

RELIGIOUS AND CULTURAL DESCRIPTION OF THE CONCEPT OF PRIVATE PROPERTY IN INDIA

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Belongingness is the most human sentiment and an imperative part of all the human existence. In society the concept of belongingness can be understood in the context of relationships and other worldly possessions. The concept of property and possession also evolves with the sense of belongingness the core element of social existence of the humans. The idea of property possession and belongingness are not new, for these concepts have always been existing in the society since the time the human beings started gathering and living together and gradually initiated the concept of civilization. It was in the early stages of the process of civilization that human beings started to realize and the value the idea of possessing the valuables in their name and having control over them. The idea of possession was so overwhelming that it gradually encompassed the meaning of power in it as the derivative of the philosophy of ascertain claim over things and people too. In most common parlance property means as proprietary ship over the objects and it also describes all those things and ownership upon which can be created by the human beings and in broadest possible sense it included living as well as non-living things in it. Property has been given various meanings in different regions of the world but one concept which is universally associated with the idea of property is that it What belongs to a person and what he desires his descendants to inherit and carry forward as his legacy. Property broadly includes the rights of the persons also and the proprietary interpretation of the same might restrict its meaning to those rights of a person which he holds upon the property and not his other legal rights. These rights on property inculcate a sense of status in a person and that gives another interpretation and meaning to the property including all those kinds of rights into the definition which are both proprietary and real¹. The law of property is a very specific field of law that deals with the concept of property in rem that is it is a right of an individual against all, my house is my property creating a periphery which is not open to access by rest of the world creating an understanding in rem. It is also the origin of the concept of private property in India.

Private property is a fundamental privilege rooted in a system that grants individuals exclusive rights over objects associated with their name. This concept empowers property owners to determine the usage and disposition of their possessions without external interference. Property cannot exist in a non-state. Matsya Nyaya says then that in a state of non-state people definitely can possess and enjoy the rights over a property but they cannot own it without any fear of it, being

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¹ Jaivir Singh; (Un)Constitution Property: The Deconstruction of the 'Right to Property' in India, August 2004 [2012 Reprint] CSLG/WP/05.

taken away. Mahabharata also establishes that in essence property is a concept which is about owning something and yet being careful about enjoying or possessing it.

In India property is not as materialistic concept as it is in western civilizations. In India property is not for Bhoga rather it is Mamatva i.e. Bhoga with Bhaya, generating an amalgamation that creates a property in a state. Geeta² while asserting on the righteousness renders that he who operates in pursue of what is right we will never ever trespass and will also be fearless while protecting that, which is rightfully his. This definitely takes courage but to own the rights on any kind be in property or other kind the will to fight for them must come for no right that can be protected can be said a real right effectively. *Chanakya in his Arthshastra*³ in Chapter 3.9 recognizes the idea of ownership over the land. He he asserts on two aspects of private property one who earns the property acquires it and then it is his prerogative to use it judiciously and to the best for not only himself but also for the society and two, that the king must make sure that such property, hard-earned, must be protected from any kind of seizure or misuse.

Manusmriti⁴ in context of private individual establishes not only the concept of property but also its accumulation using strategies and righteous ways to protect it. It is said that a hardworking man deserves not only the property but also its accumulation and safety this property however must be inherited by such person's son only but the property of a sunless man can be taken over by the father or the brothers. Agnipurana⁵ asserts that a lawfully gathered property should be divided equally and also fairly amongst the sons and it must be the duty of the sons to fulfill all of their father's responsibilities and reliability however the benefits of the common property must be divided judiciously and equally.

In Muslims, Quran and Hadith speak about the Islamic law in context of property the concept here is also based on justice, fairness and equality. In Islam⁶ the property and the concept of its ownership is treated as something that is capable of being defined, specifying and then to be owned. The Shariah law has written the rights over such properties and it also protects such rights along with regulating them. In Islam, Allah is believed to be the ultimate owner and like everything else all the land must belong to him. It is him, who has bestowed upon us the treasures of land for us, to use it freely and also to protect it but while we own and use this land, we are expected to be fair. In Islam⁷ the concept of ownership signifies two aspects related to property; one is the concept of owning it and the second one is the right to transfer this property through legitimate methods. The owner definitely deserves the ownership specifically as long as he wants to enjoy that and more importantly, till the time, he uses this property productively. In the events, when this property is not being used productively or properly, then he can be induced or forced to not hold it, in an unfruitful manner and give up the land and the rights over it, with the position that he had.

² Bhagwat Geeta, Chapter 4, Jankarm, Sanyass and Yog.

³ Thoman Trautmann, *Arthashastra: The Science of wealth*, Penguin, 2012, Pages 121-127.

⁴ Ganganatha Jha; *Manusmirti with the Commentary of Medhatithi*, Verse 9.185 on Inheritance.

⁵ N. Gangadharan, *The Agni Purana, Description of the Procedure for the Division of the properties*, Chapter 256.

⁶ Afzal-ur-Rahman, *Economic Doctrines of Islam*, Islamic Publication Limited, Lahore, 1980, Volume II, Page.20.

⁷ D.S.M Yusuf, *Economic Justice in Islam*, Lahore, 1977, Page 19.

In Christians, the Bible, establishes all the properties as that of the Lords. However, it is said that land cannot be shared together and hence the concept of property, finds its place in Bible⁸. In Bible it is also laid down when that if someone lives on a land uninterruptedly for a substantively long duration of time he gradually acquires and strengthens his right over that property⁹.

The Guru Granth Sahib considers property as an evil concept of maya but maya or wealth includes all types of property and must be held in harmony with those core beliefs in Sikhism which takes us away from the evil side of Maya that is the three daily principles of Sikhi: truthful living, service to humanity, and devotion to God. Beyond this any use of property by its owner is allowed¹⁰.

PERSONAL LAWS AND CONCEPT OF PROPERTY:

Before the qualification of law of property there were two primitive schools of thoughts governing the concepts related to the property for Hindus: Mitakshara and Dayabhaga. While Mitakshara is based on janmasvatvada i.e. ownership arising on birth, Dayabhaga is based on Upramasvatvada i.e. ownership on death.

MITAKSHARA SCHOOL:

In Mitakshara school, The Sons were given equal rights and ownerships on their father's ancestral property. These sons were the coparceners who came into existence at the time of their birth after 2005 amendment¹¹ females can also become coparceners. It is also known as the school of survivorship, notional partition and aggregate ownership. As the co-parcenary right depends on birth and death the quantum or the share cannot be pre decided and always depends on the events like life and death

There always a supplementary principle of Propinquity i.e. kinship or degree of closeness in blood. However, the right of these coparceners is limited and they cannot alienate their shares. The school is divided regionally in many further schools like Bombay School and Mithila School etc.

DAYABHAGA:

In Dayabhaga the coparcenary concept is completely different. Here it is said that a son does not buy but acquires any right in this ancestral property rather it is the death of the father that the property devolves by the way of the succession to the son who survives. Here, it is firmly believed that the father always has the power on his property to dispose it off or alienate it by the way of instruments like will or sale or mortgage etc. During the father's lifetime a son has no right to get the property or to seek the partition. The school tries to identify the amount or the fraction of the shares of the coparceners and hence it is also called as the fractional ownership the school supports the concept of religious efficacy and the share will pass on to the daughter or/and widow of the person.

⁸ Bible, Genesis 13:6.

⁹ Bible, Genesis 34:10.

¹⁰ Charan Singh, Ethics and Business: Evidence from Sikh Religion, Indian Institute of Management, Bangalore, 2013, Page 9.

¹¹ Hindu Succession Act of 2005

Property in Hindu law is classified in two kinds: namely, Joint Hindu Family Property and Separate property.

The joint Hindu family property or the coparcenary property comprises of the ancestral property which is the property that was acquired by the joint Hindu family members jointly separate property of any member which is later surrendered in the common stock or the pool of the joint family property and also the property which is acquired by anyone or all coparceners with the aid of the funds of the joint family. There is another category which is unobstructed and obstructed property as per the Mitakshara School of property.

JOINT HINDU PROPERTY:

Every coparcener in a coparcenary property has a joint interest on it the property which is acquired jointly using the aid or assistance of the ancestral property comes into the meaning and ambit of the ancestral property. The court in the matter of *V. Dhanwatey v. CIT*¹² held that

Self-acquired property can be acquired by one's own efforts without any aid of the joint family but wherein the property is joined or required by the coparcener with the aid of the joint property it is called as joint family property. Anyone who claims and asserts that our property is a joint family property, she will have to bear the burden of proof that the property in question was not acquired without the aid of the joint family property¹³. In the case of *Chaturbhooji v. Bharambhi Naranji*¹⁴ any property that is acquired with an intention to co-own it as part of joint family property will be the joint family property.

In the case of *Bhanwar Singh v. Pooran*¹⁵ the court clarified that coparcenary property consists of ancestral property and anyone having share in it the inheritance will be a coparcener.

SELF-ACQUIRED PROPERTY:

There are two categories of the self-acquired properties; ancestral and separate. Self-acquired property is the property which was initially ancestral but then after partition of the joint Hindu property it was acquired by its current owner. However, the ancestral property flows down to the generations to come, freely. A property is called to be an ancestral property if it has flown down and is inherited through three generations uninterruptedly. Three degrees of ancestral history is need to call a property an ancestral property¹⁶. To put it simply, the ancestral property can be understood as the property which was inherited from father, grandfather and the great grandfather¹⁷. In *Uttam Singh v. Subhag Singh*¹⁸ the court read section 4,8 and 19 of the Hindu Succession Act of 1956 and held that ancestral property is based on intestacy. Also, inheritance of ancestral property does not create Hindu Undivided Property¹⁹.

¹² AIR 1968 SC 682.

¹³ *Srinivas Krisnarao Kango v. Narayan Devi Kango*, AIR 1954 SC 379.

¹⁴ (1885) ILR 9 Bom. 438.

¹⁵ 2008 (3) SCC 87.

¹⁶ *Arshnoor Singh v. Harpal Kaur*, 2019,5 CTC 110.

¹⁷ *Gurdip kaur v. Ghamand Singh Dewa Singh*, AIR 1965 P&H 238.

¹⁸ AIR 2016 SC 1169.

¹⁹ *Yudhishtir v. Ashok Kumar*, 1987 (1) SCC 204.

SEPARATE PROPERTY:

Any property which is acquired and was not inherited from any of the blood ancestors is called separate property. The concept of separate property deviates from the idea of inheritance and claim all those properties to be separate which were acquired by any mean of acquisition other than the inheritance. For example; property acquired by the way of sale or gift etc.

OBSTRUCTED PROPERTY:

Another kind of property is obstructed property which is a property right over which does not accrue by the incident of birth but on the vent of the death of its final owner. The name obstructed is used because the accrual of the right is obstructed by the existence of the final owner and the said right activates only after the death of the said final owner.

Example; If A has a brother B, he can acquire B's Property if he dies unmarried without any child. So, A's right is obstructed till B live his life and remains unmarried without any child.

UNOBSTRUCTED PROPERTY:

Unobstructed property is the property which is secured by an individual at the time of his birth and such property is not obstructed by the presence of anyone. Hereditary property when finally blended into the ownership of the final owner becomes unobstructed²⁰.

MUSLIM LAW AND CONCEPT OF PROPERTY:

The concept of succession and property are constituted of following sources as per the Islamic law: Quran, Sunna i.e. the sacred practice of Prophet Mohammad, Ijma i.e consensus of the learned and respected men of a community and Qiya i.e. interpretation of the principles of Allah to understand the wrong and right. The as in Muslim law are either the sharers or the residuaries. Sharers are those people who are entitled to have a share of the property on the event of the death of the owner for example some of the sharers are enlisted as wife, husband, daughter, son, daughter of son or son's sons and so on father, parental grandfather, mother and the uterine siblings etc. Residuaries on the other hand are the ones who own the property only if the property is left after the shares were taken over by their sharers.

KINDS OF SUCCESSION IN MUSLIM LAW:

In Muslim law there is possibility of two types of succession; non-testamentary and testamentary. The non-testamentary is regulated and governed by the Muslim Personal Law (Shariat) Act of 1937. In the testamentary succession, inheritance is governed by the Sharia law as per its applicability for the Sunnis and the Shias. The testamentary successions happen where the will is made. A child in Muslim law is not entitled to get the right to inherit any property since the time of his birth but the right is later created when his ancestor dies. If the child is not able to survive the ancestor the right of such inheritance never gets created and collapse. in Sunni Law, the concept

²⁰ Commissioner of Wealth Tax, Kanpur v. Chander Sen, 1986 (3) SCC 567.

of per capita method is used for distributing the shares wherein, everybody gets equal share, whereas, in Sunni law, the concept of per strip is followed where, firstly the people in one slab or strip get their equal rights and this right might differ from the people falling in any other slab or strip. There is also a concept of Escheat and when a Muslim dies with no heir the properties are inherited by the government and the process is called escheat.

IMPACT OF CONVERSION OVER THE PROPERTY:

The constitutional mandate of secularism imposes different obligations on the state and India being a secular country as propounded under article 25 of the Indian constitution allows every individual to not only profess but also to practice any religion enabling him to choose the religion that they prefer, this freedom allows the people to convert into the religion they align with but such conversions result in complexities related to applicability of the personal laws in the given case, making the concept of the property, its inheritance and the rights, involved into it and even more complicated idea

The Hindu Succession act of 1956 creates no disqualification for the Hindus from conversion neither explicitly nor implicitly, but in section 26 the Act, propounds that the descendants born after conversion, explicitly or implicitly, will be barred from inheriting any property from their relatives that are Hindu. However, if these children of converted Hindus choose to become a Hindu again at the time when the choice of succession is opened then such bar will not be applied. The applicability of section 6 of the Hindu Succession Act of 1956 was interpreted in the case of *E. Ramesh v. Rajni*²¹, where it was held that the descendant of the converter will have the bar on him but if he converts himself to a Hindu then there is no such bar.

Whilst, Hindu laws are codified Muslim personal law is still uncodified but visibly there is no such bar that can be seen into Shariah to deprive the children of the converted Muslims from any right in property from inheritance. The Caste Disability Removal Act of 1850 was discussed in the case of *Khunni Lal v. Kunwar Govind Kishan Narayan* and the court stated that the Act creates a nullifying effect on the provisions punishing renunciation or exclusion from the caste but even though the said act was repealed, it still holds relevance where any right is abrogated because of the conversions. In few of the other cases like *Nayana Ben Firoz Khan Pathan v. Patel Shanta Ben Bhika Bhai*²², upheld the right of a converted daughter over father's property and in *Shabana Khan v. Sulochana*²³ the view was upheld.

In Christians and Parsis, it is the Indian Succession Act of 1925 that prevails in the matter of inheritance of the property specifically when the matter is of intestate and testamentary succession of the immovable properties.

Goa, Daman ad Diu (Administrative) Act of 1962 makes Portuguese Civil Code applicable in the State of Goa. As per the Treaty of Cession of 1956, the French Civil Code is still applicable in

²¹ (2002) 1MLJ 216.

²² In the High court of Gujrat, civil application number 15825 of 2017.

²³ 2007 DGLS (AP) 755.

Pondicherry. In north-east customary Matriarchal system of the inheritance still exists and hence the Garos of Meghalaya are not governed by the Indian succession act of 1925.

The cultural and religious foundation of the private property might apparently seem different in all the religions but there is one element which is common and that is the principle of fairness and the involvement of concept of property in the context of the idea of social justice and productive utilization of the resources in such a way that the resources are contributing to the welfare of the society and growth of the country in almost all the cultures and religions it is the state who is duty bound to not only uphold the right on the property but also to safeguard it in order to create an environment wherein there is a sense of safety associated with the principles of ownership irrespective of the religion and beliefs of the parties.

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