1973] SCR (3) 515; Rama Devi Agarwalla and Ors. v. CIT [1979] 117 ITR 256 (Cal); CIT v. T.V. Suresh Chandran [1980] 121 ITR 985 (Ker); CIT v. Sehgal Oil and General Mills [2008] 303 ITR 102 (PH).

37 Several cases have held that children can be members of an AOP, although some held this to be contingent on the consent of a guardian. See G. Murugesan & Bros v. CIT [1973] SCR (3) 515 and MM Ipoh v. CIT [1968] 67 ITR 106 (SC) which relied on the previous Supreme Court ruling of CIT v. Laxmidas and Anr. [1937] ITR 584; Mahendra Kumar Agrawalla v. ITO [1976] 103 ITR 688 (Patna); CIT v. C Karunakaran [1988] 170 ITR 426 (Ker). Note that these were all cases where a male adult was also a part of the AOP along with the minors. Also see note 39.

38 See N.V. Shanmugam And Co. v. CIT [1970] AIR 1707 (SC); CIT v. Buldana District Main Cloth Importers [1961] AIR 1261; Joint Committee v. CIT 48 ITR 427.

39 On intention to earn income, in the context of corporate taxpayers, several cases held that consortiums set up for the purposes of coordination were not an AOP since their object was not to produce income. See Van Oord ACZ BV In Re [2001] 248 ITR 399 (AAR); Hyosung Corporation In re [2009] 314 ITR 343 (AAR); Hyundai Rotem Co. In re [2010] 323 ITR 277 and Linde Ag, Linde Engineering v. DDIT W.P. (C) NO. 3914/2012 & CM No.8187/2012. See also Commissioner Of Income-Tax v. Chandmal Rajgarhia [1995] 43 BLJR 516 which held that, "unity of the income-making purpose rather than the unity of title in the income-yielding asset" was critical to an AOP and N.V. Shanmugham and Co. v. CIT [1970] 2 SCC 139 which held that the existence of specific or defined interest in the profits did not reduce such common purpose. On joint management, see the Patna High Court ruling in Mahendra Kumar Agrawalla v. Income-Tax Officer [1976] 103 ITR 688 (Patna), the Madras High Court rulings in State of Madras v. S. Subramania Iyer [1966] 61 ITR 613 (Mad), A. M. C. Muthuvaithilingam Chettiar v. Government of Madras [1968] 69 ITR 330 and T. Periaswamy Gounder v. Agrl. Income-Tax Officer [1982] 134 ITR 155 (Mad), the Karnataka High Court in B.T. Manjappa Gowda and Ors. v. State of Karnataka [1984] 150 ITR 303 (Kar) on how mere common management is not sufficient for an AOP.

of unity required for common purpose.[40] While the mere receipt of income was generally considered insufficient, co-purchase did result in an AOP in several situations, even if no other activity took place within the unit[41] although this rule did not apply the same way if all the co-purchasers were women.[42] Along similar lines, in relation to property held by co-heirs, a series of rulings ensued which held that merely inheriting a share in joint property would not constitute an AOP[43] in the absence of sufficient intention and will showing some forbearance or act.[44] But again, what was the essential nature of this forbearance or act? Merely appointing someone to collect income was not sufficient[45] but the positive content of the requirement seemed to vary.

We should note that in the applicable assessment years (1950-51 and 1951-52), the taxpayers were governed by the Indian Income Tax Act, 1922 ("ITA 1922"), which identified an AOP as a separate tax unit but did not define it. The term AOP continues to be undefined under the legislation applicable today, the ITA 1961, and the definition laid down in this case became the most widely accepted and applied judicial definition of the term.

Ironically, the 1961 ITA introduced a tax unit known as a "body of individuals" ("BOI"), which was similar to an AOP except that the degree of volition required was lesser – BOIs required a "common interest", but no "common design" (although they still excluded co-heirs who merely receive income jointly).[46] Until the amendment of Hindu

40 Note that the feminist judgment does not examine these questions of threshold more deeply, choosing as it does to simply state that the assessees satisfy the threshold. Meanwhile, in 2002, a legislative amendment to the ITA 1961 did away with the income generation objective entirely, and it is no longer essential to the formation of an AOP.

41 An AOP was found to exist when ten persons jointly purchased lottery tickets (CIT v. A. U. Chandrasekharan & Ors. [1998] 229 ITR 406 (Mad); and when they joined together to purchase land, just to sell it shortly after (Smt Parvathi Devi v. CIT [1987] 164 ITR 675 (AP). AOPs were also found to exist where the incomes generated were passive. See CIT v. Shivsagar Estates [1993] 204 ITR 1 (Bom) on interest from a loan assessed in the hands of an AOP.

42 See Rama Devi Agarwalla And Ors. v. CIT [1979] 117 ITR 256 (Cal) and CIT v. Smt Saraswati Bai [1982] 137 ITR 656 (Punj) where an AOP was considered not to exist when a group of women bought property as co-purchasers, in comparison with supra note 37 which lists cases where a group of men/mixed group co-purchased property and were considered to form an AOP.

43 See C Ag IT v. Raja Ratan Gopal [1966] 59 ITR 728 (SC); BTR Punja v. C Ag IT [1967] 63 ITR 442 (Mys); CGT v. R. Valsala Amma [1971] 82 ITR 828; State of TN v. Thiruvalargal Singara Estate [1996] 217 ITR 199 201 (Mad); CIT v. NK Patni [1998] 234 ITR 12; CIT v. MP Jayaram [1998] Tax LR 818 (Mad).

44 Such act could be demonstrated within and notwithstanding the jural relationship. See for example the Madras High Court in Estate of Mohamed Rowther v. CIT [1963] 49 ITR 39 (Mad) where Mohommedan co-heirs inherited a business and permitted the receivers to carry on the business. The business could not be divided and the parties intended for it to be carried on as a whole. They were treated as AOP. See also Mohamed Noorullah, Representing the Estate of Late Khan v. CIT [1961] AIR 1043.

45 C Ag IT v. Raja Ratan Gopal [1966] 59 ITR 728 (SC); CIT v. Devadasan [1967] 63 ITR 569 (Ker).

46 See Deccan Wine and General Stores [1977] 106 ITR 111 for the meaning of BOI.

Succession Act in 2005, the term BOI was relied upon to include groups of heirs without a leading male member.[47] Such groups would not have constituted a HUF in several states prior to 2005 but also frequently failed the test of AOP.[48] Leaving aside the benefit of hindsight, had the feminist reasoning been applied, the ambiguity surrounding the content and application of the volition question may not have been as widespread, and the law perhaps more consistent and robust on that account .

Finally, although the contours of the feminist judgment are set by precedent, we should pause to ask whether the emphasis on volition/activity was entirely misplaced to begin with, motivated by a belief that only action of a particular kind can result in income. To articulate the AOP definition as a question of volition/activity is to leave open the field for differential, potentially inequitable application of the rule depending on the judges and parties involved.[49] If we were allowed a fresh page, perhaps a definition targeting income shifting[50] may have made more sense, in addition to being better in sync with standards of equitable application[51] and therefore, good principles of tax policy.

47 In Deccan Wine and General Stores [1977] 106 ITR 111, the Andhra Pradesh HC held that a mother and two minor children could not constitute an AOP because the guardian would need to consent with herself, but should satisfy the test of BOI. Ironically, in coming to its conclusion, the Court refers to MM Ipoh v. CIT [1968] 67 ITR 106 (an AOP comprising of a male and a minor child) but does not distinguish it on facts. Also see note 29. See also Meera & Co v. CIT [1997] 224 ITR 635 (SC) where the widow of the deceased and three minor children were considered to form a BOI, as well as NP Saraswathi Ammal v. CIT [1997] 224 ITR 635; CIT v. Smt Renuka Ganguly [1999] 240 ITR 889; Sakinabai Ibrahim and Sons v. CIT [2000] 241 ITR 71.

48 See footnote 58 above. The treatment of erstwhile HUFs under the AOP provision is also interesting, considering that HUFs were taxable as a separate unit irrespective of what goes on within, but often failed the AOP test after partition. See Bolla Tirapanna v. Sons [1969] 71 ITR 209 (AP); Sri Ladukishore Das v. State of Orissa [1973] 87 ITR 555 (Ori); State of Madras v. Subramania Iyer [1966] 61 ITR 613 (Mad); C Agri IT v. ML Bagla [1971] 80 ITR 173 (SC); B.T. Manjappa Gowda and Ors. v. State of Karnataka [1984] 150 ITR 303 (Kar); CIT v. Indramohan Sharma And Others [1982] 138 ITR 699 (Bom).

49 See Part E of this paper for some examples of how this can happen.

50 See supra note 19.

51 See supra notes 22 and 23. Even under the law as it stands today, section 164 of the ITA 1961 taxes discretionary trusts at the trust level if the identities or shares of the beneficiaries are unknown, as it anticipates that income may be shifted amongst beneficiaries. If the court had accepted the Revenue's argument (that the AOP definition should cover all situations involving a common source until the parties made their undivided shares separate), the regime for taxing AOPs would have been similar to the treatment of discretionary trusts, and less subject to variable application depending on the facts and circumstances of individual cases. This approach was applied selectively in some cases which held that where the shares are not definite and ascertainable, co-owners should be considered as an AOP. See CIT v. Abubaker Abdul Rehman And Others [1939] 7 ITR 139 (Bom).