

**BIRD'S EYE VIEW OF THE PORTUGUESE CIVIL CODE
OF 1867 AND OF THE PORTUGUESE CIVIL CODE
OF 1939**

CIVIL CODE IN FORCE IN GOA (*Partly repealed by Indian Statute*)

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1. INTRODUCTION:

1.1 The theme of the Conference is *The Civil Code in Goa*. This expression may create a confusion in the minds of the readers, giving impression that there is some Act passed by the Goa State known as 'The Civil Code' like the Goa, Daman and Diu Land Revenue Code. By the expression 'The Civil Code in Goa' reference is made to the Portuguese Civil Code of 1867 enforced with effect from July 1, 1870 and which was in force in Goa as on December 19, 1961. The same is now internal law in view of the Goa, Daman and Diu Administration Act 1962 (Sec. 5).

1.2 As per the Indian Legislative set-up normally statutes are called "Acts". The expression "Code" is rarely used. The latter expression is found in cases of some statutes, like the Bombay Land Revenue Code, the Uttar Pradesh Land Revenue Code, the Goa, Daman and Diu Land Revenue Code and the Maharashtra Land Revenue Code. Is there any difference between the terms 'Act' and 'Code' or do they both stand on the same footing?

1.3 According to the Oxford Dictionary "Code" means a systematic collection of statutes, body of laws, so arranged as to avoid inconsistency and overlapping. Black's Law Dictionary gives also similar definition. The categories of the Code are: Consolidating Code, Creative Code, or both.

Consolidating statute is an expedient of convenience to assemble and reenact a number of antecedent provisions, while creative statute is altogether a new set of law.

Rene David in his book “English law and French law while comparing the codification within the terminology of English law and French says:

“Here lies the gist of the difference between English and French law. It matters little that we have coded in France and that the English have no Codes. *The point is that the English cannot have Codes having the same significance as the French Codes*, as long as they will keep their traditional notion of a legal rule, maintain their rule of precedent and stick to their technique of distinction, instead of taking the broad continental view of the legal rule and resorting to the technique of interpretation which is used in civil law countries.

The true meaning of codification in France can only be understood if two things are made clear. The first thing is that decisions of the Courts are not regarded as originating legal rules, the second is that the Code, when it is promulgated, abrogates all existing rules and does provide a new start in the development of the law.”

1.4 Referring to the *Continental Code* one can quote what John H. Tucker Jr., in his foreword to the Louisiana Civil Code says:

“What is meant by the term “code” as we use it here is to designate an analytical and logical statement of general principles of the law to be applied by deduction to specific cases and extended by analogy to cases where the aphorism “*au-delà du code civil mais par le code civil*” (beyond the civil code but through the civil code) can be applied. ”

It is this type of Civil Code which is being dealt with.

1.5 In India, we have the Indian Penal Code and to administer the same, a Criminal Procedure Code. There is also Civil Procedure Code. But which Code is administered by the Civil Procedure Code? Why should we not have Civil Code and correspondingly the Civil Procedure Code to administer the same?

No doubt, we have different Acts on subjects like Contract Act, Transfer of Property Act, Easement Act, Registration Act and so on and the Civil Procedure Code is used to administer the same. But, the Civil Procedure Code is not meant to administer only the substantive law contained in the aforementioned Acts. It administers also many aspects of property for which there is no act on the substantive side. In this backdrop would it not be befitting to have a Civil Code as such embracing all the civil Laws on this branch ?

Dr. Nirmal Kanti Chakravarti in his Book 'Principles of Legislation and Legislative Drafting' has devoted a Chapter on Codification of Law and he says:

“In modern times the codification of law has become imperative and accepted as an important means of legal development all over the world. In India the bulk of Legislation is an evidence of her rapid adoption of codification. Regarding codification two things should be kept in mind. First, in India, the main object of codification should be the unification of various Laws existing in different parts of the country. Secondly, there must be harmony among the legislatures, the courts and the Law Commissions. “

2. EVOLUTION OF THE LAWS AFTER 19TH DECEMBER, 1961

2.1 After 19th December, 1961 several Regulations were promulgated by the President of India in exercise of power conferred by Article 239 of the Constitution of India either making independent enactments on the subject like Daman & Diu (Repeal of Post and Telegraph Laws) Regulation 1962, Goa, Daman & Diu (Banks Reconstruction) Regulation, 1962 repealing the corresponding legislation on the subject or making Regulation extending central laws, enforcement of which was made dependent on the notification to be issued by the Lieutenant Governor/Administrator appointed under Article 239.

2.2 In particular mention may be made to Regulation no. 11 of 1962 and No.12 of 1963 whereby number of statutes were

extended and they were notified from time to time and this process was adopted until by Union Territories Act, 1963 Legislative Assembly was set up for Union Territory of Goa, Daman & Diu and thereupon it was permissible to the Local Legislative Assembly to pass the Acts.

Sometimes directly the Central Government extended a Central Act in exercise of powers conferred by Section 6 of the Administrator's Act, like the Citizenship Act. In view of such Regulations and extension, number of Acts like Citizenship Act, Transfer of Property Act, Contract Act, Registration Act and so on correspondingly those portions of the Civil Code stood pro tanto repealed.

2.3 Equally, after setting up of the Legislative Assembly the Local Legislature passed Goa, Daman & Diu Extension of Easements Act of 1880 and correspondingly the provisions of Civil Code to that extent stand repealed.

2.4 In the light of above evolution, many parts of the Civil Code have been repealed. Therefore it will be advantageous to examine the scheme of the Code in general, and then notice special features of the Code and find which parts of the Code are still in force and finally to draw the conclusions.

3. THE SCHEME OF THE CODE IN GENERAL

3.1 The entire Code which is of 1867 enforced w.e.f. July 1, 1870 has 2538 Articles and embraces practically entire Civil Law. The Code is divided into 4 parts - Part I, Part II, Part III and Part IV. The initial Articles 1 to 17 are the basic provisions. They come in Part I. Article 1 lays down that only the individual has rights and obligations and this is his juridical capacity or legal personality. The meaning of rights and obligations is given in Article 2. The Article 4 of the Code is the key to the systematization of the Code. Article 4 says that the right and obligations flow from five different sources:

1. From the nature of the individual (right of existence, association, etc.)

2. From the action of the individual without cooperation of others (unilateral acts of the individual himself), for instance occupation, possession.
3. From the action of the individual with cooperation of others. (Bilateral acts, i.e. agreements)
4. From unilateral act of another individual like wills.
5. From the operation of law, i.e. legal succession.

3.2 Part II of the Code is subdivided into three books. In book no. I categories 1 and 2 of article 4 are included; category 3 finds place in book no. II; and in book no. III categories 4 and 5 of Article 4.

3.3 Part III deals with property right, with numerous facets. Absolute property and conditional property, singular and common, perfect and imperfect, usufruct, servitudes, accession, restriction imposed on the property in protection to right of others, right of demarcation and defence, right to restoration.

In Part IV of the Book deals with the civil responsibility (Law of Torts) arising from invasion of the rights and consequent restitution. This Part IV is divided into two books Civil Responsibility and Proof of the Rights and restitution there of and in Book II the proof is dealt with. In that, part of Civil Registration finds place with Records of birth, marriages and death, of civil registration and some parts of the proof like documents, admissions by party, *res judicata* are dealt with.

4. SCHEME OF CODE IN PARTICULAR

PART I

4.1 Reverting back to initial 16 articles which find place in Part 1 of the Code, special reference can be made to Article 7, which describes that the Civil Law is equal for all and does not make distinction of person or sex except where specifically provided for. Article 7 enshrines the principle of equality which could

also find place in the Constitution. The excepted category comes into play in case of the marriage.

4.2 Article 8 declares that the Civil Law is not retrospective with one exception that interpretative and declarative law is applied retrospectively without however affecting the acquired rights. This is the principle which is contained in General Clauses Act. In the same breadth Article 11 lays down that a special rule cannot have extensive application.

4.3 Article 5 describes that the Civil Law recognizes and specifies all the rights and obligations and ensures the enjoyment of the former and fulfillment of the later. It further declares the cases in which a citizen may be forbidden the exercise of his right (like in case of minority) and how the incapacity should be filled up.

4.4 Article 12 is express in saying that the law which recognizes right provides the remedies for its enforcement. English or Indian laws would have derived the same principle.

4.5 Article 10 speaks of the consequences of the breach of mandatory provision of law.

4.6 Lastly Article 16 permits filling up of the lacunas in the law by application of principle of analogy or principles of Natural Law. The Natural Law has been defined in the Black's Law Dictionary, Edition 1979, pg. 925, as follows:

“This expression ‘natural law’, or *jus naturale*, was largely used in the philosophical speculations of the Roman jurists of the Antonine age, and was intended to denote a system of rules and principles for the guidance of human conduct which, independently of enacted Law or of the systems peculiar to any one people, might be discovered by the rational intelligence of man, and would be found to grow out of and conform to his nature, meaning by that word his whole mental, moral and physical constitution.”

4.7 In the first part of the Book besides the first basic provision referred to above dealing with civil capacity, following topics are included:

a) Acquisition and Termination of Citizenship, b) Capacity of the Citizens in Foreign Country and vice-versa capacity of foreigners in this Country, c) Personality of Legal Entities d) Domicile, e) Properties of Absentee and Guardianship for the property of the absentee, f) Incapacity on account of Minority, g) Parental Authority, Legitimacy, Alimony and Tutorship, h) Majority, i) Incapacity on account of unsoundness of mind, incapacity of deaf and dumb, incapacity of prodigals, accidental incapacity, and incapacity on account of criminal conviction. With this, Part I gets over.

PART II

4.8 Part II referred to above, is divided into 3 Books. Book No. I already referred to above, speaks of original rights of individual. After having set out in Article 359 the original rights, the Code goes on saying in Article 360 that the right of existence includes not only the life and physical integrity of the individual but also his good name and reputation which comprises his moral dignity. Article 361 in its turn speaks of right of liberty which consists of right to freely exercise physical and intellectual faculties and it includes thought, expression and action. Article 362 declares that the thought of a human being is inviolable. Article 363 declares that right of expression is free, but, whoever exceeds the limit in detriment of society or of others, shall be held liable in accordance with the law. Right of association is a right consisting of putting together and in common the means of individual effort without affecting right of others or of society. Right of defence consists of the right to object to the invasion of rights.

4.9 Article 369 onwards defines what a 'thing' means including those things which are *res extra commercium*. Things are classified into movable and immoveable and corporeal and incorporeal. They are further classified as private, common and public.

4.10 Right of occupation is defined in Article 383 which declares that any person is entitled to appropriate a thing which has no owner or which is abandoned. Occupation of animals, hunting, fishing is also dealt with separately. The right of hunting is now controlled and regulated by new law.

A specific chapter is devoted to waters and water causes classifying them into public, common, private waters and also into navigable, floatable, springs, rain water, canals and viaducts.

4.11 'Possession' and its features are set out from Article 474 to 504. Possession of property is said to be in good faith when it proceeds from a title, the defects of which are not known by the possessor. Possession in bad faith is one in which defects are known by the possessor at the time of acquisition. The possession based on trespass is also with bad faith.

Article 474 reads as follows:

"Possession is defined as holding or fruition of anything or right. Parag 1. The acts done by licence or permission do not constitute possession."

The expenses incurred on improvements to the property are protected depending upon whether the possessor holds the property in good faith or bad faith.

Article 505 to 566 deal with the concept of 'Prescription' in detail. When possession is exercised for a certain period of time, the same ripens into prescription. Such prescription is called *positive* prescription or acquisitive prescription. Positive prescription is one of the modes of acquisition of property, period of time varies depending upon several factors for instance the period is shorter when possession supported with title, and longer when possession is without title. It can be with good faith or bad faith. In former case the period is still shorter.

There is also *negative* prescription which takes place when obligations like debts are not demanded within a particular period of time. Such a prescription is sometimes called liberatory prescription. It is also confused with limitation.

Articles 567 to 640 deal with the “work”. Article 567 lays down that it is lawful to anyone to put forth his work and labour for manufacture, transformation and commerce of any objects.

Such right can be limited by express law and by Administrative Regulations sanctioned by the law.

But, whoever, in exercise of his right of work infringes the right of others shall be liable for damages in accordance with the law.

Article 569 says that the product of the labour and work is the property of the author and is governed by the law of the property in general, if there is no provision to the contrary.

Article 570 deals with copyright of Literary work up to Article 593. From Article 594 to 601 with copyright of theater artists and from 603 to 606 with art work. From Article 613 onwards the subject of patents dealt with.

These provisions now stand changed in view of Copyright Act and Trade and Merchandise Act. This is the end of Part II.

PART III

4.12 The Book II of Part II from Articles 641 till 1734 deal with contracts. There is no difference between contract and conveyance as in the Contract Act and Transfer of Property Act.

From Articles 641 till 1055 the principles of contracts in general are set out and from 1056 onwards contracts in particular are dealt with.

In the Chapter of contracts in general, after having dealt with general principles, special reference is made to following features:

- a) Article 759 - deposit of money into the Court as form of payment
- b) Article 765 - Set off
- c) Article 778 - Subrogation
- d) Article 785 - Cession/transfer
- e) Article 796 - Merger
- f) Article 802 - Novation
- g) Article 815 - Release and renunciation
- h) Article 818 - Surety

- i)* Article 855 - Pledge
- j)* Article 875 - Payment of debt through income of the property.
- k)* Article 878 - Hypothecation (distinguished from mortgage)
- l)* Article 938 - Redemption of hypothecation
- m)* Article 949 - Registration of properties
- n)* Article 1030 - Simulation
- o)* Article 1046 - Eviction.

4.13 The contracts in particular are:

- (i)* Marriage,
- (ii)* Society (like partnership),
- (iii)* Mandate (agency),
- (iv)* Contract for rendering services,
- (v)* Donation,
- (vi)* Loan.
- (vii)* Sale and purchase,
- (viii)* Exchange,
- (ix)* Location (lease),
- (x)* Emphyteusis,
- (xi)* Censo reservatio,
- (xii)* Compromise.

This is the end of Book No. II.

4.14 In Book No. III, the succession is covered, testamentary as well as legal succession.

4.15 Under book III there is one special institution which also flows from unilateral act of others where somebody acts on behalf of others but without request of the principal. He is called 'gestor' and it is covered under Article 1723 up to Article 1734. It is somewhat similar to that contained in Section 196 of the Indian Contract Act.

4.16 The right to the property has been exhaustively dealt with in Part III covering Articles 2167 till Article 2360. Article 2167 lays down that the right of property is the faculty which the individual has to enjoy for its existence and for improvement of its

condition, whatever it acquires lawfully and which can be disposed by it freely.

The property can be absolute or contingent, singular or common, perfect or imperfect. As per Article 2169, the right of properties is comprised of following bundle of rights: (1) Right of enjoyment, (2) Right of transformation (3) Right of exclusion & defence (4) Right of restitution and compensation for damages in case of infringement, damage or trespass, (5) Right of alienation.

Right of property in general and each of the rights specified in Article 2169 are unlimited but subject to the nature of the things, will of the owner or express provision of law.

A perfect property is one which consists in enjoyment of the above bundle of rights which the right of property is comprised of. Imperfect property is the one which permits enjoyment of some of these rights.

Article 2189 gives the following instances of imperfect properties (1) Empheteusis (2) Censu 4 (3) Share (4) Usufruct, Use & Habitation (5) Compascuo and (6) Servitudes.

1) Emphyteusis, as explained in Black's Law Dictionary, 6th Edition, is one of the forms of Tenures which separates the *Dominion Directum* (Latin word) - *Dominio Directo* (Portuguese word) (Dominion of the Soil) which is placed in the owner, from the *Dominion Utile* (Latin word) - *Domínio Útil* (Portuguese word) (Possessory title), the right to the use and profit is the soil, the highest interest a grantee can acquire. The manner by which such grant can be done is specified in Articles 1653 to Article 1705 of the Civil Code in the Chapter of Contracts. This is also called "aforamento".

2) The 'Censo' is a concept originating from Spanish Law. There are different types of Censo: A) Censo Consignativo, B) Censo Enfitenteico, C) Censo Reservatio

In Article 1706 coming under the Chapter of Contracts, only the 3rd one is covered. According to the definition given in Article 1706, it is the right to receive from another, an annual pension by virtue of having transferred land to him by full and perfect title (see Black's Law Dictionary, 6th Edition). But the same need not detain us more as it has been prohibited by Article 1707 and converted into Empheteusis.

3) "Quinhão" is the share in a common property which the co-owner is entitled to receive whenever such common property is vested in one co-owner for the purpose of administration. Such co-owner is called possessor, while other co-owners who receive the share are called co-sharers.

4) Usufruct is the right of using the land of another, receiving the profits of the property that belongs to another. The person who uses the profit is called Usufructuary.

The Usus & Habitation as mentioned in Article 2189, clause 4 is explained more in detail in Article 2254. If it relates to the land only it is called usus, and if it relates to building it is called habitation.

This right, as explains Article 2254, is conferred on the user so long as use is necessary for its daily needs.

Such right can be exercised in the manner the title grants that right. Black's Law Dictionary (6th Ed.) explains it as a very precarious right.

Compascuo is explained in Article 2262. Compascuo is the right of communion of pasture in the properties belonging to different owners. As per Black's Law Dictionary, it is the right of common pasture.

5) Lastly, 'servitude' which is corresponding to easement of the common law. The difference being as Black's Law Dictionary explains, 'servitude' has a relation to the burden or the estate burdened (passive) while easement refers to benefit or advantage or the estate to which it accrues (active).

6) Then comes right of enjoyment which is specified under Article 2169 and consists of *i*) Right of enjoyment, *ii*) Right of transformation, *iii*) Right of exclusion and defence *iv*) Right of restitution and to get compensation for damages in case of infringement, damage or trespass, *v*) Right of alienation.

As per Article 2287 the right of enjoyment/fruition is comprised of 1) Right to receive all the natural fruits, or the produce from the property by artificial means 2) Right of accession/accretion and 3) Right of access/passage.

7) The right of transformation is the faculty to modify or change in any manner the property in whole or part and even destroy the same.

However, this right of transformation is subject to will of the owner or provision of the law. Dealing with restriction imposed by the law, in favour of the property of the neighbour, special mention can be made of right of plantation of trees near the boundary – (Articles 2317 to Article 2320). In both the cases it is not possible to do the plantation beyond the boundary line.

Article 2324 deals with erection of buildings which can be also regulated by the municipal law. Anybody is permitted to erect the building till the boundary line of the property; however he is not permitted to keep openings like windows in the wall without keeping a distance of 1.50 mts. between the wall and the boundary line Article 2325). Similarly, the eaves of the gutters should not flow into the neighbour's property and 0.50 mt. distance is to be kept between the boundary and the neighbour's property. (Article 2327).

Articles 2328 up to 2334, 2336 and 2337 deal with construction of boundary walls and construction of common walls of buildings.

Article 2335 in particular deals with ownership of different floors vis-a-vis the entire building. It is called 'horizontal property'.

Article 2339 speaks of right of exclusion and defence. This right includes right of demarcation, putting enclosures and right of defence. The right of demarcation is specified in Article 2353, and finally, right of defence of the property in Article 2354.

As a sequitur of the right of property, Article 2356 deal with right of restoration of property in case of dispossession and payment of damages in case of infringement of right and lastly, the right of alienation is more specifically explained in Articles 2357 till 2360. This is the end of Part III.

4.17 The last part is part IV which deals primarily with civil liability arising from infringement of rights and consequent restoration or payment of compensation for damages.

The criminal liability together with civil liability is dealt with in Article 2367 to 2392; Article 2393 deals with civil liability simpliciter.

Article 2398 speaks of civil liability arising from breach of regulation or liability arising from negligence.

Article 2399 speaks of civil liability of the public servants arising from wrong committed by them in the exercise of their functions.

4.18 Next Book No.II of Part IV deals with proof of rights and restoration thereof.

The proof can be by admission of parties, oral examination of witnesses, inspection and examination by appointment of Commissioner (experts), documents, *res judicata*, oath and presumptions.

The proof by admission by parties is dealt with from Article 2408 to 2417.

The proof by inspection/examination by Commission is meant for ascertaining the facts which have left signs or which can be seen by visual inspection.

Dealing with documents Article 2421 gives 2 categories

- (i) Authentic Documents and
- (ii) Private Documents.

(i) Authentic documents are those which are executed by public official and kept in public record

(ii) The private are those where there is no intervention by public officials.

4.19 Then Article 2441 speaks of proof of birth, marriage and death. This emanates from records of civil registration. Civil registration is dealt with in Article 2445 which includes: 1) registration of birth 2) registration of marriage 3) registration of death 4) and recognition and legitimation of children. This chapter of Civil registration goes from 2441 upto 2491.

4.20 Article 2498 deals with certified copies and copies from certified copies. It is called 'traslado'. This expression comes from Spanish Law which says that a copy of document taken by the Notary from the original and not taken directly from the matrix or protocol.

4.21 *Res judicata* is dealt with in Article 2502. The evidence by witnesses is dealt with by Articles 2506 to 2511.

The presumptions are dealt with in Articles 2516 to 2519.

4.22 Oath is dealt with in Article 2520 to Article 2534 and lastly the remedial action by way of suit or proceedings is described in Article 2535 to 2538.

4.23 Article 2535 in terms says that nobody is permitted to take law in his own hands except in cases prescribed by law.

4.24 Article 2536 says that the law prescribes the remedies to get redress of his grievances.

These remedies are courts and suits (proceedings). The organization and jurisdiction of Courts and regulated in special laws and the suits in the Civil Procedure Code.

5 SPECIAL FEATURES

5.1 Some of the special features of the Code have been noted above, namely, there are many provisions in the Civil Code, which as *per* our Constitution are called 'Fundamental rights' for instance the principle of equality, freedom of expression, association and liberty.

The principle of interpretation of statutes is also contained in the Civil Code which as per Indian Law some of them are contained in the General Clauses Act.

In the basic provisions from Section 1 to 16, number of principles of civil law are enunciated and as *per* common law, recourse would have to be taken to the different maxims of law.

The citizenship is governed in Article 18 to Article 23 i.e. how citizenship can be acquired and also how it can be lost. This matter now finds place in the Citizenship Act.

Rules of Private International Law are contained in Article 24 to 31 including Right of Citizens in the foreign Country and right of foreigners in their Country. (Article 58 and 59 of Decree dated

25/12/1910 - Law of Marriage no. 1, Articles 1961 to 1965 of the Civil Code.

The personality of legal entities is described in Articles 32 to 39. The domicile in Articles 40 to 54. The property of the absentee and application of guardian is dealt with in Article 55 to 95. The parental authority during minority of the children is normal feature in all legislations. But a special feature of the law is institution of incapacity on account of the prodigality for the protection of the estate of the prodigal, as well as protection of properties of absentee.

Incapacity on account of insanity is a normal feature in the legislation, but in the Civil code incapacity of the deaf and dumb is also covered.

Accidental incapacity on account of alcoholism or for similar causes have also been dealt with separately.

The council of family is one of the specialties of the Civil Code. According to that to protect the interest of the minors, a body of 5 family members, 3 on the maternal side and 2 on the paternal side is constituted and in the absence of relations also from strangers. This body has much say in the affairs of the minors.

5.2 The classification of the things has been dealt with in Articles 369 to 382. The definition of movables and immovables is contained in the General Clauses Act but not other features.

5.3 Right over the waters has been exhaustively dealt with in the Civil Code. Also on hunting and fishing. Possession and its facets have been exhaustively dealt with in the Code.

5.4 The prescription is a feature different from Indian Law. A small note of caution may be necessary here. If a person has a valid title, he can enforce his rights based on that. Question of invoking prescription arises when the title is defective. When it was said that prescription can be supported by title it means a defective title and not a valid title because when a person has valid title he need not take recourse to prescription as he can get relief on the basis of valid title itself. Therefore plea of prescription is many times taken in the alternative. Once it is said prescription is

based on defective title, if the transferee has knowledge of defects of the title, his possession is in bad faith. Otherwise it is in good faith. There is positive prescription and negative prescription. All this has been explained from Article 505 to 566.

Article 505 reads as follows:

“Things and rights are acquired by virtue of possession, justas obligations are extinguished by reason of not demanding their fulfillment. The law lays down conditions and the period of time that are necessary for one as well as for the other thing. This is called prescription.

Proviso. The acquisition of things and rights is known as positive prescription; the discharge of the obligations by reason of not demanding their fulfillment is known as negative prescription.”

Article 535 reads as follows:

“Whoever has assumed an obligation to do or give something to another stands relieved of the obligation if its performance is not demanded for a period of 20 years and the obligant stands in good faith, at the end of the prescription period; or when the performance is not demanded for a period of 30 years, regardless of good faith or bad faith, except where special prescriptions are provided in law.

Parag. unique: The good faith, in the case of negative prescription, consists in the ignorance of the obligation. This ignorance is not to be presumed in the case of persons who originally contracted the obligation.”

The prescription should not be confused with ‘limitation’. These two concepts operate in different areas with different civil consequences. Prescription as envisaged in the Civil Code is one of the forms of acquisition of rights in the Civil Code is similar to that contained in Article 20 of the Limitation Act regarding easements and Section 15 of the Easement Act.

Article 27 of the Limitation Act prescribes that if no right is exercised to enforce right of recovery of the property such right is lost by way of limitation. But other side of the coin is, the wrong

doer acquires right because such a right cannot remain in suspense. There is no provision to say the wrongdoer acquires right, even though the courts have recognized such a fiction. The prescription fall within the substantive law while limitation falls in procedural law. Prescription has the effect of extinguishing a right, while limitation bars only the remedy. Prescription has to be specifically pleaded without which cognizance cannot be taken by the Court (Articles 514 and 515 of the Civil Code), while the cognizance of limitation can be taken *suo moto* by the Court (Article 3 of Limitation Act).

The negative prescription resembles to limitation. But in true sense it is not so because limitation is procedural in nature while prescription is of substantive nature.

5.5 While dealing with the chapter of Contracts, the Civil Code does not make a distinction between contracts and conveyances like in the Transfer of Property Act. The lease (arrendamento) and mortgage (hypothecation) are considered not as a conveyance but as a contract. Whenever one speaks of conveyance, absolute right passes to the transferor. In case of lease only enjoyment is transferred, and in case of mortgage only a right of security is created.

Reference was made to hypothecation as a security for the Creditor. In Indian/English terminology, it was necessary to give the shape of a mortgage.

5.6 In the matter of Contracts, one chapter of importance, is of Registration which runs from Article 949 onwards. This registration is not similar to that which is contemplated under the Indian Registration Act. As per Indian Registration Act, namely, Section 17, no document is valid unless registered whenever registration is compulsory as set out in Section 49 of the Indian Registration Act. The registration referred to is that the Civil Code is always made based on a public document. However, the validity of the transaction does not depend on the registration. The effect of registration is only vis-a-vis third parties. It also has relevance in the matter of prescription, because, on account of registration, the period of prescription is shorter.

The basis for prescription, is the factual possession. If the person is in possession of the property, and the conveyance is duly registered and he is in good faith, thereby meaning, he does not know defect of the title, prescription operates with a lapse of 10 years. If he is in possession in bad faith, this period is extended to 15 years. If there is no document supporting the possession, then the period is 30 years and prescription operates.

5.7 The method of registration is dealt with in Article 957. Any property, if it is not already registered, then its identification is given vis-a-vis boundaries and location and other particulars assigning to it a number. This is called 'description'. Thence forth, any subsequent conveyance and registration of encumbrance, is necessary to be done vis-a-vis that number, not otherwise. The result is that the entire history of the property with up-to-date data is known once the number of description is known.

This system stands how abrogated with the enforcement of Indian Registration Act.

As per Indian Registration Act, a certificate Nil Encumbrance is issued and at the top it is stated, the office issuing the certificate is not liable for any wrong statement (Practically therefore the value of the certificate is nil). If a certificate is issued with incorrect data by an Officer of the Registration as per Portuguese Law he would be liable for disciplinary action besides being liable to pay damages. This aspect is emphasized to say that, the State was assuming obligation to assure the title to the parties and as per our Indian system, no such responsibility is taken.

As per our Indian Registration, it is not the obligation of the Registrar to enquire whether the transferor is the owner of the property. However, as per Portuguese System, the Conservator of Property Register, would not make the entry of transfer or mutation unless he found that property is duly registered in the name of the transferor.

As per 1935 Law and which was promulgated as per article 273 of the 1917 Decree, a General Record of the property was ordered to be effected maintaining link between survey and property registered in the Property Register.

It was further laid down that once that cadastral survey was conclusively established, no registration in the Property Register could be effected without mention to survey number with the certificate issued by the Directorate of Land Survey. The 1935 law could be conclusively implemented only at Daman.

Recommendations of the Sixth Five Year Plan.

- d) Appropriate provisions will be made in the revenue laws to confer legal status on this document as proof of title and rights in land.

5.8 At this stage following facts may be taken note of:

(A) The Government has appointed one man committee namely Wadhwa Committee, under the Chairmanship of Prof. D.C. Wadhwa, Gokhale Institute of Politics & Economics, Pune-411004, on the subject "Record of Rights and the responsibility of the State towards its maintenance".

(B) The Government of India has also appointed a 7 members committee namely Committee on Revitalisation of Land Revenue Administration, headed by Shri P.S. Appu, former Chief Secretary, Government of Bihar, to deal with several aspects and one of them is:

"To examine the desirability and feasibility of introducing the system of State 'Guaranteeing Title to Land' with a view to reducing litigation and ensuring security and stability in land transactions."

SPECIAL FEATURES

It may be necessary to mention that the said 1867 Code was enacted during the Monarchy in Portugal. After the advent of Republic in 1910, in the area of Family Laws, new legislation was passed. Of the special relevance are 3 Decrees: a) Decree dated 3/11/1910 relating to divorce b) Decree dated 25/10/1910 relating to marriage and known as law no. 1. c) Decree dated 25/10/1910 relating to protection of children known as Law no. 2.

All these 3 decrees had partially modified the provision of the Civil Code and they form integral part of the Civil Code.

There was also one decree dated 22/10/1910 changing partly few articles in the matter of succession.

Decree of 16/12/1930 whereby many provisions of the Civil Code were changed.

5.9 This aspect has been emphasized because up to now the different Acts in force in India dealing with personal laws have not been extended to the Territory of Goa and in result, part of law relating to marriage, succession, guardianship has not been touched. Only in view of Indian Marriage Act, for some purposes instead of 21 years of age of majority is 18 and Child Marriage Restraint Act (S ... Act) amended from time to time, the age of marriage has undergone change.

Subsequent to Decree of Marriage no. 1, dated 25/12/1910 to give effect to many of the provisions of the same decree, Code of Civil Registration dated 9/11/1912 was enacted in Goa.

As per provisions of the Civil Code a Marriage is a Contract and as a result of the marriage different civil consequences issue. The combined effect of the Decree no.1 read with Code of Civil Registration is that only the marriage performed before the Civil Registrar was a valid one and no other marriage was recognized by the Law. Religious marriage was not valid. This is one of the fundamental difference.

5.10 As per the Law of Divorce, the marriage was dissoluble on the grounds specified in the Law. This would apply to all the inhabitants of Goa regardless the caste or creed. This is next fundamental difference.

Some times in 1940 as a consequence of agreement of State Government with Holy See and legislation enacted pursuant thereto as per Article 4 of Decree no. 35461 the Canonical Marriage was declared undissoluble. However in the year 1974, the provision was declared invalid and unconstitutional. *Expeciosa Nunes v. Nicolau Fernandes* reported in AIR 1974 GOA P.26.

5.11 The Succession Law would not make any difference in sex. Male or female would get right in equal proportion.

5.12 There was prohibition to the testator to dispose the property more than 50% when there were descendants and ascendants. This is the fourth fundamental difference.

5.13 In the area of the marriage there were different marital regimes of property. The customary marital regime was of Communion which was legal system thereby meaning it would operate either where there is no agreement to the contrary or parties are silent about the marital regime. Net effect of the same was that all the properties owned by the spouses prior to the marriage or acquired during the subsistence of marriage would go to the common pool and shared equally between the two spouses. The wife would get therefore half share. This was not the right derived from succession but from the marriage. This was a unique right. In the event of divorce also property would be divided and shared equally between the spouses regardless who has given cause for the divorce.

5.14 Other regimes of marriage were total separation of properties; separation of the properties owned prior to the marriage but communion as to properties acquired during the subsistence of the marriage. Third was dotal regime, according to which the family of the female spouse would hand over a sum to the husband to be returned by him to the wife's family in the event of dissolution. This was very rare in Goa. The regime commonly followed was of communion by 98% of the population. This was a set-up different than of the Indian Law, English Law or common Law though it is in force in Continental Europe and some States of the U.S.A.

5.15 The contract of locatio (arrendamento) which in English terminology is known as lease, had a special feature that always it was of limited duration. There was no perpetual lease. It was not a conveyance, but merely a contract.

5.16 There was contract of emphyteusis which was a perpetual grant. Its origin was of feudal regime. Full enjoyment of property was given to the grantee and the grantor would retain the power to collect a specified amount. Non-payment of the money would not entail consequence of termination.

5.17 Hypothecation was a charge on the property, not conveyance like a mortgage. In case of movables it was known as 'pledge'.

5.18 In case of enjoyment of the property was servitude which is called 'easement' in English terminology. The servitude is a passive form of the easement.

5.19 There is a special right conferred by Article 2309 of the Civil Code giving right to the owner of enclosed property to get access to the public road through the property of other upon payment of compensation for such dues to be fixed by the Court. This provision was enacted to permit the development of the properties which have no access to the public road. Such a provision is not found in the Easements Act.

Additional provision is that a right of pre-emption is given like in Article 1566 whenever there is a sale either of dominant property or serviant a consolidation and so as to eliminate a burden so that both the properties vest in one person.

5.19 Aword now about 'Arrendamento' (lease) and 'Aforamento' (Empheteusis). Many a time the word Empheteusis, in several text books is wrongly translated as perpetual lease.

As per Portuguese law 'Arrendamento' was always of limited duration. The fundamental difference between lease ('Arrendamento') and Empheteusis ('Aforamento') is as follows:

A) Though as per the Transfer of Property Act, there is a concept of perpetual lease, the lessee has no interest in the property.

B) In case of Emphyteusis this is a 'grant'. The full interest in the property vests in the grantee - emphyteuta and the only right reserved to the owner is to get annual payment of pension (*foro*).

C) Non-payment of *foro* does not entail the consequences of termination of the grant. The right of grantor being to recover the instalment of the pension.

D) The grantee has right to pay 20 installments of *foro* and get absolute ownership which is not permissible in case of lease.

5.20 Article 1566 embodies law of Pre-emption solely founded on co-ownership. Under that a co-owner, who desires to sell his

share to stranger has necessarily to give notice to co-owner whether he is ready to purchase it for the same price. If such an option is not given, the aggrieved co-owner can file suit of pre-emption within 6 months from the date of conveyance/within 6 months from the date of knowledge of the deed.

This provision is contained in the chapter of Sale. The chapter of Sale stood repealed consequent upon extension of Indian Contract Act and Transfer of Property Act. However, the Regulation by which same Acts were extended say that only corresponding sections repealed. There is no provision in the Contract Act/Transfer of Property Act for pre-emption and therefore the provision in respect of pre-emption in the Civil Code still stands good and is in force. It has to been so held by the Courts.

5.21 In the matter of succession it was already pointed out that the testator is forbidden from disposing 50% of his estate in the event he has descendants or ascendants. This restriction would apply not only to testamentary disposition, but also to donations *inter vivos* (gifts). It would be therefore seen that such restriction, though *prima facie* appears like in the Muslim Law, all the same it is wider than that, because it applies to gifts as well.

5.22 In the chapter of succession, there is what is called Collation which is mentioned in Civil Code in Article 2098, whereunder all the properties bequeathed and gifted are to be brought back to the hotch potch for the purposes of determination of share. To explain it better, it would be advantageous to know what Black's Law Dictionary says (6th Ed.).

"In the Civil Law, the collation of goods is the supposed of real return to the mass of the succession which an heir makes of property which he received in advance of his share or otherwise, in order that such property may be divided together with the other effects of the succession. The fundamental basis of doctrine is legal presumption that ancestor intends absolute equality among his descendants in final distribution of his property, that donation by him during his lifetime to any one of them was merely advancement d'hoirie or advance on donee's hereditary share to establish him in life or for some

other useful purpose, and that ancestor intended to reestablish equality among his descendants in final partition of his estate.”

That means that unless, the donee is exempted from Collation as per Article 2099, the donee is bound to bring back even the property gifted for the purpose of equalisation of the shares.

5.23 This digression was a title necessary to bring home the effect of another provision contained in the chapter of Sale & Purchase i.e. Article 1565 which reads thus:

“It is not lawful for the parents or grand parents to effect sale or hypothecation in the favour of sons/daughters or/grand sons/grand daughters, if both the sons/daughters, grand sons/grand daughters do not consent to the sale or hypothecation.”

5.24 The basis for this provision exactly flows from the provisions relating to legitime and collation. What Article 1565 prevents is that there should not be sham and simulated gifts in the garb of sale. This provision also does not stand repealed for the reasons set out above.

5.25 Lastly special mention can be made to the Code of Civil Registration to which reference has already been made earlier. Such a registration was done in a scientific manner. The purpose of such registration is to establish the filiation, legitimacy and 3rd status of heir for the purpose of succession. It is on the basis of such certificate that age was to be established and not on the basis of certificate issued by the school.

The importance of the Code of Civil Registration in the commentary of civil registration by Pedro Chaves page 11 as follows:

“The importance of Civil Registration, has been explained by Planiol (*Traité Élémentaire du Droit Civil*, Vol. I Pag. 168). The military and electoral census and civil and criminal justice finds its principal base, the individual finds therein easy proof of his status and public in general have secu-

riety in their dealings by knowledge of civil status of each person.”

Justice Y. V. Chnadrachud said:

“In particular I would comment the Portuguese Code of Civil Registration dealing with the registration of births, marriages and deaths as a scientific method.”

6. THE PARTS OF THE CIVIL CODE WHICH ARE STILL IN FORCE:

a) Marriage; b) Succession; c) Guardianship; d) Law of Property; e) Law of Torts; f) Law of Domicile; g) Possession; h) Property; i) Law governing Waters; j) Law of Emphyteusis; k) Law of Pre-emption; l) Law of Access to the enclosed properties; m) Fishing; n) The Right of access through enclosed properties.

CONCLUSION:

1. It is high time that for the reasons explained above, codification of Civil Code can be done.
2. The Code of Civil Registration to be prepared keeping in mind the methodology of the Portuguese Law.
3. The Code of Property Register is required to be arranged in the lines of Portuguese Legislation on the subject.