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**PROTECTION AGAINST UNJUST ENRICHMENT AND  
UNDESERVED MISERY AS THE ESSENCE OF PROPERTY  
RIGHT JURISPRUDENCE IN MITAKSHARA\****P. Ishwara Bhat\*\****I Introduction**

PROPERTY RELATIONS fundamentally shape a society, while the concept of justice endeavours to mould both property and personal relationship. The task of rendering to each person his due is a respectable agenda in economic processes and in distribution of their outputs. It enhances the moral worthiness of ownership of property. In a predominantly agrarian economy as that of ancient India and in a traditional society with its unique corporate institutions as that of joint family and associations, property had to perform the social security functions and eschew injustice. In addition to looking to the justifications for entitlement to property, a focus on the function that property performs in mitigating the injustices and sufferings is a socially worthy task.

The above distinct approach is the hallmark of property jurisprudence in Vijnaneshwara's *Mitakshara*, which is an authoritative commentary written in 11<sup>th</sup> century A.D. on *Yajnavalkya Smriti*. It responded to the prevalent social problems and post *Smriti* experiences, and developed the approach of justice to property right. Its position as prominent law of the land applicable to whole of India except West Bengal is justifiably owing to the fact that it could build up satisfactory legal principles based on justice and reason rather than on power relations. When one reads it as a whole and as a part of Hindu philosophy<sup>1</sup>, as it should be, one gets an impression that the western approaches of looking to property

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\*\* M.A., LL.M, Ph.D, Professor and Dean, Faculty of Law, University of Mysore, Manasagangotri, Mysore.

1. I.S.Pawate, *Daya-Vibhaga: Or the Individualization of Communal Property and Communalization of Individual Property in Mitakshara Law*. i. (1975).



only as the reward for one's labour, or as an outcome of governmental recognition or as reflection of personality or as instrument of oppression fall far short of a comprehensive approach that is required to project and uphold indigenous collectivism. In the modern context, percolation of the values of dignified life, and economic and social justice to the issues of family life<sup>2</sup> can be supported, not only by application of constitutional principles, but also by finding their doctrinal roots in *Mitakshara*. This paper is an attempt to identify *Mitakshara's* core approach to property, its basis, use, limits, the method of individual realization and measures of obligations as reflected in its detailed but compact scheme,<sup>3</sup> and evaluate its social significance and present day relevance.

## II The concept

Unjust enrichment and undeserved misery are both independent and interconnected situations of imbalances in economic relations. Whereas the former means getting economic benefit to oneself at the cost of another in contractual or property relations, the latter connotes a helpless situation arising from lack of access to resources without justifications for the same. The latter is not exactly opposite of the former. For example, the pathetic situation of women, children and slaves arising from disregard, misconduct and irresponsible act on the part of *karta* (manager or head of the family) or Hindu coparcener brings undeserved misery; but it may not always involve unjust enrichment of the male. However, undeserved serious loss as a counterpart to unjust enrichment of another may also bring misery. Avoidance of misery involves some overt approach to assist the weak by obligating the person who has moral if not legal responsibility to assist. Although many types of miseries deserve to be properly tackled through benevolent state action,<sup>4</sup> misery in the context of family life or contractual or property relations needs to be resolved by imposition of personal obligations upon the concerned individuals. As will be discussed in the paper, it is in wrestling against unjust enrichments in contractual relations, adverse possession or enjoyment of property that *Mitakshara* established clear and sound principles, which go beyond the common law rule against unjust enrichment.

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2. Such development has taken place in *Madhu Kishwar v. State of Bihar*, AIR 1995 SC 1864; *Daniel Latifi v. Union of India*, AIR 2002 SC 3958.

3. Etymologically *Mitakshara* means compact or precise code.

4. *Manu VIII*. 28 ordains that the king shall take care of and protect the property of women who have none to look after them, if they be childless, widows or whose husbands have gone abroad and yet remain loyal to their husbands, or who are afflicted with disease or have no family.



In English common law, the rule against unjust enrichment was developed as a principle of equity and good conscience in the realm of quasi contract and in the law of restitution as heterogeneous collection of civil actions. Mansfield L.J. attempted to give broad doctrinal base to this branch of law in equity, natural justice and *aequum et bonum* rather than allowing to sink it in the marsh of technicalities.<sup>5</sup> Winfield recognizes quasi-contractual liability as involving inter party relationship to avoid unjust enrichment and not exclusively referable to any specific head of law.<sup>6</sup> Law of restitution is restated to mean that a person holding title to property is under an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it.<sup>7</sup> In French law, the principle *acteo de in rem verso* is founded on the principle of equity and forbids one man to enrich at the expense of another.<sup>8</sup> The western concept is limited to situations of law of contracts and is influenced by equity. It has no larger aim of avoiding misery within the family and in the collective life. Further, its evolution in technicalities of law rather than in sound jurisprudence of justice has stunted its growth as a general principle. But the *Mitakshara* approach, as will be explained, forms an overwhelming undercurrent that influenced vast area of property right jurisprudence towards a comfortable legal position. In order to know its reach and implications, it is first appropriate to know its philosophical background or objectives in ancient India and examine whether the *Mitakshara* approach transcends some of the property theories such as labour theory, relationship theory, social security theory and religion theory, and whether suggests about more fundamental basis for property right in justice itself.

Property has a facet of social interest. Some of the essential social interests to be recognized in any civilized system for promoting general security are protection of individual interests in personality, in domestic relations and in interest of substance, as Roscoe Pound views.<sup>9</sup> Interests of personality like security of one's physical being, privacy, honour, reputation and religious belief can be realized only through some access to property. Right to dignified life is the basis for claims for maintenance in order to have satisfaction of these interests. Interests in domestic relations get protected when the interests of parents, children, husbands, wives and other dependents are satisfactorily safeguarded. According to Julius Stone, indissolubility of marital tie brings right of support,

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5. *Moses v. Macfarlan*, 1760 2Burr.1005

6. P.H.Winfield, 54 LQR 529(1938). He regards mixing of common law and equity as confusing.

7. G.W.Paton, *A Textbook of Jurisprudence* 485 (1972).

8. *Ibid*

9. Roscoe Pound, "A Survey of Social Interests" (1943-44) 57*Harv L Rev* 1.



incidental to protection of the family.<sup>10</sup> Interests of substance include property, promised advantages, advantageous relations with others, freedom of association and continuity of employment.

Regarding property, the western jurisprudence treated power of control over it as the basis without bothering about moral justifications.<sup>11</sup> Assurance of promised advantages in case of injurious reliance is another principle that law honours to avoid undeserved loss.<sup>12</sup> Collective interests involved in the association's property also demand abstinence from fraud, personal profit and other misconduct. Fair wages to labour and protection of employer from losses arising from labourer's work are the interests involved in continuity in employment.<sup>13</sup> On the whole, the emphasis on protection of legitimate expectations is central to property jurisprudence in order to conform to the social interests. While these core principles are traceable in *Mitakshara* also, unlike the western model, moral expectation about just relations in economic or property matters is a prominent idea put forward by Vijnaneshwara as distinct from earlier *Smritikaras*. That was a logical outcome of reflection upon Hindu philosophy of social obligations embedded in paramountcy of *dharma*. This provokes us to search for property's basis in philosophy.

### III The philosophical roots of property

Subordination of economic processes (*artha*) and desires (*kama*) to just law/justice (*dharma*) is one of the prominent approaches of Hindu philosophy for attaining salvation (*moksha*).<sup>14</sup> It was laid down in *Yajurveda* (40<sup>th</sup> Ch) and reiterated in *Ishopanishad* that since God is pervaded in all the subjects of this world, one should enjoy all objects with detachment without coveting the wealth of others.<sup>15</sup> Sacrifice (which includes work) is the basis of entitlement to *svatva* or property. One should earn with hundred hands by fair means to perform *dana* with thousand hands.<sup>16</sup> *Taittiriyanishad* appealed, "Ensure an abundance of food all around. Do not turn away any one who comes seeking your hospitality. This is the inviolable discipline of life".<sup>17</sup> *Rigveda* prescribes moral and legal duty upon the individual to feed the starving and says,

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10. Julius Stone, *Province and Function of Law* 565-66.

11. *Id.* at 527-28.

12. *Id.* at 537-38.

13. *Id.* at 558.

14. *Manu II* 224 & IV 176; *Yajnavalkya I*-115; *Gautama* 221.

15. *Ishopanishad Shloka* 1

16. *Atharvaveda* 3-2, 4-5; also see S.K.Purohit, *Ancient Indian Legal Philosophy* 212-13 (1994).

17. *Taittiriyanishad*



“Eating for himself alone, he becomes the partaker of sin alone”.<sup>18</sup> Non-theft (*astheya*) and non-acceptance of another’s property (*aparigraha*) were preached as important moral precepts.<sup>19</sup> Introduction of *karma* philosophy into one’s entitlement to property not only ordained to eschew jealousy but also insisted on good work.<sup>20</sup> Within the collective framework of family, duty to maintain all the family members signified social security factors emanating from property.

*Smriti* literature, in addition to continuing the above religious prescriptions and moral principles, elaborated the methods of excluding unfair property relations. *Yajnavalkya Smriti* is an outstanding religious/legal text that reflected these values. Vijnaneshara, an erudite pragmatist who responded to the local customs and practices, made a rational analysis of the concept of property in this way. About acquisition of property, he says, “Property is a thing connected to one’s self. (*Swamatmasambandhi dravyam*).”<sup>21</sup> The act of the acquirer like acceptance of friendly donation or thing found or gift made by the virtuous person; or payment of price in case of purchase; or conquest of enemy and seizure of his property in war; or lending of capital for interest; or performance of work and acceptance of wage for the same linked him to the thing acquired.<sup>22</sup> After establishing that property is product of action, quite importantly, he viewed property as an instrument for action, which has for its purpose a *laukika*, or secular thing (*laukikartha kriyasadhanatwam*).<sup>23</sup> By saying that *svatva* is *laukika* or temporal and not the one that can be perceived only by means of the *shastras* (*shastraika samadhigamya*), the advantage of property has flown to benefit women, widows and children.<sup>24</sup> This action-oriented concept of property visualized about good things and healthy consequences emerging from property’s use and allocation within the family, in contractual relations and in endowments.

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18. *Rigveda*; also see *Atharveda* 3-30-6 to the effect: “O men your drinking places be common. You take food together I bind you by the bond of love...O men, make you men, who enjoy things together, and become of one mind and take food together.”

19. *Manu* X-63, VI-92; *Mahabharat* 19-62.1.

20. *Bhirrhari Nitisataka*: “yaddhathraa nijabhaalapattalikhitam stokam mahadva dhanam...” “Whether little or plenty, whatever property is blessed by the Lord will be got by human being even in desert. He will not get more than what is ordained even by living on the golden mountain, Meru. Hence, be bold. Don’t be humble with the rich in vain. Whether in well or in sea, a pitcher can hold only what it can contain.”

21. *Yajnavalkya.II*. 168 cited by I.S. Pawate, *supra* note 1 at 85.

22. I.S Pawate, *supra* note 1 at 240-42.

23. *Id.* at 231-32.

24. *Id.* at 229.



Thus, both in the origin and use, property had to conform to social ethics of good action and fairness. Vijnaneshwara, while propounding this approach, committed himself to the proposition that the ultimate source of information on the validity of acquisition is popular recognition.<sup>25</sup> Finding the principles of justice and fair play in popular recognition was within the acumen of this great jurist. Certainly it was not a mechanical codification of the past law and practice, as new elements of justice were introduced to support the growth of law. The central principle that he developed on the concept of property had foundation in justice, which got manifested in various specific rules.

One may probe into the justification or basis of property in *Mitakshara* by asking whether any of the following or their combination viz., labour, birth, religion, recognition of legitimate expectation, means of social security, utility, class relations or justice served as *raison d'etre* for property.

Since the social site for property's functioning was family or community life, it is appropriate to have a glance at collectivism that flourished in these institutions, as an initial exercise. *Rigveda* inspired the members of a family with unity of mind and heart:<sup>26</sup>

Like-heartedness, like-mindedness, non-hostility do I make for you; do ye show affection, the one towards the other, as the inviolable cow towards her calf when born. Be the son submissive to the father, like-minded with the mother; let the wife speak to the husband words full of honey, beneficent. Let not brother hate brother, nor sister sister; becoming accordant of like courses, speak ye words auspiciously. Your drinking be the same, in common your share of food; in the same harness do I join together; worship ye Agni united, like the spokes about a nave.

Joint family's foundation in natural love and affection<sup>27</sup> and the practice of looking to one's life as a part of the life of others made the members to gather rational, emotional and physical support in their life.

The widening circles of social organizations like guilds, *shrenis*, village community and state provided additional forum for collective economic activities. Property right got purged in the warmth of collectivism and assumed functional importance of service. Because of collectivity of ownership, or property owner's inextricable relations with others in connection with property, the factors of trust, good faith and

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25. J. Duncan M. Derret, *Religion, Law and the State in India* 138 (1968).

26. *Atharvaveda III.30*. 1-3, 6-7.

27. B.N. Sampath, "The Joint Hindu Family-Retrospect and Prospect" *Banaras Law Journal* 35 at 47-8.



sincerity stood against unjust enrichment. Now, let us turn to specific theories.

#### IV Labour theory of property

This theory primarily believes that property can be claimable on the exclusive basis of one's work, which produced that property.<sup>28</sup> This is too individualistic to suit to the collectivity of joint Hindu family. For the aged, the ill ridden or the child, work could not be insisted as the source of entitlement to sustenance as a matter of humanist policy. While *Mitakshara* adheres to this collectivist approach, and goes to the extent of denying *jyeshthabhaga* right of the eldest son on this basis,<sup>29</sup> it recognizes the role of labour at least in following contexts for adequate rewards.

First, when the acquisition is without detriment to the ancestral property (*pitrdravyavirodhena yadanyat svayamarjitam*) and the acquisition is through the labour of the acquirer, it becomes the acquirer's self acquired property, which need not be shared with other coparceners.<sup>30</sup> Deviating from Brihaspati's text and amplifying Manu's dictum, Vijnaneshwara interprets *Yajnavalkya Smriti* on the point favouring individualization of self-acquisition.<sup>31</sup> He agrees with Katyayana on the proposition that the gains of learning (*vidyadhana*) which are impartible are only those gains, which are directly gained by the proof or display of superiority in learning and specified in the text when the learning itself was not acquired at the expense of the family.<sup>32</sup> Thus what was exclusively available to him was only the fruit of his own labour, pure and simple. If it had some basis in family property, family's entitlement came to the forefront. Since modes of self-acquisition were exceptions, the tilt in favour of collectivism was obvious. Protection against unjust enrichment is discernible in this balancing task, even while recognizing worker's right.

Second, in the sphere of master-servant relationship the dictum that 'wages proportionate to the work done must be paid' had reflected the principle against unjust enrichment. Commenting on *Yajnavalkya*

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28. John Locke propounded this theory in England in 17th century. John Locke, *Second Treatise on Civil Government* 26 (1986).

29. *Mitakshara* on *Yajnavalkya II.265*.

30. *Id.* at 108.

31. *Id.* at 118, 119. Srinivasa Iyengar (Ed.), *Mayne's Hindu Law and Usages* 365-66 (1938).

32. *Katyayana* 867-873; *Id.* at 118-119; P.V.Kane, *History of Dharmasastra* Vol.III 582-84 (1973); P.Ishwara Bhat, 'A Critical Appraisal of the Hindu Gains of Learning Act', 27 *JILI* 578 (1985); also see J.R.Gharpure, *Yajnavalkya Smriti*, Vol.II, 2nd Ed 1015-16.(1939).



*Smriti*,<sup>33</sup> *Mitakshara* lays down that when a hired servant, who was appointed to sell commodity at proper place and time fails to do so or undersells it, the master may pay wage at his discretion and not the entire wage. On the other hand, when more profits were made by reason of special knowledge of the worker, then the master shall pay an amount exceeding that fixed before to the labourer. Elaborating the *Yajnavalkya* principle<sup>34</sup> ‘as much a man does, so much will be his wages’, *Mitakshara* points out that when wages have been fixed for single task, which was undertaken but not accomplished due to illness or other impediment, then, in proportion to the work done by the labourer as determined by the arbitrator, wages shall be paid.<sup>35</sup>

Third, the question of ownership over the property acquired by the labour of woman, son and slave has been responded to some extent by *Mitakshara* by an approach avoiding unjust enrichment. Compared to *Manu Smriti* and other texts which regarded women, sons and slaves as not free, and hence not entitled to their earnings, the *Mitakshara* approach was radical, looked to the time and circumstances prevalent during its compilation. It regards that lack of freedom on the part of woman did not come in the way of her acquiring property (*tadastu paratantryam dhanasweekare tu ko virodha*).<sup>36</sup> It gives liberal interpretation of *stridhana* by elaborating the scope of the word ‘*adya*’ to include in it various types of woman’s property other than six classes of gifts made to her.<sup>37</sup> *Katyayana*, whose analysis of *stridhana* is approvingly cited in *Mitakshara*, said, “Wealth which is earned by mechanical arts, or which is received through affection (*pritya*) from any other but her kindred, is subject to her husband’s dominion. The rest is pronounced to be her *stridhana*.”<sup>38</sup> This meant that wealth earned by application of intellectual ability or business skill by a woman was her property. Husband’s dominion over earning from mechanical art was due to his facilitative and regulative role. Dominion did not mean total ownership but only control on wife’s right of disposal, as laid down in *Dayabhaga*.<sup>39</sup> In other words, there was hierarchy of ownership.<sup>40</sup> *Smritichandrika* differed from *Mitakshara* and stated, “A woman’s maintenance (*vritti*), ornaments, perquisites (*sulka*), gains (*labha*), are her *stridhana*. She herself has exclusive right to enjoy it.”<sup>41</sup> While accrual of interest or

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33. *Yajnavalkya II-195*.

34. *Yajnavalkya II-196*.

35. M.Rama Jois, *Legal and Constitutional History of India 192-94* (1984).

36. *Mitakshara on Yajnavalkya, II-135-6*.

37. *Mitakshara on Yajnavalkya, II.115 and 123*.

38. *Katyayana 895-902*.

39. *Dayabhaga IV.1.6*.

40. *Supra* note 1 at 29-33.

41. *Smritichandrika, IX. 2, 15*





profit is included in *labha* by Vyavahara Mayukha, Viramitrodaya includes in it presents received for pleasing Gowri.<sup>42</sup> J.D.Mayne observed, “The term ‘*labha*’ would include the earnings of a woman in a profession or trade or other employment.”<sup>43</sup> This analysis although apparently supports labour theory of property, its delineation of the boundary of *stridhana* keeps the family interests intact by avoiding unjust profit or loss.

*Mitakshara* recognizes son’s position as coparcener by birth. Deviating from the Manu text that whatever is earned by son wholly belongs to father, it gives an opportunity to the son to have self-acquisition, provided it satisfies the test of *pitrdravavyirodhena*.<sup>44</sup> Again, this avoids undeserved loss.

Regarding the position of slave, *Mitakshara* following Yajnavalkya adopts a radical approach that the sale of a person to become a slave, after having overpowered him by force, is illegal.<sup>45</sup> The buyer has no right to own him. He must release him and, if failed, it is the duty of the king to get him released. Further, if any slave happens to save his master’s life from peril, he shall not only be released from slavery but shall also be entitled to share in his master’s property as if he were his son.<sup>46</sup> Perhaps this influenced *Smritichandrika* to observe that *nija svarupa* or natural condition of man was freedom and that slavery was an unnatural or adventitious condition.<sup>47</sup> While in continuing the practice of slavery, Vijnaneshara had upon him the burden of ages and pressures of social life, his sympathy to slaves as reflected in the text was a trendsetter for humane treatment of slaves. In *vachana* literature that emerged in the same geographical area of Vijnaneshwara’s life and activity in the subsequent century, there was a clear policy of rejecting the practice of slavery.<sup>48</sup> Going beyond condemning slavery, Basaveshwara preached the sound philosophy of *kayaka* that comprised

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42. *Vyavahara Mayukha*, IV.x.3; *Viramitrodaya*, V.i.3.

43. *Supra* note 31 at 749.

44. *Mitakshara*. on *Yajnavalkya II*.108

45. Rama Jois, *supra* note 35 at 306-7.

46. *Mitakshara* on *Yajnavalkya II*.182

47. *Smritichandrika II*.201; This can be compared to the proposition in an English case of 18th century, *Somerset v. Stewart* (1772) Lofft. 1.; 20 St Tr 1 to the effect that the air of freedom is too pure to be breathed by a slave, and hence slaves shall be set free.

48. According to Basaveshwara, a doing, donating devotee deserved appreciation because almighty was the owner of all property earned through good work. He said, “If I lend myself, my treasure, my wealth for the business of usury and store it in the corners of my house, it is not my wealth, it is a curse.” Cited with translation from Kannada by Siddayya Puranik, *Human Values in Vachana Literature* 29-33 (1997).



work, purity of means, non-injury, application of one's own manual or mental labour, surrender of surplus of income for social good, and temporal and spiritual growth.<sup>49</sup>

On the whole, labour theory of property was not espoused in *Mitakshara* as the exclusive approach to property; but it was a tool in the larger concept of protection against unjust enrichment. It was extension of pro-labour approach that could usher in the sublime philosophy of *kayaka*.

### V Relationship as the basis of property

Relationship with the owner of property because of birth, adoption or marriage constitutes a basis for claiming property or physical support from the same. In any status conscious traditional society,<sup>50</sup> birth is an important factor of entitlement. The Hindu philosophy believed that birth not only continued the progeny and extended the personality of parents in a new human life, but also opened up opportunity for religious work and salvation.<sup>51</sup> Any addition of new member of family by marriage or adoption is also analogous to birth. Vijnaneshwara uses the term birth to indicate passing into a new state.<sup>52</sup> Accordingly, birth of fatherhood and sonship occur simultaneously just like relation of wife and husband is born out of marriage. *Mitakshara* reasons, "Acquisition is the act of the acquirer; and one, who has the state of ownership dependent on acquisition, is the acquirer. Is not birth, therefore, as the act of the son, rightly deemed his mode of acquisition? And have not sons, consequently, a proprietary right, during their father's life, and not by reason of his demise?"<sup>53</sup> In a similar fashion, the entitlement of daughter in the property of father and in the *stridhana* of mother, that of wife in the property of husband or that of husband in the property of wife is justified on the basis of relation.<sup>54</sup> Marital relation of a wife

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49. *Ibid.*

50. For example ancient Greek, Roman and Egyptian civilizations and medieval Europe

51. *Manu IX. 96*; I.S.Pawate, *supra* note 1 at 279; also note the belief that *aputrasya gatirnasti* referred to by all the *Smriti* commentators. Also see Kausheetaki Aranyaka Nirukta. Kannada poets like Devakavi, Kumaravyasa and Ponna have referred to the same proposition. See Kanthi Rao, *Bharatiya Nyaya Paddhati* 158 (1985).

52. "The body is but a blossoming forth of our own act." Yoga Vasishta, *Nirvana Prakarana, Uttarardha II.19*; *Yajnavalkya II.69* and *72*. Birth occurs not out of volition of the born, but out of the pre ordained relation of the past (*rinanubandha rupena pati patni sutalaya*-Subhashita).

53. I.S. Pawate, *supra* note 1 at 87-88.

54. *Id.* at 88-89.



with husband connects her to father-in-law's property. Relationship of a disciple (*shisya*) with his teacher (*guru*) may also bring proprietary right to the disciple. Thus, relations constitute source of property.

Linking of property to familial relations provides sound economic base for healthy family life. It brings emotional unity and builds cohesion with strong fibers of mutual help. Relations espouse expectations, arouse affection and demand positive attitude for cooperation. By holding that relationship itself is birth and *vice versa*, *Mitakshara* philosophizes the intimacy of relations towards ideals of natural love and affection. The cementing force of economic interest makes the relations strong stripping off bitter feelings amidst family members. Since the collectivist atmosphere of family provides access to basic necessities of life, care and support, in reality, linking property to relations is veritable means of avoiding misery that befalls undeservedly. Extension of relationship theory by *Mitakshara* to extra family situations has benefited concubines (*avaruddha stri*, *bhujisya*)<sup>55</sup> and illegitimate children.<sup>56</sup>

## VI Property as the means of social security

One prominent use of property is that it satisfies the requirements of basic necessities of life.<sup>57</sup> The very first example that Vijnaneshwara gives for secular property is rice. Security of food, dwelling house and means of living to the family members in the framework of family and community life is given appropriate attention in *Mitakshara*.<sup>58</sup> Protection of the corpus of family property and residence as against various types of abuses by any of the members and making them available for decent subsistence of all the members are admirable legal policies for healthy family life.

Matching with the superior position of *karta* in joint Hindu family, there are his definite obligations to uphold family benefit. Although he has final powers about family matters, he cannot alienate family property except for legal necessity and family benefit, which includes support of the family and relief from distress (*apathkale*).<sup>59</sup> Birth right of coparceners confer upon them right to be maintained out of family property and the right to claim partition. While they are the co-owners of family property in the eye of law, they cannot alienate family property except during the season of distress and for the sake of the family nor

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55. *Mitakshara II*. 1. 27-8. J.D. Mayne, *supra* note 31 at 823.

56. *Mitakshara I*, xii, 3. J.D. Mayne, *supra* note 31 at 822.

57. P.Ishwara Bhat, "Tracing Right to Property in the Bosom of Right to Life and Personal Liberty" 38 *JILI* 13 (1996).

58. I.S Pawate, *supra* note 1 at 214-5.

59. *Mitakshara I* 1, 28,29.



can they bind the family with *avyavaharika* debt.<sup>60</sup> Equal burden upon all the coparceners to bear the burden of family debt puts no single person into greater disadvantageous position exclusively, thus reflecting the application of principle against unjust enrichment.<sup>61</sup> The recognition of rights of unborn coparceners over the family property shows the extent of concern for fair and sound economic atmosphere in which coparceners are to lead their life. Vijnaneshwara says, “They who are born, and they who are yet begotten, and they who are still in the womb, require the means of support. No gift or sale should therefore be made (adverse to their interests).”<sup>62</sup> The *Mitakshara* principles that condemn fraud at partition, that enable reopening of partition to share concealed wealth, that give scope for partial separation (separation of few members only), and reunion of partitioned coparceners and father clearly reflect protection against unjust enrichment.<sup>63</sup>

The rights of female members in the family property at partition were given a benevolent treatment in *Mitakshara*. In this respect, Vijnaneshwara deviated from the earlier and later lawgivers who were not that sympathetic to the interests of women. Regarding wife’s and mother’s share in the ancestral property, *Mitakshara* lays down:<sup>64</sup>

When the father, by his own choice, makes all his sons partakers of equal portions, his wives, to whom peculiar property had not been given by their husband or by their father-in-law, must be made participants of shares equal to those of sons; ...or if any (separate property) had been given, let him assign the half.

As regards widowed mother’s share in family property, it provides:<sup>65</sup>

Of heirs separating after the demise of father, the mother shall take a share equal to that of a son; provided no separate property had been given to her. But if any had been received by her, she is entitled to half a share.

But in South India, owing to the influence of *Smritichandrika* and *Saraswativilasa*, which have equated the female members’ right in the family property to maintenance, the *Mitakshara* rule on this matter suffered desuetude.<sup>66</sup> This is an unfortunate development as discussed by the present author in another context.<sup>67</sup> Following Yajnavalkya,

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60. J D Mayne, *supra* note 31 at 412.

61. *Id.* at 429-431.

62. *Mitakshara I* 1, 27-8

63. *Mitakshara on Yajnavalkya II* 126. J D Mayne, *supra* note 31 at 575-76.

64. *Mitakshara on Yajnavalkya II* 115.

65. *Mitakshara I* vii, 2.

66. *Smritichandrika IV* 7-17; *Saraswativilasa* para 116.

67. P.Ishwara Bhat, “Hindu Mother’s Right to Share in the Coparcenery Property: A Critique Of South Indian Practice” 9 *The Academy Law Review* 187 (1985).



*Mitakshara* requires that brothers should have their unmarried sisters married at their expenses, giving them a quarter of their own share.<sup>68</sup> The concern of Vijnaneshwara to avoid misery on the part of women stands against the patriarchic prejudices of the Hindu jurisprudence.

Maintenance of male members of the family, their wives and their children by using family property is a legal obligation of *karta* of joint Hindu family in *Mitakshara*. But, “Where there may be no property but what has been self-acquired the only persons whose maintenance out of such property is imperative, are aged parents, wife and minor children.”<sup>69</sup> Maintenance is a right arising from relationship and is strongly justified on humanitarian and familial obligation. Illegitimate sons, when not entitled as heirs, are to be maintained by their father.<sup>70</sup> A concubine who has been kept by a Hindu continuously up to the time of his death is entitled to maintenance from the property whether ancestral or acquired, of her deceased paramour.<sup>71</sup> Widowed daughter who is not maintained by her husband’s family but returns to live with her father shall be maintained as a matter of moral obligation by her father out of his self-acquired property.<sup>72</sup> Further, there is *stridhana*, which is another source that succours not only its holder at the time of distress but also her family, if her husband so chooses. Her husband may take *stridhana* in case of extreme distress, as in famine, or for meeting some indispensable duty, or during his illness, or while a creditor keeps him in prison.<sup>73</sup> He has moral duty to restore the value of the property. What he has taken without necessity, he is bound to repay with interest.<sup>74</sup> Such right to take wife’s property is purely personal to the husband and not available to his creditors.<sup>75</sup> What is emphatically clear in these verses is that property should act as a buffer against distress and misery.

*Mitakshara* rules of succession also largely reflect this concern while regulating the patriarchic rule of survivorship. It says, “Therefore, it is a settled rule that a wedded wife being chaste, takes the whole estate of a man, who being divided from his coheirs and not subsequently reunited with them, dies leaving no male issues.”<sup>76</sup> The rule is applicable to self-acquired property too. Vijnaneshwara includes wives of the ancestor of *sagotra sapindas* as heirs entitled to succession.<sup>77</sup> He also recognizes

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68. *Mitakshara I* vii, 5-14. Also see J.D.Mayne, *supra* note 31 at 549-50.

69. *Mitakshara II* 175.

70. *Mitakshara I* xii.3.

71. *Mitakshara II* 1, 27-28.

72. J.D.Mayne, *supra* note 31 at 825.

73. *Id.* at 750.

74. *Mitakshara II* ii, 31,32.

75. *Viramitrodaya II* 242.

76. *Mitakshara II*. i. 39.

77. *Mitakshara II* v, 5.



the rights of parents and daughter.<sup>78</sup> In the matter of succession to *stridhana*, while only daughters are given the right, preference is given to indigent daughter over the well-off ones.<sup>79</sup> In succession to the property of father also, similar rule is prescribed.<sup>80</sup> This shows clear policy of supporting the destitute. From the list of *sagotra sapindas*, *samanodakas* and *bhinnagotra sapindas* given by Vijnaneshwara it is clear that the interests of all close relations of the deceased person are protected against destitution arising from death.<sup>81</sup> His treatment of the interests of illegitimate sons and concubines reflect similar approach.<sup>82</sup>

In the light of recent Supreme Court's judgments in *Madhu Kishwar*<sup>83</sup> and *Daniel Latifi*<sup>84</sup> which recognized right to maintenance as having strong elements of right to dignified life and other human rights principles, Vijnaneshwara's efforts of building property right jurisprudence as a powerful instrument of social security measure for the vulnerable against moral and material abandonment need to be appreciated as pioneering for humanist values. The nourishment that property gives to human personality by being a physical facility and a means of expression, an idea that Hegel developed as personality theory of property, was well focused in these efforts.<sup>85</sup> The belief that from food is a being made points out the link between right to maintenance and right to dignified life.<sup>86</sup> Rice as the first example of property in the *Mitakshara* discourse denotes the life-infusing propensity of property. As stated in *Yajnavalkya Smriti*, the born and the yet to be born, all of them need property as livelihood and it should not be cut off by alienation or otherwise.<sup>87</sup> Property for food security is an excellent concept of welfare. That the woman who nourishes the family should be nourished in advance speaks voluminously of sense of justice.

## VII Religion's linkage with property

Competence to perform religious rites was regarded as the basis for

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78. *Mitakshara II* ii. 2.

79. *Mitakshara II* xi, 13.

80. *Mitakshara II* 2,2.

81. I.S.Pawate, *supra* note 1 at 159-60; J.D.Mayne, *supra* note 31 at 627-630.

82. J.D.Mayne, *supra* note 31 at 646-49, 690.

83. *Madhu Kishwar supra* note 2.

84. *Daniel Latifi supra* note 2.

85. P.Ishwara Bhat, *supra* note 55.

86. *Bhagavadgita III* 4: 'annadbhavanti bhutani' also see P.Ishwara Bhat, *Fundamental Rights: A Study of Their Interrelationship* 286 (2004). Basaveshwara's analysis that it is natural for living beings including crows to call whole of their folk when they come across even a grain of food points out communitarian sharing of food.

87. Cited by I.S.Pawate, *supra* note 1 at 166-67.



entitlement to property in earlier *shastrik* writings.<sup>88</sup> But Vijnaneshwara's elaborate exposition of *sapindaship* to get rid of the doctrine of religious efficacy in the matter of succession by saying that heirship is because of relationship is a rational and secular approach that drastically deviates from the earlier notion.<sup>89</sup> He frees property relations from the male dominated dogmas of religion, and makes it available for women's ownership. He endorses the view of Narada that dependence of women is not incompatible with their acceptance of property.<sup>90</sup> Replacement of controlling influence of religion by rule of law regime is one of the finest contributions of Vijnaneshwara.

Vijnaneshwara's delinking of property from religion arises out of his elaborate discourse that *svatva* is *laukika* rather than *shastraika samadhigamya*. This implies that property is meant for the satisfaction of secular needs and is understandable by secular knowledge through human reason and application of sense organs. It is not *vidhi* or injunction of *shastra* that motivates a man to earn property; but it is the fruit *viz.*, removal of hunger, which can be seen (*drishta*), that motivates him to earn. If earning were only for sacrifice, there would be no livelihood and no motivation for earning; but when sacrifice is also for pleasure or happiness, the earning is *purushartha*.<sup>91</sup> However, *Mitakshara* recognizes *lokasiddha* principles for right earning. It says, "It should not be alleged that even what is obtained by robbery and other nefarious means, would be property. For proprietary right in such instances is not recognized by the world; and it disagrees with received practice."<sup>92</sup> But it would be a permissible practice for a Brahmin to perform sacrifice or to teach for the benefit of a wrongdoer and receive from him in return valuables subject to rendering of atonement, prayer and rigid austerity.<sup>93</sup> The lawful methods of acquisition of property for various *varnas* have also been insisted in *Mitakshara*.

It is interesting to see that Vijnaneshwara effectively puts forth a down-to-earth temporal approach to property along with equally pragmatic principles of social morality on propriety of means in acquisition of property. While this avoided unjust enrichment, weaning property

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88. Manu cited by I.S.Pawate, *supra* note 1 at 292; *Narada XIII* 25-26, IX.217.

89. I.S. Pawate, *supra* note 1 at 212; as stated by Nilakantha in Samskara Mayukha, "Vijnaneshwara abandoned the theory of connection through the rice-ball offering and accepted the theory of transmission of constituent particles." See Markendeya Katju, 'The Importance of Mitakshara in 21st Century' a paper presented in Seminar on Vijnaneshwara held at Gulbarga, 2004. Also see, *Balasubramanya v. Subbayya* (1938) 65 IA 93 (102).

90. I.S. Pawate, *supra* note 1 at 271-73.

91. Quoting Madhava, I.S.Pawate analyses in this manner *id.* at 238.

92. *Mitakshara I* i.11

93. *Mitakshara I* I.16



away from religion protected women against undeserved misery. Vijnaneshwara did not preach total abandonment of property for religious merit. Nor did he tolerate anarchical practice in property matter. Unlike him, Basaveshwara took a highly ideological view that property earned through pure and truthful labour could be dedicated to God whereas sinner's wealth fits only to penalty and not for righteous utilization.<sup>94</sup> Religion's links with property as handled by Vijnaneshwara could fill the latter with compassion and sense of fairness rather than with discriminating dogmas.

### VIII Analysis

The above analysis of possible theoretical bases of property in *Mitakshara* jurisprudence partly approve each of their relevance and positive role. But these theories fail to emerge as comprehensive explanations about philosophic justifications for property in *Mitakshara*. They only reflected part of the larger theoretic framework, which, in fact, consisted in protection against unjust enrichment and destitution. Equity, good conscience and justice were the specific components of this approach. Quite contrary to the individualistic concept of property espoused in the west, ancient Indian jurisprudence in general and *Mitakshara* in particular, propounded collective right theory of property focusing on the social effect of its institutions and incidents. The ideology that it is theft to retain to oneself beyond that which is suffice to satisfy one's hunger,<sup>95</sup> or that one should earn in hundred hands to give away in gift by thousand hands<sup>96</sup> reflected the concern against concentration of wealth in few hands to the detriment of societal interests. In the background of such healthy thoughts and their desirable effect, the extreme theory of class conflict did not emerge as the theoretical basis of property. *Mitakshara* tried to remedy class conflicts by treating workers, women and destitute in a fair manner.<sup>97</sup>

### IX Practical application

The approach of protecting against unjust enrichment and undeserved misery was applied in *Mitakshara* into various spheres of civil law including family law, some aspects of which are already discussed above.

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94. Between the property of the affluent that could construct temples and the mental ability of the poor devotee who could convert his body itself into abode of worship, Basaveshwara did not discriminate.

95. *Bhagavata VII* xiv.8

96. *Atharvaveda* 3-2.4-5

97. Basaveshwara went a step ahead by socially marginalizing the economically powerful in order to purge wealth from the sins of exploitation.





Practical application of the doctrine sensitized the law on debts, mortgages, adverse possession, associations, gifts, treasure trove, bailment and endowments. The *Mitakshara* vision of justice has sensitized the principles against unjust enrichment in each of these spheres.

While the rule of pious obligation was approved, which protected against unjust enrichment, an exception is carved out to protect the family against misery. Following Yajnavalkya, *Mitakshara* lays down that son is not liable to pay the debts incurred by father which was contracted for the purpose of liquor, lust or gambling, or which is due as the balance of unpaid fine or toll, as also gift without consideration.<sup>98</sup> *Mitakshara* interprets the phrase 'gift without consideration' as the one promised to rogues, dancers, thieves, swindlers etc., or for illegal or immoral purposes.

Regarding the exclusive right of the prior mortgagee against a later mortgagee, there is a clear rule in *Mitakshara*.<sup>99</sup> Further, the scope for redemption of mortgaged or pledged property is not subject to lapse in case it is a *charitra* pledge.<sup>100</sup> *Mitakshara* explains that when a thing of high value is kept in pledge for paltry sum having full faith in the good character of the creditor or when money is lent by accepting a thing of little value by having faith in the good character of debtor, the pledge or mortgage does not lapse.<sup>101</sup> Under the law relating to bailment, loss of property relating to theft from the hands of bailee is exonerated from bailee's liability in the same way as act of the king or act of God are exonerated since they are above human control.<sup>102</sup>

A brilliant stroke of interpretation of *Yajnavalkya Smriti* in *Mitakshara* could galvanize the rule against unjust enrichment in the matter of adverse possession. Yajnavalkya says: "Right of a person to land is lost to him if he does not question the open and adverse claim and possession by another for twenty years. In case of moveable property, the right is lost after ten years of open and adverse possession by another."<sup>103</sup> *Mitakshara* interprets, " Here the loss intended to be indicated is that of the profits (or accession) of the land as well as of the wealth, not of the corpus, nor of the right at law. For even if at law the owner gets back the land after twenty years' possession without protest by him, still he does not get a right to follow the proceeds, both

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98. *Mitakshara* on *Yajnavalkya II* 53, 54.

99. *Mitakshara* on *Yajnavalkya II* 93.

100. *Mitakshara* on *Yajnavalkya II* 23.

101. 61; *Mitakshara* on *Yajnavalkya II* 59; M.Rama Jois regards this as an example of incorporating the modern doctrine of unjust enrichment by which protection of debtor from exploitation by the creditor or *vice versa* is ensured. See M.Rama Jois, *supra* note 35 at 124.

102. P.N.Sen, *General Principles of Hindu Jurisprudence* 219-20.

103. *Yajnavalkya II* 24.



on account of his own fault in the form of non-protest as also on account of this text.”<sup>104</sup> This is a laudable approach as it balances the interests of both the parties. But the true owner can recover his asset only when profits can be detached from the source of those profits. However, in keeping with the thrust of public opinion and texts of other *Smritis*, *Mitakshara* was agreeable for three generations rule rather than 20 years rule in case of adverse possession.<sup>105</sup> Robert Lingat observes, “ It is clear that he was profoundly hostile to acquisition by prescription against the true owner and that in his eyes, possession, no matter how long, could not be a means of acquiring ownership. It is this preconceived opinion which guides his steps through the maze of texts, which induces him to align them one after another like landmarks leading whither he knew he would arrive, and brings him finally to reduce to a minimum the significance of the rule actually expressed by his author, Yajnavalkya.”<sup>106</sup> What Vijnaneshwara has done in this process is expounding of the rule *dharma* with all good faith for social practice and high morality, as Lingat views.<sup>107</sup> Promotion of the cause of justice is a notable development even when past practices prevail over reasoning in case of conflict. *Mitakshara* carves out exceptions to rule of prescription. According to him, there could be no prescription against a minor or idiot or woman or king and *Brahmana*.<sup>108</sup> These persons are unable to protect their interests because of either incompetence or numerous avocations or studies in which they might have submerged.<sup>109</sup>

Regarding rights and duties of members of association, *Mitakshara* advocated strict observation of the customary duties, objectives of the association and king’s commands.<sup>110</sup> While Yajnavalkya<sup>111</sup> requires that honest persons acquainted with law and with sense of duty who are able, self-controlled, and come from noble families, and are skilled in business shall be appointed heads of associations, *Mitakshara* elaborates that men knowing *dharma* as laid in *Shruti* and *Smritis*, who are pure internally and externally, un-avaricious for any pecuniary gain should only be commissioned as the deliberative wing of the assembly. Rama Jois points out the enduring relevance of the rule, “This requirement of entrusting the management of the affairs of an organization or association to men of character and integrity is of utmost importance and holds

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104. M. Rama Jois, *supra* note 35 at 293-94.

105. P.V.Kane, *History of Dharmashastra* 322-24 (1973).

106. Robert Lingat, *The Classical Law of India* 165 (1973).

107. *Id.* at 166-7.

108. P.N.Sen, *supra* note 102 at 114.

109. *Id.* at 115-6. P.N.Sen regards the exceptions as eminently reasonable.

110. *Mitakshara on Yajnavalkya II* 186.

111. *Yajnavalkya II* 191.



good even for the present and the future also.”<sup>112</sup> Avoidance of unjust enrichment and misery by relying on responsible set of directors is a foresightful policy.

About the requirement of valid gift, Vijnaneshwara insisted on clear proof of acceptance of it by the donee.<sup>113</sup> Gifts should be accompanied by possession. Since gift carried with it obligations of atonement and penance on the part of receiver of gift, it appears, he wanted to exclude undeserved misery in this matter.

In the matter of treasure trove, Yajnavalkya states that if the king discovers the treasure trove, he will take one half and the rest shall be distributed amidst *brahmins*; if a learned *brahman* finds it, he shall keep the whole himself; in other cases, the king will give one-sixth to the finder and takes the rest himself.<sup>114</sup> To this *Mitakshara* adds that even in such case if the real owner comes forward and establishes his title, the king shall restore the treasure to him after retaining one-sixth to himself and one-twelfth to the finder.<sup>115</sup> About lost articles found by stranger, Hindu law entrusts upon the king right to retain them for definite period, after which he is allowed to appropriate them on making over one-fourth to the finder. *Mitakshara* introduces refinement to the effect that if the owner comes forward even after three years and establishes his claim, the king shall restore the articles or their equivalents to him because title cannot be lost by mere lapse of time.<sup>116</sup> Once again, sense of justice applied by Vijnaneshwara towards avoidance of unjust enrichment is remarkable.

Yajnavalkya permits use of another’s land for the benefit of the neighbours without detriment to the interest of landowner. He says, “an embankment which is beneficial to the people should not be prohibited by the owner of the soil, where the inconvenience is slight, and similarly, a well which occupies a little space, and supplies abundance of water.”<sup>117</sup> This is unique principle reflecting communitarian approach to property, and is continued in *Mitakshara* with due emphasis.

In order to mitigate the unenviable position of first wife in case of bigamy some provision is made in *Yajnavalkya smriti* and *Mitakshara*. It is provided that in case a man marries a second time during the lifetime of his first wife he should pay to the first wife as much as he spends on the second marriage, or if she has already received some property as her peculium, as much as would render this equal to the

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112. M. Rama Jois, *supra* note 35 at 178.

113. *Mitakshara on Yajnavalkya II-175; Yajnavalkya II-176-2.*

114. P.N.Sen, *supra* note 102 at 58.

115. *Ibid.*

116. *Id.* at 59.

117. *Yajnavalkya Smriti II 156.*



amount spent over the second marriage.<sup>118</sup> Today bigamy is impermissible due to legal reforms. But to declare at the face of high patriarchic regime that husband's second marriage brings sorrow to the first wife, and hence should be compensated, it required bold empathy.

On the whole, *Mitakshara* introduced the rule against unjust enrichment and misery as a general rule of justice and equity that could infuse benevolent principles in various spheres. It is difficult to make an exhaustive survey. What is explained above is only illustrative, and to prove the hypothesis that the *Mitakshara* concept of property is rich in components of justice, which no modern theory could fully comprehend.

### X Conclusion

The *Mitakshara* discourse on property represents crucial and typical concern of the ancient Indian legal system to use property as an instrument of benevolent actions and justice. Going beyond the contours of labour, relationship and social security theories of property, it addresses the central issues on functional concept of property. The undercurrent of the rule against unjust enrichment and undeserved misery has influenced various facets of family law and civil law towards a very comfortable result. The concept is comprehensive and dynamic, and has abundant dimensions of social justice. It ensures fairness in economic relations, ranging from adverse possession, mortgage and pledge to lease. In driving out the exploitative power component in the instrument of property and enhancing the worth of use aspect of property,<sup>119</sup> the policy of *Mitakshara* has a great bearing as it uniquely builds the property concept around justice. In the context of deletion of right to property from part III of the Constitution, which led to the necessity of protecting just claims of property in the nooks and cranny of part III or general interests of justice, function-conscious approach to property in *Mitakshara* has great social significance. When one looks to it standing on the terrain of 21<sup>st</sup> century he gets from it valuable messages of humanism to avoid misery and to strengthen the concern for dignified subsistence. Application of them appreciably adds to the task of translating the value goals of welfare system laid down in part IV of the Constitution into a reality.

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118. P.N. Sen, *supra* note 102 at 282.

119. For a discussion of use and power aspects of property, see P.Ishwara Bhat, *supra* note 57.