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# Divorce Law in Goa: An Analysis

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PEARL MONTEIRO<sup>1</sup>

## ABSTRACT

*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. However, the various provisions of the Civil Code remain a mystery for most people, be it academicians or legal fraternity in the rest of the country.*

*The Supreme Court in a plethora of judgments has called upon the legislature to enact a uniform civil code for the country. The Constitution also exhorts the State to enact a uniform civil code for its citizens. This provision is however a directive principle of state policy and as such it is not perceived as mandatory thereby justifying the State inaction.*

*The tiny State of Goa has an unparalleled opportunity to lead by example and fill this lacuna. The Research Paper summarizes the law of divorce applicable to all Goans irrespective of religion or domicile.*

*The Research Paper incorporates legislative provisions as well as judicial precedents. It is an attempt to present, clarify and analyze the law.*

## I. INTRODUCTION

Today, Incredible India, a land of variety, a land of many colors, many religions and many laws regulating the interpersonal relations of people of these religions. Whereas we have uniform civil and criminal laws, in personal matters, such as marriage, divorce, guardianship, and inheritance, we continue to be governed by laws unique to the religion of the claimant. The Constitution of India vide Art 44<sup>2</sup> calls for a “Uniform Civil Code” applicable to all Indians irrespective of religion. This concept has been the subject of debate before the honourable courts since *State Of Bombay v Narasu Appa Mali*<sup>3</sup> the learned court observed:

*“The personal laws prevailing in this country owe their origin to scriptural texts. In several respects their provisions are mixed up with and are based on considerations*

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<sup>1</sup> Assistant Professor, V.M. Salgaocar College of Law, Goa, India

<sup>2</sup> Art 44. Uniform civil code for the citizens The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India

<sup>3</sup> LNIND 1951 BOM 112

*of religion and culture; so that the task of evolving a uniform civil code applicable to the different communities of this country is not very easy. The framers of the , Constitution were fully conscious of these difficulties and so they deliberately refrained from interfering with the provisions of the personal laws at this stage but laid down a directive principle that the endeavour most hereafter be to secure a uniform civil code throughout the territory of India.”*

Later in *Shayara Bano v. Union Of India*<sup>4</sup> while discussing the inaction of the legislature in giving effect to Art 44, the Court opined,

*“Article 44 provides that the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India. The aforesaid provision is based on the premise that there is no necessary connection between religious and personal law in a civilized society.... It is no matter of doubt that marriage, succession and the like matters of a secular character cannot be brought within the guarantee enshrined under Articles 25 and 26 of the Constitution..... All this leads to the clear understanding, that the Constitution requires the State to provide for a uniform civil code, to remedy and assuage, the maladies<sup>5</sup> expressed in the submissions advanced by the learned Attorney General”*

Further in *Jose Paulo Coutinho v. Maria Luiza Valentina Pereira*<sup>6</sup>, the latest in a long line of consistent, concurrent, judgments, the Honourable Supreme Court observed:

*It is interesting to note that whereas the founders of the Constitution in , Article 44 in Part IV dealing with the Directive Principles of State Policy had hoped and expected that the State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territories of India, till date no action has been taken in this regard. Though Hindu laws were codified in the year 1956, there has been no attempt to frame a Uniform Civil Code applicable to all citizens of the country despite exhortations of this Court in the case of *Mohd. Ahmed Khan vs. Shah Bano*<sup>7</sup> and *Sarla Mudgal & Ors. vs. Union of India & Ors*<sup>8</sup>*

A marriage may be made in heaven, but unfortunately, it has to be lived, dare I say, tolerated, on earth. Goa is seen as a paradise on earth. It has its own Civil Code which applies to all goans

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<sup>4</sup> LNIND 2017 SC 415

<sup>5</sup> Triple Talaq

<sup>6</sup> LNIND 2019 SC 729

<sup>7</sup> (1985) 2 SCC 556

<sup>8</sup> (1995) 3 SCC 635

irrespective of religion. “Goa is a shining example of an Indian State which has a uniform civil code applicable to all, regardless of religion except while protecting certain limited rights.”<sup>9</sup>

Moreover, a goan carries his law wherever he goes, that is, in personal matters a goan will be governed by the Civil Code irrespective of whether he is domiciled in Goa or elsewhere<sup>10</sup>. In *Monica Variato v. Thomas Variato*,<sup>11</sup> it has been held, since there was no material on record to hold that at the time of marriage, the respondent (a German national) was governed by the Personal Law in force in Goa, including the law of divorce, the appeal was dismissed.

In *Saeesh Subhash Hegde v. Darshan Saeesh Hegde*<sup>12</sup> where the Petitioner was goan, the Karnataka High Court directed the Family Court, Belgaum, is directed to return the Matrimonial case, in M.C.No.75/ 2006, to the respondent to be presented before the Court having jurisdiction.

## II. CONCEPT OF DIVORCE

*“What God Has Put Together Let No Man Put Asunder”*<sup>13</sup>

A divorce is an official or legal process to end a marriage.<sup>14</sup> “From divorce under exceptional circumstances to divorce by consent, we are now heading towards divorce on grounds of irretrievable breakdown of the marriage. It would be no exaggeration to say that strict and stringent divorce laws are no index of stable marriages; they may only impel parties to live in the empty shell of matrimony devoid, essence and happiness.”<sup>15</sup>

## III. DIVORCE UNDER THE CIVIL CODE OF GOA

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.<sup>16</sup> However, divorce between the parties to marriage was not provided for by the Civil Code of 1867. It was by the Decree of 3<sup>rd</sup> of November 1910 that the provision for divorce was made<sup>17</sup>.

Article 1 of the Decree states that marriage is dissolved by the death of one of the parties or by

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<sup>9</sup> Jose Paulo Coutinho v. Maria Luiza Valentina Pereira 2019 SCC OnLine SC 1190

<sup>10</sup> *ibid*

<sup>11</sup> 2000(2) Goa L.T. 149

<sup>12</sup> LNIND 2008 KANT 143

<sup>13</sup> Matthew 19:6 Holy Bible New Revised Standard Version

<sup>14</sup> <https://dictionary.cambridge.org/dictionary/english/divorce>

<sup>15</sup> Kumud Desai: Indian Law Of Marriage And Divorce Publisher: LexisNexis India (a division of Reed Elsevier India Pvt Ltd)

<sup>16</sup> Art 1056

<sup>17</sup> See, Prof. Doutor Pires De Lima, ‘Fundamental Concepts of Civil Law’ (Vol II, 1997, Fundacao Orient, Centro de Estudos, Norte America, p.244. The Civil Code of 1867 considered marriage as a perpetual union between the parties and therefore did not provide for the grounds of divorce. Marriage could be dissolved only by the death of the parties.

divorce. Divorce as recognized by the Decree is of two types. That which can be applied for by one of the parties is called 'Contentious divorce' and that which is applied by both the spouses is called 'Mutual Consent Divorce'<sup>18</sup>.

#### **IV. CONTENTIOUS DIVORCE<sup>19</sup>:**

This type of divorce can be filed by either of the parties to marriage. Article 4 of Decree of November 1910 provides for the grounds. Only the following grounds can be used for seeking divorce.

##### **1. Wife's adultery:**

This ground has to be construed on the same lines as done under the Hindu Marriage Act 1955<sup>20</sup>. A false accusation of adultery would amount to "cruelty" within the meaning of the Code for purpose of divorce.<sup>21</sup> In *Joseph Shine v. Union Of India*<sup>22</sup> The honourable apex court observed, Adultery did not fit into concept of crime—If it was treated as crime, there would be immense intrusion into extreme privacy of matrimonial sphere—To treat adultery as crime would be unwarranted in law, thus though adultery remains as a strong ground for divorce, it would no longer have penal connotations under Indian Penal Code, 1860<sup>23</sup> nor under the Code of Criminal Procedure, 1973<sup>24</sup> as these sections treated woman as chattel, such provision discriminates against women on grounds of sex only

##### **2. Husband's adultery:**

The same interpretation to be given, as given to the wife's adultery<sup>25</sup>

##### **3. Final sentence of the spouse to any serious penalty/penalties under article 55 and 57 of the Penal Code.**

It is submitted that this provision be interpreted to mean an offence punishable with seven years imprisonment or more under the Indian Penal Code. Analogous provisions may be found in The Special Marriage Act, 1954, The Parsi Marriage and Divorce Act, 1936 and under Dissolution of Muslim Marriages Act, 1939

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<sup>18</sup>Grounds for contentious divorce are found in Article 4 of Decree of 3<sup>rd</sup> November 1910 and divorce by mutual consent in article 35. However, some provisions are repealed and replaced by the Civil Procedure Code.

<sup>19</sup> Article 4 of Decree of 3<sup>rd</sup> November 1910

<sup>20</sup>Sec. 13 (1)(i): has after solemnization of marriage, had voluntary sexual intercourse with any person other than his or her spouse.

<sup>21</sup> Mrs Loretta Olimpia Roberta Lobo E Remedios v. Mr Caetano Xavier Ivo Dos Remedios Furtado LNIND 2017 GOA 164

<sup>22</sup> LNIND 2018 SC 493

<sup>23</sup> S. 497

<sup>24</sup> S. 198

<sup>25</sup> Art 14 Constitution of India, 1950

#### 4. Serious ill-treatment or indignity:

The provision does not explain what constitutes serious ill-treatment or indignity. However, it can be construed from the interpretations given by the Court from time to time. It is akin to the ground of “cruelty” mentioned in other legislations in pari materia.

It includes physical ill-treatment like blows, threats, etc. In *Shri Ashok Toraskar v. Smt. Alka Ashok Toraskar*<sup>26</sup>, the High Court of Bombay has explained the concept of cruelty. It has been stated that “The expression cruelty has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. Cruelty is a course or conduct of one which is adversely affecting the other”.

The judgment states that cruelty may be mental or physical, intentional or unintentional. It is comparatively easier to determine the physical cruelty as it is a matter of degree and fact. But determining mental cruelty is a difficult task. The Court has listed the considerations while determining ‘Mental cruelty’. Enquiry must first be made as to the nature of cruel treatment, and secondly, the impact of such treatment on the mind of the other party to the marriage. It should be such that it causes reasonable apprehension that it would be harmful or injurious to live with the other party. But there might be a case where the conduct complained of itself bad enough and per se unlawful or illegal. In such a case, inquiry into the impact on the mind of the petitioner need not be specifically considered. Cruelty here would be considered to be established.

However, single act ill-treatment, eg., slapping by the wife, is not considered to be so humiliating or discrediting or shameful to cause mental agony to such an extent that it would warrant dissolution of marriage<sup>27</sup>.

Appellant filed suit for Divorce on ground of ill treatment and causing injury and that Respondent abandoned conjugal domicile in Mumbai and came to Goa. A question raised before the Court was whether condonation of cruelty is a valid defense? The Court observed, merely agreeing with the Respondent to come to Goa for the welfare of the son cannot by itself be a ground to claim that the ground for Divorce otherwise allegedly available to the Appellant has been waived.<sup>28</sup> Held, plaintiff was victim of physical cruelty at hands of Defendant. Disposition of child with regard to assault on his mother by father trustworthy Testimony of

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<sup>26</sup>2007(3) Bom CR 967

<sup>27</sup>Marle Dos Santos Braganza (Smt.) v. Aldino Santos Braganza, 2001 (3)Bom CR 801.

<sup>28</sup>Mrs Loretta Olimpia Roberta Lobo E Remedios v. Mr Caetano Xavier Ivo Dos Remedios Furtado LNIND 2017 GOA 164

plaintiff fully corroborated by testimony of son Cruelty established if conduct itself proved or admitted.<sup>29</sup>

**5. Complete abandonment of matrimonial home for not less than period of three years:**

This amounts to abandonment of obligations by the respondent. In *Nazario Alfredo Magalhaes v. Smt. Maria Fatima Varela*<sup>30</sup>, the Court stated that the requirement of this ground is the same as under the Hindu Marriage Act 1955.<sup>31</sup> ground of desertion except statutory period. Under the Hindu Marriage the abandonment should be for a continuous period of two years but under the provision of the Goa Law, it should not be less than three years.

**6. Absence without news of the missing spouse for not less than four years:**

This ground entitles the petitioner to seek dissolution of marriage, when the spouse is not heard of for a period of four years, by those who would normally hear from him. This provision could be interpreted to mean presumption of death. Similar provisions are found in most of the other divorce legislations. A spouse may obtain a decree of dissolution of marriage on the basis of presumption of death.<sup>32</sup>

**7. Incurable insanity after three years of the court order confirming insanity becomes final.**

The fact of insanity has to be judicially declared. The pre-requisite is that the insanity has to be incurable.

**8. Defacto separation by consent for ten consecutive years, whatever the reason for separation.**

In *Prakash Gopal Virginkar v. Umadevi Prakash Virginkar*<sup>33</sup>, the Court stated that in order to invoke the provision of Article 4 (8), it would be necessary to prove

(i) that there is physical or de facto separation;

(ii) that such separation was freely consented by the concerned party;

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<sup>29</sup> Shri Ashok Toraskar v. Smt Alka Ashok Toraskar LNIND 2006 GOA 227

<sup>30</sup> AIR 2005 Bom 380

<sup>31</sup>Sec.13(1)(1b), Hindu Marriage Act, 1955: ...has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition...Explanation. In this sub-section, the expression desertion means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and the grammatical variations and cognate expressions shall be construed accordingly.

<sup>32</sup> Dhunbai v. Sorabji AIR 1938 Bom 68

<sup>33</sup>LAWS(BOM)-2006-10-64

(iii) that such separation was for more than 10 consecutive years; and lastly (iv) irrespective of the cause of such separation.

The Court referred to Commentary of Treatise on Civil Rights (Tratado de Direito Civil) by Dr. Cunha Gonsalves who has commented that to uphold the claim for divorce, it is enough to prove; (a) that the couple is de facto separated; (b) that this separation has been uninterrupted; and (c) that the said separation is for more than 10 years. This determination would be sufficient to allow a petition of divorce. Whether, consecutive period of 10 years of de facto separation referred to under clause 8 of Article 4 of Law of Divorce could be any period of 10 years before filing of petition or that period could be immediately preceding date of filing of petition for divorce Held, no such desire to unite on part of spouse contesting claim for divorce during the period of 10 consecutive years of separation It could very well be said that claim for divorce on ground of freely consented de facto separation under Clause 8 of Article 4 of Law of Divorce ought to succeed.<sup>34</sup>

#### **9. Inveterate addiction to games of fortune or chance.**

This ground covers cases of serious addiction to gambling and such activities. This ground is unique to Goa and not available under the other personal laws.

#### **10. Contagious disease recognized as being incurable or an incurable disease involving sexual aberration.**

The exact nature of the disease has to be confirmed by prior examination. The disease as it is clear has to be contagious in form. Whether, plaintiff proves that defendant is suffering from incurable disease of leprosy and suit is maintainable without verification of nature and characteristics of disease by way of previous examination in terms of Articles 247 & 260 of Code Held, suit is not maintainable on account of non-compliance of mandatory provisions of Para 4 of Article 4 of the Law of Divorce.<sup>35</sup>

### **V. MUTUAL CONSENT DIVORCE:**

The provision for Mutual Consent Divorce is found in article 1472 of the Civil Procedure Code<sup>36</sup>.

Application for divorce can be made by spouses who are;

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<sup>34</sup> Smt Sheetal Prakash Pai Nee Vijaya Bhangui v. Dr Prakash Ramnath Pai Lnind 2010 Goa 304

<sup>35</sup> Antonio Filipe Faleiro v. Sandra Faleiro LNIND 2001 GOA 82

<sup>36</sup> Previously the provision of article 35 of the Decree of 3<sup>rd</sup> of Nov 1910 applied to Mutual Consent Divorce. The article required two years of marriage to be completed along with 25 years of age. The Civil Procedure Code now requires minimum five years of marriage.

1. Married for at least five years, and
2. Completed the age of twenty five years.

Once an application is made for such divorce, the judge has to call a meeting of the parties to the divorce application, their parents and their children who are above the age of eighteen years<sup>37</sup>. The presence of the family members is expected to influence the parties to give a second thought to their decision of dissolution.

The Judge shall urge the parties not to pursue divorce by explaining to them the consequences of divorce and its effect on the future of their children<sup>38</sup>, if any.

In case the parties to the application still persist in their resolve to dissolve the marriage, the court shall draw up an agreement for divorce and both the parties shall sign it. A decree nisi of provisional divorce shall then be decreed for a year. This shall not have effect of dissolution of marriage but would suspend conjugal life for such duration.

After completion of one year from such decree nisi, the parties are required to again appear before the Court<sup>39</sup>. The Judge shall once again attempt reconciliation. In case reconciliation is successful or if the parties have already reconciled, the decree nisi shall be declared to be of no effect<sup>40</sup>. In case it is not possible to reconcile, the final decree of divorce shall be granted by the court.

It needs to be observed that the Courts administering Law of Divorce from the Portuguese Civil Code now in force in the territory of Goa, are often placed in difficult situation in applying the doctrine of irretrievable breakdown of marriage enunciated in Naveen Kohli s case<sup>41</sup> to the matrimonial cases before them and often remain susceptible to errors as a result of lack of adequate legislation on the subject. Looking to the present times, there can be genuine instances of irretrievable breakdown of marriage. It is, therefore, necessary that law makers give serious consideration to the doctrine of irretrievable breakdown of marriage.<sup>42</sup> In Naveen Kohli<sup>43</sup> Supreme Court Observed, irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act, 1955. Because of the change of circumstances and for covering

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<sup>37</sup>Article 1474, Civil Procedure Code.

<sup>38</sup> Article 1475 Id

<sup>39</sup> Article 1476, Id

<sup>40</sup> According to article 41 of Decree of 3<sup>rd</sup> November 1910, the parties who reconcile before the final divorce decree is granted, are barred from again petitioning for divorce by mutual consent. They can however seek contentious divorce.

<sup>41</sup> Naveen Kohli v. Neelu Kohli AIR 2006 SC 1675

<sup>42</sup> Jayanti Shantaram Gaonkar Wife Of Shantaram Raghu Gaonkar Daughter Of Sonu Gaonkar v. Shri Shantaram Raghu Gaonkar Major LNIND 2010 GOA 187

<sup>43</sup> ibid

a large number of cases where the marriages are virtually dead and unless this concept is pressed into services, the divorce cannot be granted.

## **VI. CONCLUSION**

The law of divorce in Goa, applies uniformly to all those who are subjected to it, irrespective of the religion. This distinguishes it from other personal laws which have religion specific provisions.

The provisions of divorce applicable under the Family Laws of Goa are fairly comprehensive as they provide for contested claims as well as that by mutual consent. Even in case of mutual consent divorce the parties are expected to give a second thought to their resolve of divorce. This is where the concept of irretrievable breakdown of marriage becomes vital in granting a divorce.

The unique part of the provision, other than the fact that it is uniform, is that it contemplates the meeting of the family members, thus making it amply clear that marriage as well as its dissolution, is not only the concern of the parties to it but also a matter which affects interests of those closely related. Due regard has to be given to the expression of their interests and the effort for conciliation. Similar provision is not found in other personal laws in India.

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