FAMILY LAW IN GOA AFTER THE ACT OF 2012: KEY CONCEPTS IN THE PORTUGUESE CIVIL CODE OF 1867 AND THE CODE OF GENTILE HINDU USAGES AND CUSTOMS OF 1880*

By

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Summary:

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I. Introduction

1. On the 1st of July 2020, 150 years will have passed since the Portuguese Civil Code of 1867 became applicable in Goa.

During that period, Goan Family and Succession Law have undergone some very relevant changes and is now dispersed through different legal texts, which include:

- The surviving provisions of the Civil Code, parts of which have been repealed*;*
- The *Code of Gentile Hindu Usages and Customs of Goa 1880*, which provides a set of exceptions to the Code's provisions on Family and Succession Law; and
- The *Goa Succession, Special Notaries and Inventory Proceeding Act 2012* (Goa Act 23 of 2016), which replaced the corresponding provisions of the Code.

These developments raise a number of issues, not only in respect of the determination of the rules effectively applicable to family and succession matters, but more generally in relation to the ideal of a uniform codification of Civil Law, which the founding fathers of the Indian Constitution have enshrined in its article 44.

Those issues will be the subject matter of this session, which comprises two parts: Succession Law will be dealt with by my distinguished colleague Dr. Elgar Noronha, while I will concentrate on Family Law and its legislative codification.

II. Codification, de-codification, re-codification: a comparative overview of the phenomenon

2. In order to do so, a conceptual clarification is first required in respect of the notion of codification.

The word «code» stems from the Latin *codex.* This was the term used in the Roman Empire to identify the collections of imperial constitutions, the most prominent of which was the *Codex Justinianus*, of 534, that became the 3rd part of the *Corpus Iuris Civilis* compiled under the auspices of Emperor Justinian.

In the Middle Ages, European codes basically still consisted of collections of laws, arranged in alphabetic, chronological or some other order. They were also called «ordinances». Portugal had three sets of Ordinances, promulgated by Kings Alphons V (in 1446), Manuel I (in 1503) and Philip I (in 1603). Their main purpose was to facilitate access to the applicable law, which at that time was still largely fragmentary and scattered through different texts.

The modern notion of code is somewhat different. It means a text that contains the fundamental rules that govern a given category of legal relationships, organized according to a scientific criterion.

Codes in this sense have only emerged after the French Revolution of 1789. In fact, they are the product of a revolutionary idea: the *principle of equality*, which requires the general application of the law. Thus understood, a code should in principle prevail over all local or personal laws, as well as over customs.

The first code drafted according to this model was the French Civil Code of 1804, which embodied the ideals of the French Revolution: *freedom*, *equality* and *solidarity*. It also aimed at ensuring the certainty of the law and its stability. The latter aim was unequivocally achieved, since the French code has lasted for more than 200 years and survived ten constitutions, albeit several times amended.

From France, the Civil Code disseminated to other countries, such as Spain, Belgium, Holland and Italy, which took it as the basis of national codifications.

The Portuguese Civil Code of 1867 was also influenced by it, although, as we shall see later, it is arranged according to a different system and is to some extent based on different philosophical premises.

A very different Civil Code, the so-called *Bürgerliches Gesetzbuch,* entered into force in Germany in 1900. It is much more concerned with conceptual rigour and economy of thought than the French code. Its rules are, in fact, the expression of an *abstract approach to law*, according to which instead of dealing directly with the types of situations that occur most frequently in social life, such as contracts or wills, the Code should strive to regulate first what is common to those situations, for example the so-called «declaration of will» (*Willenserklärung*), which are the object of a general part containing the rules that apply to all types of legal relationships. This notion of code was very influential in Portugal, notably in the 1966 Civil Code.

The prestige acquired by the French and the German codes explains why almost all continental European countries have adopted a Civil Code, which eventually became a symbol of the Civil Law legal family.

Even some legal systems that do not belong to this legal family have adopted or are presently in the process of adopting a Civil Code. This is the case of Louisiana in the USA, Quebec in Canada, and the People's Republic of China.

3. Notwithstanding its dissemination in four continents, the codification ideal underwent some erosion during the 20th Century.

In Europe, the growing intervention of States in social life, in particular through the regulation of economic activities, led to the adoption of a large number of special statutes on Civil Law matters, many of which were the result of the transposition of European Union Directives. This was the case, for example, of laws on product liability, unfair contract clauses, time-sharing, distance contracts, etc.

A phenomenon of *de-codification* thus occurred in Europe, by virtue of which many issues of Civil Law became the object of rules not included in Civil Codes.

This phenomenon turned so widespread that in the late 1970s it led an Italian author, Natalino Irti, to hold the thesis that a new *age of de-codification* had arrived.

4. More recently, however, the negative consequences of de-codification, notably the incoherencies it generates and the difficulties it gives rise to in what concerns access to the law, led national legislators to *re-codify* Civil Law and, at the same time, to modernise Civil Codes. This is what happened, e.g.:

— In Holland, with the Civil Code of 1992;
— In Quebec and Russia, with the Civil Codes of 1994;
— In Macao, with the Civil Code of 1999;
— In Germany, with the modernisation, in 2002, of the Part of the Civil Code concerning the Law of Obligations;
— In Brazil, with the Civil Code of 2002;
— In East Timor, with the Civil Code of 2011;
— In Argentina and Hungary, with the Civil Codes of 2015; and
— In France, with the reform, in 2016, of the law of contract and of the general law of obligations.

One may therefore say that in the 21st Century codification of Civil Law is a vibrant reality again.

III. The Portuguese Civil Code of 1867, its underlying philosophy, systematics and reception in Goa

5. Let us now turn to the Portuguese Civil Code. The first Civil Code of Portugal was published in 1867.

The Code was drafted by António Luiz de Seabra, a judge at the Oporto Court of Appeal, whom the Queen of Portugal had appointed to that task in 1850.

His draft code, originally submitted in 1858 and subsequently revised by a committee of experts, was approved by a Law of 1 July 1867, and entered into force on 23 March 1868.

The code was preceded by very important doctrinal works, among which one should mention those of Borges Carneiro, Correia Teles and Coelho da Rocha, which Seabra used when preparing the code.

Although inspired by the French Code, the Portuguese Civil Code of 1867 follows, as already mentioned, a different system. It is divided into four parts, dealing respectively with civil capacity, the acquisition of rights, the right of property, and the breach of rights and its remedies.

The Code embodies an *individualistic vision* of the law, which was already apparent in a book published by Seabra in 1850 – the very year when he received the mandate to prepare the Code – entitled *A propriedade. Filosofia do Direito para servir de introdução ao comentário sobre a Lei dos Forais.*

The Code thus puts the emphasis on the individual holder of the rights, not on social institutions, and takes the right of property as the basis and origin of all other rights.

Party autonomy knows very few limits in this code. The consequences of the lawful exercise of individual rights, even if abusive, are not relevant. Good faith is not an autonomous source of duties of conduct for the parties.

The influence of Natural Law theory on the author of the code is visible throughout its provisions: human rights, for example, are deemed to pre-exist the law, which merely recognizes them and ensures their enforcement.

Accordingly, article 5 of the Code states the following on the function of Civil Law:

«Civil law recognizes and specifies rights and corresponding duties; ensures and protects the enjoyment of rights and the performance of duties; lays down the circumstances in which a citizen may be disabled from exercising rights and the manner in which such disability may be overcome.»

One may say that this single provision encapsulates, in an elegant formula, the whole philosophy of this unique Code.

6. By a Decree of 18 November 1869, the Civil Code of 1867 was extended, as of 1 July 1870, to the Overseas Provinces of Portugal. Thus, the Civil Code of 1867 became applicable also in Goa, Daman and Diu.

By virtue of the *Goa, Daman and Diu (Administration) Act 1962*, all laws in force in these territories, including the Civil Code, were kept in force after they were integrated in the Indian Union, «until amended or repealed by a competent Legislature or other competent authority».

Since then, several legal acts of the Indian Union concerning Civil Law matters, such as the *Indian Contract Act 1872* and the *Indian Transfer of Property Act 1882,* were extended to Goa, Daman and Diu and the corresponding provisions of the Civil Code were repealed. The remaining provisions of the Code, notably those concerning Family and Succession Law, Property Law (except its transfer) and Tort Law, remained in force.

More recently, however, the *Goa Succession, Special Notaries and Inventory Proceeding Act, 2012* has repealed the corresponding provisions of Succession Law contained in the Portuguese Civil Code of 1867.

One may therefore say that *de-codification* of Civil Law has also reached Goa. It remains to be seen whether it will be followed, in the coming future, by a *re-codification*, as has happened elsewhere around the world.

IV. Fundamental traits of Family Law in the Portuguese Code of 1867; in particular the notion of marriage and the communion of assets regime

7. Be that as it may, it is clear that the Code's provisions on Family Law, notably those on marriage, contained in its articles 1056 to 1239, remain in force. I shall now consider them.

One of the fundamental traits of Family Law in the Civil Code of 1867 is the notion of marriage originally enshrined in it. According to article 1056:

> «Marriage is a perpetual contract made between two persons of different sex with the purpose of legitimately constituting a family.»

This provision reflects the Code's underlying secularism, which saw marriage as a contract and deliberately omitted any reference to it as a sacrament.

Marriage could nevertheless be celebrated, according to article 1057, in two forms: the canonical one, which was mandatory for Catholics, and the civil one, for those who did not profess the Catholic religion.

Both provisions were modified in 1910, the former one in order to abolish the perpetual nature of marriage, and the latter in order to provide for the necessary solemnization of marriage before the civil registrar.

In 1940, these rules were modified again by virtue of the Concordat between Portugal and the Holy See, whereby the perpetual nature of catholic marriages was restored and these were recognized civil effects.

8. Another fundamental tenet of the Code concerns matrimonial regimes, i.e., as defined by section 2(n) of the 2012 Act:

> «the system of rules which governs the ownership and management of the property of married persons as between themselves and towards third parties.»

Under the 1867 Code, a *communion of assets* is, by default, constituted among married couples, comprising all their assets brought to the marriage or acquired after it (article 1108).

Those assets are to be administered by the husband (article 1117). Consent of both spouses is nevertheless required for the disposition by any of them of immoveable property integrating the communion (article 1119).

Furthermore, if the couple becomes separated or divorced, each of them is entitled to a half of the common assets (articles 1121 and 1123).

The regime of general communion of assets was also called in article 1108 «marriage as per the custom of the realm». This was so because this regime was in force in Portugal since the Middle Ages. The Manueline Ordinances stated in its respect that:

> «All marriages carried out in our kingdoms and lands shall be deemed as having been entered into on the basis of equal shares, except when the parties stipulate otherwise.»

However, this regime no longer applies in Portugal as the default one, which has been, since the adoption of the new Civil Code, the *communion of acquired assets*.

Why – one may ask – did the Portuguese Code of 1966 opt for the communion of acquired assets and drop the general communion?

This change is in line, I would say, with a certain relaxation of the bonds between spouses that characterizes the modern era in many Western countries, including Portugal.

A union of two persons through marriage is no longer deemed to be necessarily a perpetual one, since divorce has been allowed with

increasing liberality; and each of the spouses may maintain a certain degree of financial independence from the other, notably in respect of the assets that it already possessed before the marriage, or which it acquired gratuitously thereafter.

A much more *individualistic notion of marriage* has thus prevailed in Portugal and elsewhere in Europe over the past 50 years.

9. Anyway, the 1867 Code provided for ante-nuptial agreements, by virtue of which different rules could be agreed by the spouses in regard of their assets, e.g., by stipulating that each spouse would keep as his or her personal property the assets acquired before the marriage or even a complete separation of assets.

In fact, according to article 1096:

> «It is lawful for the spouses to stipulate, before the solemnization of the marriage and within the bounds of the law, whatever they think fit in respect of their assets.»

A remarkable degree of freedom was therefore granted to both spouses by this Code in respect of their patrimonial relations – again, a distinctive feature of the Code, no doubt inspired by the prevailing economic liberalism at the time of its adoption.

V. The *Code of Gentile Hindu Usages and Customs of Goa* of 1880; in particular the Joint Family institution

10. I now turn to the *Code of Gentile Hindu Usages and Customs of Goa*, approved by the Decree of 16 December 1880, article 1 of which preserved the usages and customs of the Hindus of Goa, as revised and compiled in the Code's provisions.

The Code reflects a century-old policy of recognition of local customs and usages pursued by the Portuguese administration in its erstwhile overseas territories in India up until their integration in the Republic of India.

The Code has not been revoked or amended until the present day. Although seldom invoked by Hindus living in Goa, it is therefore still in force.

11. It is interesting to compare the rules of the Civil Code of 1867 on matrimonial property with those of the 1880 Code, notably those concerning the so-called Joint Family («*sociedade familiar*»)

This is one of the most prominent customary law institutions codified in Goa in 1880. It is defined by article 16 of the Code, for all judicial and civil purposes as «the reunion of gentile Hindus of both sexes inhabiting the same house and living within the same domestic economy».

This type of family organization almost always existed, as was explained by Dr. Cunha Gonçalves in his commentary to the Code, by tacit agreement, and lasted for centuries. At the time when this author wrote his commentary to the Code, it was the «normal, traditional and almost invariable form of the Hindu family».

In spite of being named, in Portuguese, a «*partnership*» («*sociedade*»), the Joint Family was essentially distinct from all forms of partnership provided for in European law, in particular in the Portuguese Civil Code of 1867.

In fact, according to article 17 of the 1880 Code, all the property, rights and shares owned by the Joint Family, as well as anything acquired by any member thereof, were deemed to be a common asset and is managed by the Head of the Family (the so-called «*Maioral*»).

There were therefore, so to speak, no individual shares in this partnership.

Certain exceptions were, however, allowed in the sub-paragraphs of that article. These concerned:

— The assets or income donated or left to a member of the family with the express reservation that they should not become part of the common property;
— The assets that were inherited by such member of the family from his or her relatives belonging to another family;
— The assets acquired through his or her own work without resorting to common funds; and
— All other assets that were deemed to be owned exclusively by the members of a partnership under the general provisions of the law.

The burden of proving that an asset did not belong to the Joint Family nevertheless rested with the member that made such an allegation.

A Joint Family was ruled, managed and represented by its oldest male member having legal capacity (article 18).

As manager, the Head of the Family could carry out all acts of administration according to the general provisions of the law, unless otherwise authorized by the family through a deed (article 19). Contracts entered by the Head of the Family in principle reverted to the benefit of the family (article 20).

The members of the family, regardless of their degree of kinship, were entitled to maintenance based on the common income of the family while they live associated to each other and while they shared the same roof and economy (article 21).

The Joint Family was dissolved in the cases and the manner foreseen in the general provisions of the law and the general rules on partition between co-heirs were applicable thereto (article 22).

12. These rules are essentially distinct from those of the Civil Code. In fact, the communion created by marriage under the Civil Code does not comprise assets that were acquired or earned by the offspring of the couple, as in the Hindu Joint Family.

The scope of the communion provided for in the Portuguese Civil Code is thus *much more restricted* than that of the Hindu Code.

VI. The relationship of the Hindu Joint Family with the matrimonial regimes of the Portuguese Civil Code of 1867

13. A word should now be said on the relationship of the Hindu Joint Family with the matrimonial regimes of the Portuguese Civil Code of 1867.

The Decree of 18 November 1869, which extended the applicability of the Civil Code of 1867 to India, expressly maintained the usages and customs of the New Conquests as well as those of Daman and Diu, as collected in their respective codes.

The Decree of 1869 thus formally enshrined the principle of the *plurality of personal statutes of Private Law* applicable in Portuguese Overseas territories.

Accordingly, the rules contained in the 1880 Code constitute, within their specific scope of application, a set of exceptions to the Family and Succession Law rules contained in the Civil Code of 1867.

However, the parties to whom the rules set out in the 1880 Code applied were allowed by article 30 to *opt in*, by a common agreement, for the applicability of the Civil Code and the further legislation of the realm; in such case, the latter applied to them.

In light of this provision, the rules concerning the Joint Hindu Family contained in the 1880 Code are not mandatory, as they can be excluded by the option for the Civil Code's provisions, just as the provisions of the Code on the general communion can be excluded by the spouses.

As was noted by Prof. Carmo d'Souza, the said provision of the 1880 Code reflects the *assimilation policy* followed by the Portuguese in India, which led them to preserve, for practical considerations, local uses and customs affecting the personal life of the non-Christian population, while

seeking to gradually do away with them through education and other means.

One must therefore conclude that the Hindu Joint Family is a part of a *special personal status* provided for in the said 1880 Code, which is only applicable to Goan Hindus that have not made the option for the Civil Code's provisions as their personal status.

That option entailed the *exclusive applicability* of the Civil Code provisions and ruled out the applicability of the Hindu Code's provisions.

It is a well-known fact that, by and large, Hindus in Goa did not resort to the 1880 Code's provisions, preferring instead to opt in for the Civil Code.

Such an option in favor of the Civil Code's provisions was *irrevocable and thus perpetual*, as provided by article 3 of Decree no. 43.897, of 6 September 1961; therefore, those that so opted could not subsequently return to the gentile status. Their offspring, including the minors existing at the time of the option, were also subject to the chosen law, according to the same legal provision. Two reasons account for that irrevocability:

- A concern for *legal certainty and security*, since otherwise great instability would arise as to the personal status of the interested parties;
- The policy of *legal and socio-economic integration* of the members of Hindu communities making such option.

VII. Conclusion

14. In light of the above, one may say that Goan Family Law has kept a remarkable degree of uniformity, despite all the social and political changes occurred in this part of India over the past 150 years.

In fact, to a large extent, the Civil Code's provisions on Family Law apply irrespective of their addressees' religion. In this sense, the Civil Code of 1867 can be classified as a *quasi-uniform code*.

It is noteworthy that the 2012 Act, despite constituting a form of de-codification, has endeavoured to preserve the uniform application of the law, as is apparent from its article 1 (4).

The issue nevertheless remains of what will be the fate of Civil Code in Goa.

To retain or not to retain Family Law and other Civil Law matters in a code proper, such as the 1867 one, is a question that lies largely in the hands of Goan legislators.

I would allow myself to note in this respect that, as Comparative Law shows, modernization of the law can be undertaken while preserving its codification.

The ideal of a Uniform Civil Code, enshrined in the Indian Constitution 70 years ago, is thus by no means incompatible with the adoption of a Family Law that is in line with the spirit and the needs of present times.