

MARRIAGE AND DIVORCE LAWS IN GOA AND IN INDIA: A COMPARATIVE STUDY OF UNIFORMITY AND DIVERSITY.

- NAHEED MUSTAFA³⁴

“India is full of diversity. This diversity is our pride, and it is our strength. Diversity is the specialty of India.”³⁵

-PM SHRI NARENDRA MODI

ABSTRACT

India is a multifaceted land of diverse religions which procures the identity of every religion under the Constitution of India. To maintain peace between major and minor religions of India during British Rule, separate personal laws were granted to Hindus, Muslims and others to avoid any conflict or harsh opposition from community leaders. However, Goa was under Portuguese and Damaon colonial rule. Therefore, in Goa, personal laws were not applicable.

The Portuguese Civil code 1867 is applicable to all Goans irrespective of their religion, which includes family laws. As the law is dynamic in nature, the Portuguese Civil Code is also amended from time to time and there are a few amendments which are included for maintaining harmony between different religions.

In this paper I will make a comparative study of marriage and divorce laws which are applicable in India as well as in Goa, with a broader analysis of uniformity and diversity in them.

³⁴ The Author is a Research Scholar at Aligarh Muslim University and can be accessed at nahidmustafa786@gmail.com.

³⁵ *India full of diversity, it is our pride and our strength: PM Narendra Modi*, THE ECONOMIC TIMES, Nov 14, 2015, 04:28 AM IST <https://economictimes.indiatimes.com/news/politics-and-nation/india-full-of-diversity-it-is-our-pride-and-our-strength-pm-narendra-modi/articleshow/49774433.cms?from=mdr> (retrieved on 15.03.2022).

INTRODUCTION

A family is a social group and has been defined as the smallest identifiable social unit.¹ It is one of the main regulatory institutions which lay the foundation of a society in which marriage plays a critical role in an individual's life for attaining mutual progress of the partner and ultimately benefitting the state.

State intervention in the family is an ideological, not an analytic concept.² Therefore, the state has interference in regulating laws and procedure in the family system from the day he or she is born to last rites. To maintain law and order in society each individual's choice in establishing family is safeguarded. Therefore, we have separate law to govern marriage and divorce laws for Muslims, Hindus, Christians and Parsis in India.³ But Goa is the only State which has a Uniform Civil Code for governing the entire population of Goa, The Portuguese Civil code 1867, which is applicable to all Goans irrespective of their religion, includes family laws too. However, there are some amendments, modifications for maintaining harmony in the social structure in Goan lives.

1. IMPORTANCE OF MARRIAGE

Since the genesis of civilization, marriage has been the greatest and most significant institution in human society. It has always existed in some form or another in every culture, granting societal legitimacy to a physical union between a man and a woman and attributing the foundation for the family, which is society's fundamental unit.⁴ Therefore, marriage is recognized as an institution in the whole world rather than an association of two adults. Children born from such an institution are claimants of their paternity. It promotes the interest of every individual in a family, husband, wife, children who share proportional rights and duties towards each other to maintain equilibrium as well as ensure dignity and social upliftment morally, politically and economically.

¹ IV SALUSTIANO DEL CAMPO ET. AL., SOCIAL AND ECONOMIC DEVELOPMENT 44(EOLSS Publications 2010)

² Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J. L. REFORM 835, 835-836 (1985).

³ Law Commission Of India, *Fourteenth Report (Reform of Judicial Administration)*, Ministry of Law, Government of India, September 26, Vol. 1 (1958).

⁴ S. Nambi, Marriage, mental health and the Indian Legislation. Presidential Address, 47 INDIAN J PSYCHIATRY 3, 3-4 (2005).

Marriage and Divorce Laws in Goa and in India: A Comparative Study of Uniformity and Diversity

2. MARRIAGE AS SACRAMENT IN HINDUISM AND INCLUSION OF DIVORCE

It is well settled that a Hindu marriage is a Sacrament and not a contract.⁵ That is why marriage is considered as the indissoluble union between husband and wife. Therefore, it was held by the Supreme Court of India in *Gopal Krishan Vs. Mithilesh Kumari*.⁶ *Marriage is a sacrament not merely a socio-legal contract*. In general, Hindu Law does not recognise divorce since marriages viewed as an indissoluble union between the husband and wife that extends to the next world. Despite the fact that Hindu law does not address divorce, it has been held that if it is regarded as an established custom, it would be enforceable by law.⁷ During the 19th century in India, divorce was made legal for two groups of people.

- I. Those who converted to Christianity and had their spouses refuse to live with them as a result of the Native Converts Marriage Dissolution Act, 1866, and
- II. Those who were Christians and had Christian marriages as a result of the Indian Divorce Act, 1869. However, divorce was not yet available to high caste Hindus, some of whom had enlightened views and espoused social reforms, including the enactment of divorce legislation, due to the influence of western education and contracts. Following independence, the Hindu Marriage Act of 1955 was adopted, bringing significant and dynamic changes to Hindu marriage and divorce law. In some cases, there are explicit provisions for divorce.

3. MUSLIM MARRIAGE AND DIVORCE

The institution of marriage has been ordained by Muhammadan law, sanctioning sexual relations between two members of opposite sexes with the goal of preserving the human species, establishing descent, preventing men from debauchery, encouraging chastity, and promoting love and union between the husband and wife, as well as mutual help in earning a living.⁸ If this very object of marriage is lost the marriage may fail to fulfill its purpose and sometimes even become harmful. Therefore, under Mohammadan Law, Al-Qur'an ordained Divorce under a separate chapter of '*surah talaq*' that specifically deals with the

⁵ P. Uberoi, *When is a Marriage Not a Marriage? Sex, Sacrament and Contract in Hindu Marriage*, Contributions to Indian Sociology 319, 322-323(1995).

⁶ *Gopal Krishan Sharma v. Dr. Mithilesh Kumari Sharma*, AIR 1979 All 316.

⁷ *Rup Jyoti Das v. Beron Saikia*, AIR 2006 Gau 125.

⁸ Abdur Rahim, *The Principles Of Muhammadan Jurisprudence*, 327 (S.P.C.K Press, Vepery, Madras 1911).

procedure of divorce in which mediation/counselling⁹ is there, modes of divorce as well as maintenance for wife and kids¹⁰ to safeguard the interests of wife and children born out from such wedlock

4. MARRIAGE AND DIVORCE IN CHRISTIANITY

In Christianity, marriage is also considered as a sacrament of husband and wife, further it is also added that it is an act of God, not by humans. *"This at last she is bone of my bones and flesh of my flesh; she shall be called Woman, because she was taken out of Man."*¹¹ Question of annulment of marriage arises, therefore separate Act is constituted to deal with divorce under Indian Divorce Act, 1869 and it was said by Chief Justice Arijit Pasayat in *George Sebastian vs Molly Joseph*¹² that Court is the final authority in the dissolution of marriages of Christians and no any other tribunal/body has the right to dissolve a marriage.

5. PARSI LAW ON MARRIAGE AND DIVORCE

The term 'parisi' does not refer to a religious community. He or she must be a Zoroastrian in order to be a Parsi. In essence, a Parsi marriage is a contractual union with a sacramental component.¹³ A priest performs the "Ashirvad" ceremony in the presence of two witnesses. The Parsi Marriage and Divorce Act of 1936 were further amended in 1988.

Originally, the Parsi community came from Iran's 'Pers' region. They arrived in India approximately 600 ADS, settling in Daman and Diu before migrating to other regions of the country. Parsis, being a close-knit group, preserved their own separate and distinct practises, which are shown in their marriage and divorce rituals. Marriage is regarded as a spiritual practice in Parsi Law, and the Parsi Marriage and Divorce Act, 1936 (hence referred to as

⁹ *Al -Qur'an* 4:35 (Sahih International). In this Surah Nisa'a God commanded If a couple is afraid of being separated, appoint an arbitrator from his family and another from her family; if they decide to reconcile, God will assist them. You have the option of reconciling with them equitably when the interim is completed, or proceeding with the separation equitably.

¹⁰ *Al Qur'an* 2:23(Sahih International).

It is also mentioned in Sirah Baqarah when you divorce women and they are nearing the end of their waiting time/iddat period, you can either keep them or let them leave honourably. However, do not keep them solely for the purpose of harming or exploiting them. Whoever does so is unquestionably wronging in his own spirit. Take Allah's revelations seriously. Keep in mind Allah's blessings, as well as the Book and knowledge He has sent down for your guidance. Keep Allah in mind, and remember that Allah has perfect knowledge of everything.

¹¹ *Genesis* 2 :23 (King James).

¹² *George Sebastian v. Molly Joseph*, I (2000) DMC 716.

¹³ Laxmikant Das, *Divorce under the Parsi Law : A critical analysis*, VSRDIJTNTNTR Vol. IX Issue II February 2018,41,41-42(2018).

Marriage and Divorce Laws in Goa and in India: A Comparative Study of Uniformity and Diversity

PMDA) and its 1988 revision govern Parsi marriage and divorce in India. Divorce can be granted under this law for a variety of reasons, including non-consummation within a year of marriage, adultery, cruelty, unnatural offence, and so on.¹⁴

6. MARRIAGE AND DIVORCE LAW IN GOA

The 'Codigo Civil Portuguese,' or Portuguese Civil Code of 1867,¹⁵ which is also known as the Common Civil Code and is based on the French Civil Code (Code Napoleon), has been in effect in Goa since 1870 and has several amendments from time to time. Because the code applies to all religions in Goa, it is known as the Common Civil Code. Therefore, personal laws do not apply separately to particular communities in Goa. As per the census of 2011, distribution of different religious community is collected in Goa.¹⁶

Description	Population	Percentage
Hindu	9,63,877	66.08
Christian	3,66,130	25.10
Muslim	1,21,564	8.33
Sikh	1,473	0.10
Jain	1,109	0.08

Indian Population Census 2011

Keeping in view the dynamism of the social character of law, there were significant changes laid down in Portuguese rules, including family laws¹⁷ to maintain harmony among distinct

¹⁴ Section 32, Parsi Marriage and Divorce Act, 1932.

¹⁵ A Common Civil Code established in 1867 still exists in Goa, a small state on India's west coast that was under Portuguese dominion for 450 years (from 1510 to 1961).

¹⁶ Government of India, Indian Population census 2011, 15th National census survey. Retrieved from: <https://www.census2011.co.in/census/state/goa.html> (Mar 15, 2022).

¹⁷ The Civil Code of 1867 was extended to the Portuguese Overseas Provinces by Decree of 18 November 1869, with effect from 1 July 1870. As a result, the Civil Code of 1867 was extended to Goa, Daman, and Diu. All laws

religious groups. Hindus are in the majority consisting of 66 percent of the population so, therefore the Code of Gentile Hindu Usages and Customs of Goa, which establishes a set of exceptions to the Code's provisions on Family and Succession Law, was enacted in 1880.

7. MARRIAGE IS A SACRAMENT OR CONTRACT IN GOA

Article 1056 of the Portuguese Act¹⁸ defines the concept and purpose of marriage as a legal contract and its registration is mandatory under Article 1057.¹⁹ Therefore, marriage is a legally binding perpetual contract between two people of different sexes for the purpose of legally forming a family. Marriage was perpetual in nature in Portuguese rules, but the developments made several changes in law which enacted a law on divorce that makes civil marriages as civil contract rather than a sacrament.

8. VALIDITY OF MARRIAGE AND DIVORCE UNDER ECCLESIASTICAL COURT/CANON LAWS IN INDIA

An appeal was filed by the wife for setting aside the judgment of High Court which declares the marriage as null and void as per the Divorce Act. Second marriage was considered as illegal because there was no decree for the dissolution of marriage from the Court of Law, which has jurisdiction over it.

*“Canon Law (or personal law of Christians) can have theological or ecclesiastical implications to the parties”.*²⁰

The provisions of the Portuguese Civil Code, which are applicable to Goa, Daman, and Diu under an enactment dated November 18, 1869, or similar, were not considered in the above judgment. On the 25th of December 1910, a separate Marriages and Divorce Law was adopted, providing for divorce. The Portuguese Government published an improved version of the

in force in these territories, including the Civil Code, were remained in force after they were merged into the Indian Union under the Goa, Daman and Diu (Administration) Act 1962, until altered or repealed by a competent Legislature or other competent body. Since then, various Indian Union civil law acts, such as the Indian Contract Act 1872 and the Indian Transfer of Property Act 1882, have been extended to Goa, Daman, and Diu, The Civil Code was abolished. The Code's remaining provisions, particularly those dealing with Family and Succession Law, Property Law (save its transfer), and Tort Law, remained in effect. The Goa Succession, Special Notaries, and Inventory Proceeding Act of 2012, on the other hand, repealed the analogous provisions of Succession Law in the Portuguese Civil Code of 1867.

¹⁸ Art.1056, Portuguese Civil code 1867.

¹⁹ Art. 1057, Portuguese Civil code 1867.

²⁰ Molly Joseph v. George Sebastian, AIR 1995 Ker 16, (1996) 6 SCC 337.

Marriage and Divorce Laws in Goa and in India: A Comparative Study of Uniformity and Diversity

Portuguese Civil Code on December 16, 1930, combining all of these amendments under one roof.

The High Court of Bombay at Goa passed another judgment related to the orders passed by the Patriarchal Tribunal of the Archdiocese of Goa and Daman and the Metropolitan Tribunal of the Archdiocese of Mumbai are constitutional or unconstitutional under Article 14 and 21 of the Constitution of India. It was held by the Court:

“Article 19 of Decree No. 35461 is declared as unconstitutional, illegal, null and void and ultra-virus Articles 14 and 21 of the Constitution of India and is struck down. Endorsement made by the Civil Registrar pursuant to the order passed by this Court under Article 19 of Decree No. 35461, cancelling the marriage registration of the petitioner with respondent no. 4 is declared as illegal, null and void and is set aside”.²¹

9. UNIFORMITY OF GOA CIVIL CODE WITH INDIAN PERSONAL LAWS PROVIDING SPECIAL PROVISIONS TO CERTAIN COMMUNITIES.

Family laws in India are applied differently, considering the sacredness of each religion. To maintain and sustain the social order, some exceptions are also included in the Goan family laws. Following are the changes brought from time to time in consonance with the social dictum in society.

- Bigamy: There is a general rule of monogamous marriages. But there is an exception²² because the Hindu men have a right to remarry if the wife is unable to deliver a child until the age of 25 and a male child until the age of 30.

(In Hindus, Christians and Parsis, monogamy is the rule but Muslim males may practice polygamy following justness²³ among wives). The only report on the subject Committee on the Status of Women in India, published in 1974, which found that polygamy was widespread throughout India, including among tribals

²¹ Elmas Fernandes v. State of Goa, Writ Petition Nos. 351 of 2017 & 691 of 2013.

²² Article 1 of the Decree of Gentile Hindu Usages and Customs of Goa, 1880.

²³ *Al Quran* 4: 3 (sahih international) explains the **rule of justness** among wives, And this is the only bigamy or polygamy but it is embedded in human nature that a human being cannot love equally even their own kids, therefore Quran gave permission to marry captives, widows, orphans to promote women moral, social and economic interests and also safeguarding their chastity, If Muslim men marrying for this reason then it is justified but if they are marrying for other reasons then it is not a practice of Islam which is owed by muslim men.

(15.2), Buddhists (9.7), Jains (6.7), and Hindus (5.8). Muslims were determined to be the least polygamous (5.7).²⁴

- Catholic and Non-Catholic marriages: There is a difference of annulment in the Catholic and non-Catholic marriage. For Catholics marriage may be annulled by the ecclesiastical court and High Courts support this decision, except under extraordinary circumstances, they did not approve it and their signature in the church is sufficient for civil registration of marriage. But for non-Catholics, Marriage is not annulled by the ecclesiastical court and such power is only exercised by the civil courts. Their intent to marry before 15 days is required and for solemnization, a second signature is required due to which the problem of marriage validation arises. Most women are not aware of the law and its flaws.
- Divorce: There are different grounds of separation between husband and wife.²⁵ If adultery is committed by the wife it's a ground of separation, but if wife seeks separation then she has to prove the scandal of adultery as a public offence or he completely deserted or keeps a concubine within the same place of dwelling.
- Hindu practices were protected and gentiles Hindus were granted exemptions from the Civil Code under Article 1 of the Decree of Hindu Usages and Customs Gentile of Goa, 1880. This decree maintained the Hindu joint family institution, known in Portuguese as *sociedade*, which is more akin to a partnership than the concept of a Hindu joint family.²⁶

10. DIVERSITY OF GOA CIVIL CODE WITH INDIAN PERSONAL LAWS

• Matrimonial Properties

There's also the one-of-a-kind idea of marriage property rights, which is absent from the rest of India's personal laws. There is no legal idea of matrimonial property in the rest of India. Therefore, the property ends up in the names of males and is thus solely the property of the male, which he can mortgage or sell as he pleases. If nothing is stated explicitly at the time of

²⁴ S.Y Quraishi, *The polygamy myth*, THE INDIAN EXPRESS (July 6, 2017 12:10:24 am) <https://www.census2011.co.in/census/state/goa.html> (retrieved on 18.03.2022).

²⁵ Article 1204 of Portuguese Act 1867 also mentions distinct ground for separation between husband and wife. Adultery by the wife is sufficient cause against the wife but public adultery by the husband, or full abandonment of the wife or having a mistress in the conjugal domicile are all examples of adultery.

²⁶ Faizan Mustafa, *Explained: Why Goa's Civil Code is not as uniform as it is made out to be*, INDIAN EXPRESS (April 20, 2021 7:41:46 am) <https://indianexpress.com/article/explained/why-goas-civil-code-is-not-as-uniform-as-it-is-made-out-to-be-7279365/> (retrieved on 18.03.2022).

Marriage and Divorce Laws in Goa and in India: A Comparative Study of Uniformity and Diversity

marriage in Goa, the default system is communion of assets,²⁷ which implies that upon marriage, partners shall hold as co-owners of property any assets they have individually or jointly acquired or inherited before or after marriage. Couples can opt out of this default by signing a contract with each other. A system of asset communion at the time of marriage, by entering into a pre-nuptial contract²⁸ in which they decide whether the properties were acquired before marriage will be held separately and those acquired after marriage will form a communion, or if all property is held separately, whether acquired before or after marriage. But the management solely lies with the husband.²⁹

- Religion: For the dissolution of marriage, religion is not a ground in Goa.³⁰ However, it is applicable in India.

CONCLUSION

Marriage is the most important institution in an individual's life on which many aspects of progress are dependent. If this institution of marriage lacks the foundation of mutual benefit and satisfying the needs of each other, that will perturb the "social unit" in each domain of life. But this institution of marriage, with the advancement of time, is losing its worth. Therefore, divorce is introduced into personal laws and secular laws except Muslim law. Under Islam, provision of divorce is not new because it is considered as a contract not a sacrament.

Family laws in Goa and Indian personal laws related to divorce and marriage are compared vividly with their uniformity and diversity. It is evident from the juxtaposition that the Goan civil code seems to be equal for all religions, but there are fewer exceptions on the basis of religion and gender. Hence, it is concluded that to maintain harmony between law and society, the sentiments of people must be respected. That is why some specific provisions related to matrimony and dissolution of marriage are there in Goa and in India. Goans have some privileges like bigamy in Hindus, Catholic and non-Catholic marriage registration and

²⁷ Art.1109 of Portuguese Civil code 1867 explains the Contract of asset communion between spouses - When the couples simply state in their contract that they want to marry according to local custom, the conditions of Articles 1108 to 1124 must be followed.

²⁸ Art.1096 of Portuguese Civil code 1867 defines the Contract of asset communion between spouses as per their customary laws, where the spouses simply state in their contract that they wish to marry according to local custom, the provisions of Articles 1108 to 1124 apply..

²⁹ Art. 1117 of Portuguese Civil code 1867 states about the ownership, possession, and management of the matrimonial estate's assets. During the marriage, both spouses have ownership and possession of the common assets; however, the husband is responsible for the administration of the couple's assets not excluding the wife's personal assets. Only with the approval of the husband, or during his disability or absence, may the wife manage. Only with the approval of the husband, or during his disability or absence, may the wife manage.

³⁰ Art. 1090 of Portuguese Civil code 1867 have a distinct approach towards religion and marriages of different religions are not cancelled or annulled on the basis of the contracting parties' faith. Moreover, conversion is one of the ground of dissolution of marriage in India.

their dissolution, different provision for wife and husband for alleging adultery and also maintenance of property by husband is a crystalline example of diversity. Although goans have, uniform civil code but in reality, it is quasi uniform code. These codified laws are not clear to people as the Family Laws (Marriage, Divorce and Protection of Children) enacted in 1910-11 were also not physically integrated into the body of the Goans Civil Code as they are primarily regulated by customs and encoded in the Portuguese language.

It is reasonable to conclude that, despite all of the social and political changes that have occurred in this region of India over the past 150 years, Goan Family Law has maintained a remarkable degree of uniformity. In fact, the Civil Code's rules on Family Law are not heavily influenced by addressees' religion. It is possible to classify the Code of 1867 as a quasi-uniform code.³¹

³¹ Dr. Dário Moura Vicente, Professor of Law, University of Lisbon ,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,Lecture delivered in the Goa High Court, session organized by the Goa State Legal Services Authority in association with the Goa High Court Bar Association (6 Feb 2020). Retrieved at <https://www.fd.ulisboa.pt/wp-content/uploads/2020/02/Goa-FAMILY-LAW-IN-GOA-AFTER-THE-ACT-OF-2012.pdf> (15 Mar 2022).