

“Male Bias under The Uniform Civil Code of Goa: A Comparative Analysis under The Code Of 1870 and The Decree Of 1911”

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Introduction

"God created man in his own image. . . . male and female he created them. " Scripture and tradition have always put woman after man. Whether it was the intention of God to create woman as a lesser being or whether man believing in the old adage, behind every successful man, there is a woman" kept her firmly behind him, is anybody's guess. The Universal Declaration of Human , 1950 in the preamble the recognizes, the equal rights of men and women. Further in Article 1 it states that All human beings are born free and equal in dignity.¹ This agenda for equality is further emphasized in Convention On The Elimination Of All Forms Of Discrimination Against Women, 1979. In its preamble, the Convention explicitly acknowledges that "extensive discrimination against women continues to exist", and emphasizes that such discrimination "violates the principles of equality of rights and respect for human dignity".² The Constitution of India, 1950 emphasizes its commitment to equality in its preamble³ and further guarantees equality before law and equal protection of law to all persons⁴. The right to equality has been recognized as one of the basic features of the constitution.⁵ Equality does not mean that all should be treated equally. In fact when all are not equally circumstanced equality demands that we treat unequally. In fact, the Constitution permits the State to make special provisions for women and children.⁶

The Land of Goa has a uniqueness envied by many. One of its most endearing features, its uniform civil code has received praise both from academicians as well as the judiciary.

The Uniform Civil Code in Goa

Goa claims to have a uniform civil code, while it is true that the Code treats the religions without bias, by applying to all goans irrespective of religion, it is submitted that the law is male centric.

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¹ https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf

² un.org/womenwatch/daw/cedaw/text/econvention.htm

³ EQUALITY of status and of opportunity;

⁴ Art 14 Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India

⁵ IndraSawhney II v. UI AIR 2000 SC 498

⁶ Art. 15 (3) Nothing in this article shall prevent the State from making any special provision for women and children

The Civil Code of Goa, is a Portuguese inherited legislation⁷ applicable to all goans. Unlike the rest of India, all goans irrespective of religion are governed by this code which applies 'uniformly'. When the Portuguese conquered Goa, they extended The Civil Code of 1867, later in 1911 some of its provisions were amended and repealed by Decree No 1 of 1910, but most of its provisions were retained and apply to goans even today. Thus, The Civil Code of 1867 was in force in Goa, Daman and Diu w.e.f 1-7-1870, some of its articles were substituted and repealed by the Decree No 1 dated 25-12-1910, in force w.e.f 26-5-1911.

The present is always governed by the tentacles of its history and the tendrils of its future⁸. This article examines the provisions under The Civil Code of 1867 and any subsequent amendment by the Decree No 1.

Under the Code, marriage is defined as a perpetual contract made between two persons of different sex with the purpose of legitimately constituting a family.⁹ The regime of community of property applies by default if no other is specified¹⁰. By this regime the spouses own and have an equal claim to the matrimonial property. This is one of the most visible features of the Code. However, the Code of 1867 was clearly male biased, many of these provisions were repealed or modified by the 1911 Decree.

The following provisions are, it is submitted, clearly male biased:

Minors and Consent Regarding their Marriage:

Firstly, like most personal laws, the Code permitted a marriage between minors, however, in order to be valid, the minors required the consent of their parents. In case of dissent between the parents (of a minor)¹¹, in respect of grant of permission for marriage, the opinion of the father shall prevail.¹² Now, the new provision states, that, in case of dissent, Judge shall decide.¹³

Further the Code specifies different ages for valid marriages depending on gender. The following shall not contract marriage, male below the age of 14 years, and females below the age of 12 years.¹⁴ The age is now below 18 for boys and 16 for girls.¹⁵ It is worthwhile to note that neither the Contract law¹⁶ nor the Indian Penal Code¹⁷ provide for different ages, depending on gender. Thus it may be concluded that this age difference serves no purpose except maybe ego related?

⁷ Goa, Daman and Diu (Administration) Act, 1962

⁸ Gantzer H *The Year Before Sunset* (2019) Anglo-Ink Books

⁹ Art 1056

¹⁰ Art 1098

¹¹ Art 1060

¹² Art 1061

¹³ Art 6

¹⁴ Art 1073

¹⁵ Art 4(3)

¹⁶ Section 11 in The Indian Contract Act, 1872 - Who are competent to contract.—Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject. —Every person is competent to contract who is

Matrimonial Property

Further The Code also states that the spouses, before the solemnization of marriage, within the bounds of law, may stipulate, whatever they think fit in respect of their properties. The immoveable properties, both common and exclusive, cannot be charged or alienated in any manner without the consent and agreement of both spouses. However, the wife is not entitled to deprive her husband of his right of administering their properties by way of ante-nuptial contract.¹⁸ This provision is still in force in Goa.

The husband shall administer all the couple's assets, including common properties, as well as wife's exclusive properties.¹⁹ The wife is responsible for their administration only when the husband is absent or unable to do so.²⁰ The husband can freely dispose the couple's movable assets²¹. The husband will not administer the couple's assets and the wife will:

- i. If the assets have been given or left to her subject to a condition that she administer them²²
- ii. If the husband consents to her administration²³
- iii. If the husband is absent²⁴
- iv. If the husband is unable to act²⁵

The incapacity of married women in property matters²⁶

The wife may not except in cases which are specially authorized by law, acquire or dispose of assets or contract obligations, without the husband's permission.²⁷ However in the exceptional cases when the husband permits or is declared incompetent by court, the wife is the administrator of the couple's assets. The wife as administrator of the couple's assets is generally not permitted to alienate the immovable properties without authorization of the family council which will be assisted by the Public Prosecutor.²⁸ Any alienation made in contravention of this provision is null and void , and entitles the purchaser to recover the purchase price from the exclusive

of the age of majority according to the law to which he is subject,1 and who is of sound mind and is not disqualified from contracting by any law to which he is subject."

¹⁷ Section 82 & 83 in The Indian Penal Code 1860 – S.82. Act of a child under seven years of age.—Nothing is an offence which is done by a child under seven years of age. S. 83. Act of a child above seven and under twelve of immature understanding.—Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.

¹⁸ Art 1104

¹⁹ Art 1117

²⁰ ibid

²¹ Art 1118

²² Art 1109

²³ Art 1194

²⁴ Art 1117

²⁵ ibid

²⁶ Art 1193

²⁷ Art 1116

²⁸ Art 1190

properties of the wife or her share of the moiety.²⁹ It may be noted that this incapacity does not apply to household management.³⁰ The wife has other disabilities too, she is incapable of accepting conditional or onerous gifts without husband's permission.³¹

The Code allows the wife "pin money"³², the wife may reserve for herself part of the income arising from her property as pin money and dispose it as she pleases

Again if there is absolute separation of property³³, she may freely dispose her movable assets that are not part of the community of assets and are not invested for interest, together with 1/3 of her income³⁴. She may also encumber these assets.³⁵

The wife is not allowed to incur debts without permission of the husband except in case of his impediment or absence and where the debts were of such nature that it was impossible for her to wait for his recovery or return.³⁶ On the other hand, if the husband incurs debts without the wife's consent, his exclusive property, or share of moiety will be liable. Moreover, if these debts were for common benefit of spouses (not defined) or incurred in case of impediment or absence of wife, and where the debts were of such nature that it was impossible for him to wait for her recovery or return, the common properties are liable for repayment.³⁷

As mentioned earlier, this incapacity can be overcome with the husband's permission.

The wife may also apply to a judge for an order dispensing with her husband's consent if it is unreasonably withheld.³⁸ If she does any of the act for which she lacks the necessary capacity, without producing the necessary authorization the act is affected by a relative nullity.³⁹

The Regime Of Absolute Separation Of Property, is characterized by a complete separation of the spouses' assets with each of them, in principle, retaining the power of free disposal.⁴⁰ However, the wife may not dispose off her immovable assets or capital invested for interest, or 2/3 of her income, without husband's permission. There is no restriction on the husband's power to dispose his property.⁴¹

Of General Rights And Duties of the Spouses⁴²

The wife is bound to obey the husband, he is specially bound to protect and defend her person and properties.⁴³ She is bound to accompany him, except to foreign countries.⁴⁴ She cannot

²⁹ Ibid

³⁰ Art 39 of decree no 1

³¹ Art 1478

³² Art 1104

³³ Matrimonial regime

³⁴ Art 1128

³⁵ Art 1127

³⁶ Art 1116

³⁷ Art 1114

³⁸ Art 1193

³⁹ Art 1190

⁴⁰ Art 1127

⁴¹ Art 1128

⁴² Division VIII

publish her writings without consent of her husband, but may approach the Court in case of his unfounded opposition.⁴⁵ Today, the conjugal union is based upon liberty and equality, the husband is specially bound to protect and defend person and properties of wife and children. Wife has duty mainly of domestic management and moral assistance conducive to strengthening and improvement of family unit.⁴⁶ The wife may publish her writings without the consent of her husband.⁴⁷ She is bound to reside with him, unless he decides to migrate to a foreign country.

Locus Standi of Married Women

A married woman shall not move the Court without the consent of her husband, except:

- i. In criminal cases in which she is the accused
- ii. In any suits against her husband
- iii. In proceedings which have, as its sole object, the maintenance or preservation of her own and exclusive rights
- iv. In cases where she has to exercise the rights and duties inherent in parental control in respect of her legitimate issues or of her illegitimate issues born from another.

Today, a married woman may sue without the approval or permission of the husband.⁴⁸

Of interruption of conjugal society⁴⁹ & Of Separation of Persons and Properties:

The husband may separate if wife is guilty of adultery, the wife may separate if the adultery of the husband is coupled with public scandal or her complete abandonment or keeping a mistress in the conjugal domicile.⁵⁰ In case the ground of separation is the wife's adultery she has no right to separation of property, irrespective of the matrimonial regime, except for her maintenance.⁵¹ The only exception being, if at the time of her adultery, she could have applied for separation on the ground of her husband's adultery with its qualifying conditions.⁵² Fortunately today, the common ground of adultery applies to both spouses.

⁴³ Art 1185

⁴⁴ Art 1186

⁴⁵ 1187

⁴⁶ Art 40

⁴⁷ Art 42

⁴⁸ Art 44

⁴⁹ Division IX

⁵⁰ Art 1204

⁵¹ Art 1210

⁵² ibid

Of Simple Judicial Separation of Properties:

In case the wife finds the husband's administration of properties bad she may apply for separation of properties subject to various conditions.⁵³ In such situation, the wife will be given the administration of her properties.⁵⁴

Conclusion:

"The Lord God said: "It is not good for man to be alone. I will make a suitable partner for him."⁵⁵

The Civil Code in Goa and the Decree are progressive legislations, keeping in mind the time and circumstances of their enactment. The drafter had a vision of a composite family unit. He sought to maintain peace and harmony in this unit. Two swords cannot fit in one cover, nor can one obey two masters at the same time. Harmony in the wisdom of the legislator was to be maintained by keeping one head, a concept, it is submitted akin to the karta in the Mitakshara System of Law.

A home should not be a battle ground or a court house. It is a sanctuary, wherein the family comes in to just be, to live, to maintain harmony there is an allocation of roles, albeit, it is admitted, gender stereotyped, a division of labour as it were. Adequate provisions are made for any genuine redressals. The best can only be achieved at great price, it is submitted that the provisions, depriving wife to administer her properties is a small price in the greater scheme of things. We would do well to remember that we are here referring to a marriage, the closest union possible, between two persons unrelated by blood, we are not referring to a partnership as defined under the Indian Partnership Act,

⁵³ Art 1219

⁵⁴ 1223

⁵⁵ The Bible (Gn 2:18)