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'JUST' LAWS ARE NOT ENOUGH

*A Note on the Common Civil Code, Marriage
and Inheritance in Goa**

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INTRODUCTION

The relationship between law and society is today a prime juristic as well as a sociological concern. The common argument is that the law positively affects social status, and that gender-just laws in particular can greatly transform and improve women's position in society. However, field experience tells a different story. This chapter debates the role that law plays in bringing about social equality and justice, and the ability of the law to effect social control and change. This is done by highlighting a few features of the civil law in the Indian state of Goa, namely, the Portuguese Civil Code which has been in effect for over a century, and by contrasting the existing law with some of the field realities. This chapter argues that though the law may seem to be pro-women, it alone cannot bring about an improvement in the status of women in that society. Law has to go hand-in-hand with appropriate dissemination, social movement and social action, as well as programmes to assist people to deal with the consequences of change that is either prescribed by the law, or is mandatory

* This chapter critiques the Civil Code in Goa, India, but in no way seeks to suggest that the Civil Code be replaced by the personal laws that govern the rest of the country. The author also does not claim that the chapter is exhaustive, as only a few aspects of the law have been discussed.

for the law to be assimilated into the lives of the people governed by that law.

Article 44 of the Indian Constitution provides a Directive Principle that 'The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India'. Since then, and over the last five decades, there has been much debate in India about the institution of a Uniform Civil Code (UCC) in the country. One of the arguments against the UCC is that it goes against one's Fundamental Right, which is to be governed by one's religious personal law. Several religious fundamentalists, political parties and others have argued in favour of the retention of separate religious personal laws. While the rest of the country discusses the pros and cons of a Uniform Civil Code, few are even aware that in Goa, a small state situated on the west coast of India, which was for 450-odd years under Portuguese rule (from 1510 till 1961), a Common Civil Code instituted in 1867 exists even today. Those aware of this law have often argued that the unique law in this state is responsible for the seemingly high social status of women in Goa. While the latter may be true with respect to certain aspects of women's lives, such as health status, education, etc., there remains much to be desired before we can talk of equality of sexes in Goa (Desouza 2004). The credit given to the law is debatable. Besides, we have had the Common Civil Code for 450 years, while the changes we have noticed in Goan society are much more recent. Credit is due to the women's movement in Goa, which is largely responsible for creating an awareness about women's rights. The proclaimed advantages of the law really contribute only marginally to women's advancement in society. We will discuss this by looking at a few provisions of the Civil Code regarding 'marriage', and some of the laws regarding succession and inheritance.

Goa comprises approximately 64 per cent Hindus, 31 per cent Christians, 4 per cent Muslims and 1 per cent other communities. Goa was a Portuguese colony for over four centuries. The 'Codigo Civil Portugues' or the Portuguese Civil Code of 1867, which is often referred to as the Common Civil Code and is based on the French Civil Code (Code Napoleon), has been in effect in Goa since 1870, and continues to exist with some modifications over the years. The title Common Civil Code has been earned because the code applies to all communities in Goa. Here, the personal laws are not applicable.

REGISTRATION OF MARRIAGE

Under the Civil Code registration is mandatory, registration not only of births and deaths, but of all marriages too. This proof or recognition of marriage is meant to ensure a certain amount of security to a married woman, as the law also assures a married woman of a share in her husband's assets.

Although registration is mandatory for all communities in Goa, the implementation differs from community to community. The procedures for registration are as follows: the two parties entering into the contract of marriage have to first declare their intention to marry before the office of the civil registrar by signing the declaration in the presence of two witnesses. A period of two to three weeks is then sought by the civil registrar, who has to post this intent on the door of the office to invite objections, if any, to the marriage. Objections are referred to the civil court for examination before a decision is taken. If there are no objections, the couple must appear before the civil registrar after the stipulated period to confirm their intention and to sign the Book of Registration, again in the presence of two witnesses. For Catholics wishing to marry in a church, the procedure is different. After declaring their intent to marry at the Civil Registry, a no objection certificate is obtained from the civil registrar, which is handed over to the church. The officiating priest is granted the power of a civil registry. This was given under the treaty signed in 1946 between the Roman Catholic Church at the Vatican and the Portuguese government under Antonio de Oliveira Salazar. At the church, after the marriage rites have been performed, the couple sign a register in front of witnesses, and an extract of the church register is then sent to the office of the civil registrar, who prepares the civil marriage certificate.

Problems with this System of Registration

The flaws in this system are numerous, not least among them being that the procedures are too complicated, cumbersome and do not apply uniformly to all communities. Very often the declaration of intent to marry has been mistaken by women as the civil marriage itself, resulting in several cases where women have believed themselves to be married when they are actually not married in the eyes of the law. If the intent is not confirmed

within a year, the declaration ceases to be valid. Women's organisations in Goa have found several such cases, which came to light especially when women wished to take legal recourse for marital problems. A religious marriage alone is not a valid marriage in the eyes of the law, leaving many ignorant women in more vulnerable positions.

Then, unlike Sections 405 and 406 of the Indian Penal Code where a denial of *stridhan* (the wife's personal property under Hindu law) is considered a criminal offence, under the Civil Code a woman cannot immediately claim any of her belongings from her husband without going through the court to retrieve them. So, if a woman has been thrown out of her marital home, she cannot even take her clothes and personal effects with her, leave alone her rightful share in the family assets, without applying for the same through the court. There is no distinction between personal property and communion of assets. Then, for Hindus and Muslims, it is taken for granted that the people are aware of the compulsions of registration, so the marriages of persons who are oblivious of this mandate and are married by religious rites are considered invalid.

Another problem with the system is that there are civil registries only in the talukas (administrative headquarters), and not in the village panchayats. Then there is an additional problem, as these offices are not yet computerised. Therefore, it is very difficult for the offices to check if the partners seeking to marry have in fact been married before or not. And in cities there is now so much of anonymity that it is not uncommon for a person to register, in the same office, marriages to two different women.

People Aware of Mandatory Registration of Marriage

A study conducted by the Centre for Women's Studies, Goa University, showed that although women were not aware of the actual procedures of registration, the awareness of the need to register marriages was fairly high, particularly among Muslim women. The provisions in the Civil Code are quite contrary to the Muslim personal law, which might be an explanation for the high degree of awareness among people in this community.

Another contributing factor to the general awareness of this need to register marriages is the tax benefit that is made available on the registration of marriage. Income from all other sources is considered joint

property and taxed likewise, that is, each partner is taxed on only half the total amount of assets owned.

MARRIAGE IN GOA

Law views marriage as a contract, and according to the Civil Code there are four systems by which a marriage can be contracted. Therefore, before the civil registration, an Ante Nuptial agreement is to be signed by the two partners entering into marriage, stating clearly how the properties of each party are to be held. If no agreement is signed prior to the marriage, the marriage is considered contracted under the first type of marriage system, that is,

- (i) **Communion of Assets:** All wealth and properties here, regardless of the source, owned by both partners are considered joint family assets, and both partners own equal shares. It might be interesting to note here that the husband cannot sell or do away with his property without the consent of his wife. Even in the event of non-payment of a loan taken by the husband alone, the half share of the property belonging to the wife cannot be attached. In other cases, however, the division of properties cannot be done during the subsistence of the marriage. The collective property can be partitioned only on the dissolution of the marriage, that is, in the event of death or divorce. The main drawback of this system is that the administration of common assets rests solely with the husband. If there are children, the family assets are further shared between sons and daughters equally.
- (ii) The second system is that of a total separation of properties or no communion at all, which is a very rare agreement signed before marriage as it is not in keeping with the sentiment surrounding marriage. Here the partners hold all their properties independently.
- (iii) The third is where there is total separation of the properties and assets owned prior to the marriage, and a communion of those assets and properties acquired subsequently. This type of agreement was not very common until very recently, when it started becoming increasingly common. This might reflect the nature of marriages today.

- (iv) The fourth system is the one often mistaken for dowry. It is the Dotal Regime. The bride is given a certain share of her father's property and assets, which are handed over to her husband at the time of marriage. The husband is bound to restore to his partner all the property and assets, should the marriage be dissolved. It is not a consideration for marriage, but a 'trust' in the hands of the husband. In the case of his death, his heirs are liable to pay the wife the corpus of the amount.

Regardless of the system of marriage, all children have a share in the family property, and sons and daughters are treated alike. It is, therefore, next to impossible for parents to disinherit their children, as only half of their share of the property can be disposed of according to their wishes. In the absence of descendants, ascendants are entitled to the share and in their absence, brothers and sisters and their descendants are entitled to equal shares.

The Reality is Something Different

Very often daughters get a certain amount of gold at the time of their marriage and are asked to sign off their rights to the family property. It is not common for daughters to fight for their share of the parental property and if there are such cases, it is invariably because of the informed son-in-law, who wishes to claim his share. It may also be because of the land prices today, and the known wealth that the construction industry can bring. Regarding awareness in Goa about the inheritance and succession laws, there is awareness of the fact that by law the spouses are equal partners to family assets, but awareness of the other provisions of the Ante Nuptial agreement is not very high.

A problem that has been noted by women's organisations in Goa is that invariably, it is the husband's name that is recorded in the land records unless the wife insists that her name be included too, which is very rare. Therefore, a man wishing to dispose of his property and disinherit his wife can do so by concealing the fact that he is married.

In Article 1204, which talks of the separation of persons and properties, adultery committed by the wife is a ground for separation. However, for the husband, only adultery accompanied by public scandal, or a complete abandonment of the wife, or keeping a mistress in the conjugal domicile

are grounds for separation (this is apart from ill-treatment and serious injuries, and conviction to life imprisonment, which are applicable to both spouses).

Bigamy in Goa

Bigamy is not uncommon in Goa. Women's organisations have been discussing this issue and have noted that bigamy is very high in the state. Some might reason that this is the practice, as there is a provision for polygamy under Articles 3 and 4 of the section on 'Usages and Customs of Gentile Hindus of Goa' in the family laws. However, polygamy is permitted only under certain conditions:

- (i) Absolute absence of issues by the wife from the previous marriage until she attains the age of 25 years (with the consent of the wife from the previous marriage).
- (ii) Absolute absence of male issue, the wife from the previous marriage having completed 30 years of age; and being of lower age, 10 years having elapsed from the last pregnancy (with consent of wife from the previous marriage).
- (iii) Separation on any legal grounds, when proceeding from the wife, and when there is no male issue.
- (iv) Dissolution of the previous marriage as provided under Article 6 of Usages and Customs, that is (a) impotency of spouses, duly proved; (b) adultery by the wife; (c) ill-treatment and serious injuries; (d) change of religion.

Interestingly, however, bigamy is prevalent in all Hindu, Catholic and Muslim communities. This is despite the fact that Section 494 of the Indian Penal Code considers bigamy an offence. It may be interesting to note that prior to 1955, in the eyes of law there was no such thing as a monogamous marriage as there was no mention of polygamy as an offence. Divorce laws also did not exist.

LAW AND SOCIETY

An important aspect of the relationship between law and society is the process of assimilation of the law into the lifestyle of the people,

as only then will the law be consciously used as a vehicle of social transformation.

With the entry of modern influences on education, political ideology and socio-cultural values, such as ideas of democracy and equality which have led to a serious questioning and rethinking of traditional values, the desired position or status of women in society has undergone a fair change. The law, likewise, also has to be updated vis-à-vis the needs of the society. According to the Civil Code (Chapter V, Article 39), 'The conjugal union is based on liberty and equality, the husband being duty bound, especially, to defend the person and the properties of the wife and of the children, and the wife having the duty mainly of domestic management and moral assistance to the strengthening and improvement of the family unit'.

'Development' is indeed a primary goal today, and the question of women's status and the creation of an environment that will enhance their social functioning are incorporated in the agenda. Law is believed to be one way by which societies provide protection to individuals, maximise civil liberties and promote equality; however, it is often the law that has to be transformed if development is to be achieved, especially those laws that delay or distort development efforts rather than help realise them—gender-biased laws, for instance. But just laws are not enough. The law has not helped to improve women's access to economic resources, incomes and employment, nor has it helped to improve women's health, nutritional and educational status. In reality, women have been unable to exercise their rights, and neither do they have freedom from and protection against violence, as the number of reported cases of violence has been on the increase.

The various movements for reform and revival in earlier times were all usually accompanied by a social service counterpart. If change is desired, it has to be the 'felt need' of the society, for it has also to be accepted and assimilated. Social sanction for the law is mandatory. Society therefore has to be informed. Not only is social awareness necessary, but the society also requires supportive services to help it 'adjust' to the consequences of any change. Social reform and legal reform should be linked, and be considered synonymous with development as both essentially aim at change—a change sometimes involving the values of a society. But this is easier said than done.

Traditional Indian society has only in the last century been exposed to modern ideas of democracy and equality, and it is therefore still too soon for these new ideas to be completely assimilated by the people who have for centuries been living with different values. There is also an underlying belief that anything that has earned itself the name 'tradition', and has stood the test of time, should have some merits to account for its continued existence. Thus in our society, we have even today both defensive and assimilative reactions to law, and more particularly to law reform. Legal reform and social reform, as stated earlier, should go hand-in-hand. Even social transformation is meaningless without an adequate legal system to sustain it. This can be exemplified by past social movements.

CONCLUSION

It is true that the well-being and development of the individual and equal recognition of the dignity of every individual, are indicators of social progress. However, there is one major problem with regard to human rights, and that is the conflict that often arises between individual good and social good. This conflict is often overlooked by law, which tends to view things more in terms of black and white, and wrong and right. The reality in society is not that simple. These complexities have to be understood and dealt with before we can even hope that the law will determine or improve society, particularly women's status within it. The law-enforcing agencies should therefore go beyond the 'institutional' and also include the 'social'.

REFERENCES

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