



LAW RELATING TO MARRIAGE AND DIVORCE (4th ed. 1996). By Justice S.C. Jain. Universal Law Publishing Co. Pvt. Ltd., Delhi. Pp. xxxvi + 612. Price Rs. 450.

**FAMILY, THE** basic unit and family laws intended to govern and regulate the personal relations of family members, their mutual rights and obligations, share identical aims, yet a marked disparity is evident globally and even nationally in their content and implementation owing to multifarious social and cultural values. In India, where diversity in personal laws is a rule rather than an exception, existence of the multiplicity of laws governing different communities and having their applicability criterion as the religion, sex, community and domicile of individuals, is an accepted fact. Though extensively disparate with respect to the substance, each of these laws has been a mutual source of influence for the other. A very broad classification in two categories is possible. One, primarily the religious based, having their availability criteria depended on the religion of the parties; and the other, the secular laws, available to every Indian without any religious connotation. The major laws included in the former category are, (i) the Hindu Marriage Act 1955; (ii) the classical Muslim law; (iii) Dissolution of Muslim Marriages Act 1939; (iv) the Parsi Marriage and Divorce Act 1936; (v) The Indian Christian Marriages Act 1872; (vi) The Indian Divorce Act 1869, while the latter would comprise the Special Marriage Act 1954 and the Foreign Marriage Act 1969. Except for the availability criteria, and the performance of religious ceremonies at the time of solemnisation of marriage, none of the religious based personal laws display a major religious component, yet the diversity continues. The changing family and social values owing to policies of liberalisation, emancipation of women, education and influence of western civilisation in the era of globalisation has had an effect on the matrimonial relations of the parties to the marriage, giving way to increased matrimonial litigations and breakup of marriages, forcing the legislature to shed its rigid outlook relating to indestructibility of the marriage institution and come up with comparatively liberal laws despite resistance from the traditionalists.

The title of the book<sup>1</sup> is indicative of the proposed study undertaking an analysis of the laws relating to marriage and divorce among Indians. The author points out in the preface to the first edition, that he intended to codify the entire law relating to marriage and divorce. The preface to the present edition also claims “this revised edition of the book is an encyclopaedia covering the entire matter touching the field of relations between the husband and wife”.

However, due to the existence and applicability of plurality of laws, an inevitable conclusion would be, that it deals with all the marriage laws with an equal emphasis. It appears to be misleading, when one goes through the book. The book is primarily a commentary on the Hindu Marriage Act 1955, and the Special Marriage Act 1954, with other enactments and provisions as merely supplements. While the classical Muslim law relating to marriage, maintenance and divorce has not even been touched, provisions entitling a Muslim woman to file for a divorce

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1. Justice S.C. Jain, *Law Relating to Marriage and Divorce* (4th ed. 1996).



under the Dissolution of Muslim Marriages Act 1939, and the statutes relating to maintenance have been given an insignificant discussion. The claim of the author, therefore is incorrect.

While a comparative approach, has not been taken up in the book, analogous provisions of different laws have been mentioned as part of the same chapter under selected topics only, *i.e.*, (i) punishment for bigamy;<sup>2</sup> (ii) grounds for divorce;<sup>3</sup> (iii) legitimacy;<sup>4</sup> (iv) custody of children;<sup>5</sup> and (v) the stipulation of the time, when divorced spouses can remarry.<sup>6</sup> This random picking of the topics is without any explanation and appears to be very surprising, as these five topics are not related to each other in the manner as others are, which have been left out. While discussing provisions relating to the legitimacy of children, the entire Muslim law, including the rules of acknowledgement of paternity by the Muslim father have been ignored. Further, while dealing with the prohibited degrees of relationship under the Hindu Marriage Act, the author has given the distinctive features of the analogous laws of the continental countries, but has refrained from mentioning the parallel provisions under the Indian laws.<sup>7</sup>

The book has been divided into eleven parts and four appendixes. The preliminary, deals with the title, application, definitions and the overriding effect of the Hindu Marriage Act. A straightforward approach has been followed and after a very brief comment on the nature of Hindu marriage under the sacred texts, the author, commences with the commentary on the Act. Unlike the usual approach taken by the family law authors of elaborating the classical Hindu law and its sources, the variation reflects the usefulness of the book more from the practical point of view rather than research.

However, the author stipulates<sup>8</sup> that the Hindu Marriage Act, is applicable to all Hindus except those who are domiciled in the State of Jammu and Kashmir, and the members of Scheduled Tribes. The submission does not appear to be correct. As besides them, Goa, Daman and Diu Hindus are also governed by their distinct laws,<sup>9</sup> some of the provisions of which, specially with respect to bigamy, are in deviation to the one provided under the Hindu Marriage Act.

Part II, deals with Hindu marriages, conditions relating to its validity, its solemnisation and registration. With respect to the fulfillment of the conditions relating to the validity of a Hindu marriage, it has been specified that, "Under this section a valid marriage can be solemnised between two Hindus, if the conditions enumerated therein are satisfied. The fulfillment of the conditions is mandatory as

2. *Id.* at 161.

3. *Id.* at 94.

4. *Id.* at 159.

5. *Id.* at 226.

6. *Id.* at 156.

7. *Id.* at 19.

8. *Id.* at 12-14.

9. Decree of Usages and Customs of the Gentile Hindus of Goa 1880; Usages and Customs of the non-Christian inhabitants of Diu 1894; Code of Usages and Customs of the Non Christian Inhabitants of Daman 1854.



In just three lines, all that has been provided in the book for the age requirement is, that if the wife is below fifteen years of age at the time of marriage, the marriage is neither void nor voidable, and that the offence is punishable under the Act.<sup>11</sup> Brief comments on the Child Marriage Restraint Act 1929,<sup>12</sup> are also silent, despite a bulk of litigation about why the child marriages, including infant marriages though prohibited, and punishable are valid under the Act. The interpretation of the courts, which appears to be in major deviation of the written provision of law is worthy of a detailed discussion and not a summary disposal as has been done here.

There also appears to be an additional contradiction here. On the one hand the author says, that a void marriage even though contravening section 5 (i), (iv), and (v), has yet to be regarded as a subsisting fact and it cannot be said to be wholly *non est* in law, or a nullity so long as it is not declared to be null and void by a decree of nullity of the district court on a petition presented by either party thereto against the other party to the marriage.<sup>13</sup> On the other hand, while comparing void and voidable marriages, the author notes as follows :<sup>14</sup>

[I]f a marriage is void ab initio, it is open to the parties even without recourse to the court to treat it as a nullity. Neither party is under an obligation to seek a declaration of nullity under this section. When a marriage is void, the court regards it as never having taken place and that there is no conferment of status of matrimony as a result thereof.

Such glaring discrepancies must be clarified.

Part III, deals with restitution of conjugal rights and judicial separation. The remedy of restitution of conjugal rights, has been discussed in detail. The author's observation that this remedy is used as a stepping stone to get a decree of divorce is perhaps based on his first hand knowledge of the court experience. There is a mention, that restitution of conjugal rights is based on the old Hindu concept of stability of marriage,<sup>15</sup> but, on the next page it is said that the law on restitution is based on the English concept.<sup>16</sup> The English cases that have been cited are very old, of 1895 to 1953. Are we to be guided by these old English cases, specially in the light of the fact of abolition of this remedy in England in 1970.<sup>17</sup> This exhaustive discussion ends rather tamely, with a passing reference to its constitutional validity, which may otherwise be of immense value to a lawyer, researcher or an academician.

The fourth part, deals with nullity of marriages and divorce. The exhaustive discussion spread over a hundred pages of the case law, and with specific emphasis on the procedural aspects, is a welcome deviation from the usual approach of

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10. *Id.* at 23.

11. *Ibid.*

12. *Id.* at 584-586.

13. *Id.* at 23.

14. *Id.* at 67.

15. *Id.* at 36.

16. *Id.* at 37.

17. *Ibid.*



on the procedural aspects, is a welcome deviation from the usual approach of concentrating only on the theoretical aspect, taken by the family law authors.

However, while furnishing the analogous laws pertaining to grounds of divorce of the Christian community the author notes that section 10 of the Indian Divorce Act 1869, permits either spouse to obtain a decree of divorce on the grounds of adultery, bestiality, rape, sodomy and of desertion.<sup>18</sup> A sweeping statement like this should have been avoided as the grounds of divorce under the Act are not identical as between husband and wife. While discussing the Indian Divorce Act later, he himself observes:

[T]he husband can only file a petition for dissolution of marriage on the ground that his wife has since that solemnisation of marriage, been guilty of adultery, whereas the wife has been endowed with many grounds, i.e. incestuous adultery....<sup>19</sup>

Part V, explains the jurisdiction of the courts and the procedure to be followed in matrimonial litigations; while the *sixth*, deals with, (i) the maintenance provisions; (ii) *pendente lite*; (iii) permanent alimony and maintenance of the spouses; (iv) custody of children; (v) distribution of the matrimonial property; and (vi) the provisions for appeals and decrees.

The rules to regulate the proceedings under the Hindu Marriage Act of around 14 states and the specimen petitions for, (i) matrimonial remedies of divorce; (ii) nullity; (iii) judicial separation, (iv) restitution of conjugal rights; (v) maintenance and custody, form part of appendix-1. The statutory laws relating to marriage and divorce, besides the Hindu Marriage Act have been summarised in appendix II. The comments on the statutes are very brief, showing the author's preferential concentration on the Hindu Marriage Act and the Special Marriage Act.

Though the right of maintenance of a Hindu woman has been dealt with thoroughly, under the Hindu Marriage Act, and the Criminal Procedure Code 1973, the same under the Hindu Adoptions and Maintenance Act 1956, has been given an almost negligible handling. The author has added matrimonial offences, under the Indian Penal Code, in the last appendix.

The language, presentation and the handling of the topics make it an interesting and informative study. However, a parallel treatment to other enactments was desirable. Two things strike immediately, while going through the book: *firstly*, not all topics have been given a comparable treatment; and *secondly*, the primary concentration is on the Hindu Marriage Act and the Special Marriage Act and rest of the Acts have been simply supplemented with very brief comments. The inclusion of the penal provisions are a welcome addition. Though this is the fourth edition of the book, some errors have crept in<sup>20</sup> and proof reading could have been

18. *Id.* at 95.

19. *Id.* at 437-39.

20. *Id.* at xvii, appendix II (vi), Indian Christian Marriage Act 1972, should be 1872: at p. 108, line 18, repute, written as reute: at p.22, love affair for live affair: at p.2, Hindu Widow Remarriage Act, instead of 1956, it should be 1856; while dealing with the breakdown grounds of divorce, in the third para, on p.6 instead of 1974, it should be 1964.



improved. On the whole, the book would prove useful to those intending to familiarise themselves with the practical aspects of the Hindu Marriage Act, and the Special Marriage Act.

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