

## **Western Region Workshop on Family and Property Laws of Goa.**

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A Workshop on Family and Property Laws of Goa was organized by V.M. Salgaocar College of Law on 24 and 25 August 2002. The Workshop was held at the premises of the sponsors, Fundacao Oriente. The objectives of the Workshop were: (a) to familiarize the teaching faculty especially of the two Law colleges with the family and property laws of Goa, (b) to prepare a blue print for dissemination of information and preparation of relevant material, (c) to identify the concepts and principles of those laws which can be useful and relevant for the Indian conditions, (d) and to identify the areas in those laws which can be incorporated in the academic syllabus of the Indian Universities.

For a fruitful discussion, the presenters and participants were selected from different sections mainly judges, lawyers, NGOs and academicians. Some of the academicians came from different universities and colleges of Western Region of India.

The methodology adopted consisted mainly of short and brief presentations, followed by a session of question answers and group discussion. As a result each and every participant in the seminar was actively involved and was able to react and contribute to the proceedings.

### **Inaugural Address**

Dr. V. B. Coutinho, Vice Chancellor of Gulbarga University, in his inaugural address referred to Vijnaneshwar, whose birthplace came within the jurisdiction of his University. He praised Vijnaneshwar's masterpiece, the Mitakshara, which was a common code for the Hindus from Kashmir to Kanyakumari, with a lasting influence over eight centuries. It was a bond beautifully conceptualizing a joint family, common in worship and with "community of interest and unity of possession" as described by Privy Council. Yet this code had emerged from a very dry and neglected region of India. Dr. Coutinho stated that he has proposed to the Central Government to start a chair on the subject in Gulbarga university in order to carry out research into this masterpiece of ten centuries back.

Referring to Family Laws, Dr. Coutinho highlighted the need for an effective system of Registration of Marriages in India. He referred to the requirement of safeguarding the interest of women and children in any Family Law. At every conference there was a cry to make marriage registration compulsory as the women were at the receiving end due to this lacuna. Many marriages could not be proved due to lack of evidence, where the celebration was carried into a remote temple. He advocated research into the Goa experience especially as regards the

registration system in order to find a solution to the lacuna in personal laws of India.

Earlier, Dr, Sergio Mascarenhas de Almeida welcomed the gathering, Principal Pinheiro , introduced the Chief Guest and referred to the dynamics of the Workshop, Prof Prasad raised the vote of thanks and Prof .Tamba compered the function .

#### Concepts an Principles of the Portuguese Civil Code.

Adv. Elgar Noronha made an interesting and effective presentation expounding the historical background , concepts and principles in a Civil Code. In order to have a proper approach to Civil Code it was essentially that one was indoctrinated in the methodology used in Civil law system . Adv. Noronha clearly explained the concept of a Civil Code, which possessed the elements of logical exposition on the area of concerned law. It was a piece of legislation where there is logical ordering of civil law. His presentation clearly indicated how the Civil Code went much beyond the Family law regime.

On a historical note, the presenter referred to Antonio Luis Seabra , the man behind the Portuguese Civil code of 1867 and to the Benthamite classification which the Portuguese Code seemed to obey. The Seabra Code of course was based on the “subject” rather than on the “object” of rights. The Code was labeled as a legal biography of the “subjects of rights and obligations”. It was based on the socio-political doctrines built around individualism and the individual liberty in vogue in those days. The piece was categorized as a Conceptual Code, being criticized at the time as being full of doctrinal concepts.

The speaker explained the division of the Civil Code. The Portuguese Civil Code of 1867, is divided into four parts namely, Civil Capacity, Acquisition of Rights, Right to Property and Violation of Rights and the Remedies. He then referred to some peculiar Concepts found in the Portuguese Civil Code. They include the concept of Natural Law, which came as a substitute for equity in the original draft . He also referred to Art. 24 to 31, which contained the Principles for conflict of Law , based on Principles of Private International Law.

#### **Discussion Session**

The presentation was followed by question answer session and group discussion. The audience especially those who were not aware of the system were very appreciative for the informative lecture. In fact some participants remarked that if family law was to be thought in the college it was necessary to build up the concepts and methodology of civil law for proper appreciation of the subject.

Many participants were of the opinion that it was necessary to teach Civil Law system especially in view of the importance of Comparative Law in modern days studies.

A point hotly debated was as to the question as to who is a Goan or better framed to whom does the Family Law of Goa applies. There were some lucid explanations based on the intrinsic web of post Liberation law in 1962. Perhaps the question may have to be tested by the courts or answer provided by the legislature. Also views were expressed on the meaning and content of uniform Civil Code as required by Art.44 of the Indian Constitution.

### **Suggestion**

One of the important observation was that it is necessary to teach the Civil Law System in our legal institutions, due to its growing importance in international and other fields. If Goans are to look for better placements in International Law it is high time to be aware of the methodology used in Civil Law countries. It was suggested that in Pondicherry there is Civil Law institute set up with French collaboration. It would be ideal to have one such institute in Goa. Perhaps it could be named after Dr. Cunha Gonsalves, eminent legal scholar from Panjim, who wrote a treatises of dozen books or so on the Portuguese Civil Code as suggested by one of the participants. The contribution of Dr. Cunha Gonsalves was pointed out to the participants by Senior Advocate M. S, Usgaocar. Also, Goa earlier being under the Civil Law system and having switched to Common Law possesses a rich experience of the two systems. While the two systems today are attempting to come closer, Goa could be one of the most fertile places for research. For instance one could conduct research to find out the impact of law drafted in one system when it is operated in another. Besides, Goa has a set of excellent judges and lawyers who have worked under both the systems. Their experiences could be a valuable contribution even in terms of international research. One can be sure that foreign scholars will flood Goa, once they are aware of this rich heritage and an institute is set up. It is necessary to tap this especial brand of legal heritage, before it is too late.

### **Marriage and Divorce**

In the afternoon session Dr. Alvaro Noronha Ferreira presented his paper on marriage and divorce. He began with the concept of family under the Roman Law, as persons living under the guidance of Pater Familia irrespective of relationship linking the persons. He referred to the Church concept of family arising out of a link of marriage. Next following a historical line, he developed the marriage as per the original law under the Civil Code of 1867. The Civil Code devoted a chapter to Marriage providing two types of marriages i.e. according to

cannon Law or marriage before Civil registration. Art. 1056 defined marriage as a perpetual contract and hence divorce was not permissible, however permitting separation of persons and assets or separation of assets only. At that stage divorce was not accepted in most countries.

In 1910, with the overthrow of Monarchy and the proclamation of Republic in Portugal, the law of Divorce was enacted. Here advanced ideas of civil marriage and divorce got reflected. Art. 2 of the Law of Marriage stated that contract of marriage is purely civil and there was only a presumption of perpetuity, which could be dissolved by Divorce. The marriage of citizens was to be performed before the Civil Registrar. The speaker pointed out that there was some resistance to the above, till a new enactment was enforced providing a term of three months of imprisonment to the priest, who performed the marriage without the certificate issued by civil registrar.

Dr. Ferreira lucidly clarified how on the imposition of the Civil Code, the Hindu Community made a representation to the Government. As a result there were three institutions that were safeguarded. They were: (a) Hindu Undivided Family, (b) Adoption of a male child in case the married couple does not have a son, (c) Permission to a Hindu to take a second wife in case the first wife did not bear a male child. The above were granted with due restrictions. On the point of bigamy, it was permissible if there was no male child after ten years of marriage, the wife being twenty five years old or above. The second marriage could be performed only if the first wife granted the permission by executing a public document. The conditions and procedure were so stringent, that it deterred second marriage. There were few or no instances in the memory of people, the last such marriage being held over half a century back.

In July 1946, a Decree extended to Goa converted the clauses of Concordat (Treaty with Holy See) into an internal law. As pointed by the speaker, a Catholic Priest could perform the marriage, and it would be presumed that the spouses had renounced the right to apply for Divorce. They could get annulment from a Canonic Tribunal or get separation of persons and assets in a court of law. However the proceedings preceding the marriage had to be done in Civil registrar, signing a declaration that they intended to marry. The Judicial Commissioner in Goa in a judgment of 1974, quashed the provision that barred the citizens married in the church from seeking divorce, as being discriminatory and violate of the Indian Constitution.

Dr. Noronha Ferreira also explained the impediment to marriage, the grounds of divorce as well as the Matrimonial Regimes.

### **Discussion Session**

The presentation was followed by question answer session and group discussion. Dr. Coutinho who chaired the session brought to the notice of the participants that the Hindus were able to get three important concessions from the rulers. He felt it was a very important and relevant point for research. He also requested the participants to give due weightage to safeguarding the interest of women and children in their evaluation of laws. The general feeling was that the laws were generally uniform except for certain anomalies that had cropped as part of historical process. Some observed on the utility of matrimonial Regimes in Family Laws.

### **Suggestions**

1. The Catholic Church could carry out their own research to find out whether it may be necessary and practicable to delink religious marriage from civil marriage, restoring it to 1910-1946 position. Thus there could be a solemnization of civil marriage for the Catholic too in the Civil registrar. They could then offer a suggestion to the Government, thus bringing uniformity in family laws on celebration of marriage.
2. The Catholic Church could carry out their own research to find out whether it may be necessary to delink the process of annulment from civil consequences. The women organizations have certain problems when the annulment process deprives a wife from her suit for divorce and as a consequence deprives her of moiety. Annulment though in one hand is a power it can be a liability. Once delinked it will set the Church free from the State and vice versa.
3. The Hindus have not used the legal provision on bigamy for several decades. Hence they could set a committee to study whether it should be done away with. It is to be noticed that such provision is not available in the rest of India.
4. The Government or the Goa University must following the example of the Gulbarga University, at least carry out a Research Project on the Hindu Law available from the Portuguese Records in Goa. Perhaps Goa has the earliest codification of Hindu law in 1853, 1880 and even earlier legal provisions of eighteenth century. They are a valuable legal and cultural heritage of our past.
5. The law of adoption may have to be enlarged in keeping with the modern Hindu Law in India, where one has option to adopt a son if he does not have one and also a daughter if he does not have a daughter. Similar provision may be made available to a childless Catholic couple too.

6. One needs to carry an in-depth research into the provision about the joint family in Goa, and if it does help to maintain unity within family, it could be said to be a desirable provision. Possibility of optionally extending to others may be considered as object of research.
7. The concept of family courts as pointed by Dr. V. B. Coutinho, need to be strengthened. Goa could provide an excellent model of Family Courts in order to preserve marriage. Latest methods of counseling etc. can be incorporated to prevent unnecessary damage to the family fabric.
8. As pointed by Dr. Coutinho, Marriage Laws and other Laws must strengthen the family bonds rather than weaken it.
9. A note of caution should be exercised while giving divorce. Judges, legal practitioners, councilors, social workers and litigants could adopt methods to minimize the impact of divorce on the fabric of family and society.
10. In any law under the present conditions, any hardship caused to women should be reasonably taken care of by reforming the law if necessary.
11. It is necessary to research into the use of Matrimonial Regimes. One may have to collect case studies of several divorced women in Goa and India to find utility or otherwise of including matrimonial regimes in Family Laws of India. The question whether any special provision is required in the family law as regards distribution of assets in case of divorce is an important point for study.
12. Greater attention should be paid to the registration of marriage. Perhaps the system has been diluted over the years. Attention to be paid right from the officials, infrastructure, equipment, buildings, to forms and legal provisions.

## **Sessions**

**The Law of Succession:** Sunday August 25, in the morning session Adv. Mario Bruto Da Costa, tickled the intellectual faculties of the participants with the law of succession. He explained the intricacies of the law of inheritance with practical examples. As an author of books on the subjects of Matrimonial Regimes, Succession and Inventories, he was able to explain any question posed to him on wills and intestate succession. His presentation was lucid, and the answers to the queries demonstrated the mastery of the speaker on the subject. He clarified on the position of the wife as regards her moiety under the community of assets, and her position down the line as a heir of her husband.

**Discussion Session:** The presentation was followed by question-answer session and group discussion. The general observation was that the laws of succession and wills were quite fair to both the genders. In fact the provisions

are better than most other personal laws. There was a question on whether the wife had to be moved up on the list of heirs. It is to be observed that the wife as a general rule is entitled to half moiety if there is no prenuptial contract to the contrary. Hence as a rule she gets a good chunk of property. However in exceptional cases where she is deprived of moiety, the laws of succession may have to be amended to give her better protection. The few flaws need to be researched. One needs to prepare the society for the future.

**Property Laws of Goa.** Senior Advocate M. S. Usagaocar dealt on a very difficult topic during the afternoon session. He has being a pioneer in getting the Family Law of Goa accepted both in the locality as well as in the rest of India. There is a mind block among Common law experts in accepting the Continental system and vice versa. The traditional prejudice is strong and has taken a long time for Europe and its islands to comprehend each other. It is only now that English, American and European universities are trying to understand each other. Senior Advocate Usagaocar has taken a difficult task on popularizing the continental system as regards Property Laws. Having the benefit of having worked under both the systems, he can understand the intricacies of the subject, as few people can do.

The speaker took the participants through the complicated labyrinth of present day property laws in Goa. He brought out carefully the advantages of Comparative Legal analysis. He went through the concepts of Empheteusis,, Servitudes and Easement, Right of Access, Access to Land locked Property, Law of Preemption among others.

**Discussion Session :** It was generally observed that the time was too short for the Property Laws to be dealt in one session. However it had served its purpose. It had highlighted the importance of understanding the property laws of Goa as they were prior to Liberation, to study their present day position after an impact of social legislation, and to make reforms in the light that Goa needs to plan for the future society. It was necessary too to study the Portuguese Record System to improve on it and prepare Goa for the market society.

**Valedictory Address.** Dr. Coutinho gave his concluding views on the Workshop. Dr. Hirani, Head of Department of Faculty of Law, University of Poona, made a critical appreciation on the Workshop. The Chief Guest, Justice Eurico Santana Da Silva in a nutshell beautifully brought out the highlights in his Valedictory Address. Principal Pinheiro gave the vote of thanks, while earlier the delegate of Fundacao Dr. Sergio Mascarenhas welcomed the participants. Prof G. Tamba compeered the function.

**Conclusion:** V. M. Salgaocar College of Law after identifying the various issues in connection with the Family Laws intends to take the workshop to its

logical conclusion. It intends to call on experts to deliberate on issues identified to thrash out solutions if necessary.

( The writer is a lecturer in V. M. Salgaocar College of Law, Miramar. This article is based on the reports of various reportaires at the Workshop as well as comments and suggestions given by participants. )