CHAPTER II

THE EVOLUTION OF THE CONCEPT OF MARRIAGE

Marriage in early society
Marriage as a sacrament
Marriage as a dissoluble union
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It is an acknowledged fact that marriage in any form has been the most ancient institution for time immemorial in the history of mankind not only in the social, religious and ethnological sense but in the legal sense also.

It is, however, distinct from 'association' like that of 'family.' Marriage being a social institution is a part of 'family.' In other words, the family is created by marriage. Since it bestows proprietary rights and obligations upon the parties, it is, as such, an economic institution also. Since it confers mutual rights and obligations, it is also in the nature of a contract.

For the proper understanding of the present shape of marriage, a study of its origin and development may be a fruitful exercise. It is, therefore, obvious to know as to how the institution of marriage did evolve and how and why it had passed through different stages, forms and phases. We would proceed to discuss this aspect of the marriage under three heads (i) Marriage in the early society; (ii) Marriage as a sacrament; (iii) Marriage as a dissoluble union.

MARRIAGE IN THE EARLY SOCIETY

Sociologists and anthropologists agree to a large extent that probably the institution of marriage did not
exist in the primitive society. Marriage was an unknown and unfamiliar phenomenon to the primitive man. Sir John Lubbock has very rightly observed, "The primitive condition of man, socially, was in which marriage did not exist, or as we may perhaps for convenience call it of convenience call it of communal marriage, which all men and women in a small community were regarded as equally married to one another." These communal marriages were no marriages at all but only another name for sexual promiscuity. Although the state of sexual promiscuity among the primitive men and women is beyond any disputation from evolutionists' point of view but they differ widely on the main bases, causes, and conditions which led to the emergence of the idea and chronological forms of marriage at a later stage of the progress of mankind, however, ephemeral it might be. They have largely contributed to the growth, evolution and development of the present concept of marriage. Some sociological and anthropological studies of the early period have thrown considerable light on the evolutionary process of the present institution of marriage. Let us briefly review them.

Bachofen

Until the start of the sixties of the preceding century, nothing like the history of the family appears to have existed. Nobody knew and tried to trace the evolution of the family and put the facts in the historical sequence. It was believed that the patriarchal family system was the oldest one according to the five books of Moses. At most,

it was, however, admitted that in the primitive days there was a period of promiscuous sexual relationship. But the question of putting them into a historical sequence was for the first time answered by Bachofen although there was already a work on this by E.B. Tylor but the various forms of family and marriage discovered by him were stated merely as "strange customs." Bachofen published his famous book, Mother Right in 1861, in which he tried to show that the early humanity lived in utter sexual promiscuity which he characterised as "hetaerism" and due to promiscuity in sex the paternity being unknown the lineage was traced through the female i.e. according to the mother right and also started that originally this was prevalent among all peoples of antiquity. He further generalised that consequently a woman as a mother was only the definitely ascertainable parent of the offspring and therefore she enjoyed a high place and position and even there was a complete woman rule (gynecocracy). He lastly propounded that transition to monogamy implied the violation of the primitive religious ordinance, and infringement the toleration of which had to be purchased by surrendering the woman for a limited duration of time. He found full support from the passages of ancient classical literature and the transformation from "hetaerism" to "monogamy" and from "the mother right" to the "father right" happened as a consequence of the evolution of the religious ideas particularly among the Greeks. Therefore, in the real Bachofenic sense, not the historical development of the actual conditions in which men existed, but the religion has been responsible to bring changes into the men-women

2 E.B. Tylor, Researches into Early History of Mankind (1865).
relationship and their position. He gives a beautiful illustration of Oresteia of Aeschylus as to the struggle between the outgoing mother-right and the emerging father right in the Heroic Age. Clytemnestra had killed Agamenon her husband (the father of Oresteia). Oresteia killed his mother Clytemnestra. He was accused of committing matricide which was the most heinous crime at the time because of the mother-right rule. But in a trial of murder, which was rather a trial of mother-right principle in the real sense, he was acquitted. The main prosecution was based on the principle "unrelated by blood", that she slew and therefore, that was an expiable crime she committed. Then Athena, the President of the Court, cast her vote in favour of Orestes and acquitted him. From this time the father-right got victory over the mother right.

His thesis of mother-right was assailed mainly on the ground that he substituted for mere phrases for an unknown primitive condition of the promiscuous sexual intercourse proof that ancient classical literature teems with traces of a condition that in fact existed before monogamy among the Greeks and the Asiatics.3

J.F. Mc Lennan

His famous book Studies in Ancient History was published in 1886, a reprint of Primitive Marriage. His view was quite opposite to that of Bachofen. He propounded and evolved marriage on the basis of the division of tribal groups between the exogamous and endogamous and

established an antithesis "tribes" between those two types of groups. The exogamous tribes used to lift their wives only from the other tribes because of all-time-state of permanent inter-tribal warfare and that was the feature of savagery which forced them to do so only by abduction. He further believes that the rules of incest and consanguinity have nothing to do with it due to the reason that they are of a later origin. He inferred the female infanticide also which led to the scarcity of women in one's own tribes and, therefore, they were constrained to pick wives up through abduction from other tribes. The preponderance of men, naturally, existed in the tribes which forced them to adopt polyandry i.e. common possession of a woman by a number of men. The logical step, further, was only left to recognise the lineage of off-spring through mother. He lastly generalised "all the exogamous races as having originally been polyandrous . . . which recognised blood ties through mothers only." 4

He was assailed in his attempts on the ground that he had by no means discovered the existence of exogamous groups, and still less did he understand. 5 But his main contribution lies in the discovering that reckoning descent through mothers as the original one and, therefore, he was in England characterised as the founder of the history of family and most eminent authority in this field. To conclude, Mc Lennan was able to discover only three types of marriage, i.e. polygamy, polyandry, and monogamy although there was one more kind of marriage i.e. group

4 J.r. Mc Lennan, Primitive Marriage, p. 124 (1876).
5 Engels F., Supra note 3, p. 19.
marriage or the communal marriage as discovered by Lubbock. According to him a group of men acquired a group of women in common. Mc Lennan's antithesis was further disbelieved by Engels on the ground that endogamy and exogamy did not constitute antithesis. The argument being that at the time the group-marriages were in vogue almost everywhere - the tribes were comprised a number of groups embodying the blood relation system through the mother and gentes within which marriage was proscribed. This reason forced them to procure wives from their own tribe but outside their gens. Therefore, the gens itself was certainly exogamous while the tribe was essentially endogamous.

One discovery made by Mc Lennan was certainly unchallenged and that was the antithesis "tribe" between engogamous and exogamous. Upon this antithesis the whole system came to be rested. This theory of Mc Lenan was not disputed but it came to be accepted even generally as the pivot of the entire history of the family. The main attack was only on his attempt to explain this antithesis inadequately.

Morgan

In 1871 Morgan's first work Systems of Consanguinity and Affinity came to light in which he, on the basis of questionnaires and tables drawn, positively asserted that a system of kinship prevailed among the Iroquois which was not only common in all the aborigines of the U.S.A. but in whole continent. By analogy he observed that this Indian American system of kinship was in vogue in almost

6 Lubbock, Supra note 1.
7 Supra note 3 at p. 25.
8 Id at 24.
all the tribes of Asia also in addition to Africa and Australia with some modifications. That kinship, he observed, emenated a form of group marriage in Hawaii and in other Australian islands. Taking the system of kinship as his starting point, he built up the forms of family equivalent to them and in this way he opened the avenues of research into the prehistory of mankind. On the basis of the gens of the American Indians he made a second discovery that gens found in the earlier civilized people were originally organised according to mother-right out of which later on developed the gens according to father-right. Since with this discovery the Greek and Roman gens could not be illustrated by the Indian gens and, therefore, a new foundation was laid for the entire history of the primitive society. It was indeed a very important discovery. This was because of this rediscovery Morgan could succeed to put for the first time the history of primitive society particularly the family in the most scientific, rational and convincing stages of development in his later classical work *Ancient Society* which certainly brought a revolution in outlook. In this work, he divided the whole history of mankind into three main epochs, that is, savagery, barbarism and civilization as the sequence of man's progress since inception. Each and every epoch has been further subdivided into the lower, middle and upper stage of progress in production and reproduction. Production pertains to the means of subsistence while reproduction to the procreation of the species. Here we are concerned only with the latter. He drew the conclusion that there was a period i.e. the lower stage of savagery, in which

9 Id at 23.
promiscuous intercourse did exist within a tribe as to enable every man to have free access to every woman equally and vice-versa. This stage of perfect promiscuity as logical postulate can therefore be well characterized as the first stage of the Morgan's history of human marriage. The second stage of the development of human marriage is the 'Consanguine family' based on marriage between brothers and sisters except parents and children which he found in the Hawaiian mode of characterising Kin, the argument being that maternal uncles were called by the same title as the fathers only due to reasons that all of them were fathers having free access to their sisters and similarly all nephews and nieces were called sons and daughters as all his sisters were his wives, for they were the wives of his brothers and so on. Therefore, Morgan lays the basis of the present concept of marriage in the practice and principle in 'consanguinity' as the first stage of human marriage. At this period the idea of marriage came into being. This stage of consanguine family, appears to have come immediately after the cessation of the state of utter lawlessness. The third stage of development of human marriage was the Punaluan family which developed out of the consanguine family in the Morganian sense. In the latter there was the exclusion of parents and children to be mated while now in the former natural brothers and sisters had also been excluded for the purpose of mating. They were always the brothers and sisters from maternal side being the paternity unknown while later on the marriage in this form between collateral brothers and sisters was also proscribed. Since a number of sisters were the common wives of their common husbands who used

to be brothers by themselves in relation. These husbands were not called as brothers to one another but as punalua which stood for intimate companion or partner. That was why this kind of system came to be known as 'punaluan family' which like consanguine system of family, existed in Hawaii and throughout Polynesia. This is further confirmed by the fact that Caesar once told that the Britons during the middle stage of Barbarism had by tens or twelves possessed their wives in common and they were mostly brothers and sisters and parents and their children. The institution of gens itself had emerged out of this punaluan family. This is also further clear that still by the time the lineage was traced through mother only because of such group marriages. Lowie calls Morgan's punaluan family as the group marriage while according to Engels a little was known about the group marriage at the time Morgan was writing his book.

The fourth stage of development in the history of marriage, according to Morgan was the emergence of the 'Pairing family.' The main distinction between the punaluan and pairing family system was in the fact that amongst the several wives, the man had a principal wife and vice-versa. Such habitual pairing increased as the gens developed and thereby a number of marriages between brothers and sisters and other such relations came now to be impossible. The gens prevented marriages between blood relatives and that is evident in the Iroquiois and most other Indian tribes in the lower stage of barbarism. This growing

11 Id at 57.
12 Engels, F., Supra note 3 at p. 68. He shows great indebtedness to English Missionary Loriner Fison for having furnished a lot of knowledge of groups marriage in Australia where he found the lowest stage of development among Negroes of Mount Gambier in Southward. See Id at 69.
complexity of marriage restrictions made the group marriages to an impossibility and they were replaced by the pairing marriage which otherwise meant living of one man with one woman although polygamy and some acts of sexual lapses remained the male preserve. At this time the concept of adultery had come into being of which the wife was seriously punished. The divorce came into existence and could be privileged by either of the parties but the children still did belong to the mother. At this stage women occupied a high position among all savages and barbarians of the lower and middle stages and partly even of the upper stage. The division of labour between men and women was determined not according to the status of women in society but on some other different criterion. The fifth and the last stage of the development of the human marriage came to be evolved and known as the monogamy out of the pairing family. The concept of monogamy is clearly the outcome of the civilization with which Morgan has no concern.

Morgan has been severely criticised mainly on conclusion which he drew about the Hawaiian who used to call their maternal uncles as the fathers which led to conclude that they were consanguineous families. Lowie suggests "since this supposition leads to a monstrous conclusion, it must be discarded." The nomenclatures calling their maternal uncles as the fathers were simply honorific ones and not real. Lowie further says "Morgan fails to prove that the Hawaiian nomenclatures must have had its origin in the inter-marriage of brothers and sisters, and even if it had

13 Engels, Supra note 3 at p. 75.
14 Id at 78.
15 Id at 79.
16 Lowie, Supra note 10 at p. 56.
arisen in this fashion, there would be no proof that either the terminology or its hypothetical cause is of great antiquity."¹⁷ Lowie justifies his attack on the basis of the terminology used by the Dakota who follow the Hawaiian system. The Dakota, like the Hawaiians have a single word for father and father's brother and another for mother and mother's sisters."¹⁸ Lowie further assails Morgan's interpretation of the sororate as the relic of group marriage and Frazer's extension of this interpretation to levirate as well. He says that they are empty guesses which deserve to be discarded.¹⁹ But Morgan gets support from Marx when he (Marx) told that in primitive the sister was the wife, and that was moral.²⁰

Engels. F

Engels' work is but a meagre substitute for that which had been left unaccomplished by Morgan.²¹ He is a great admirer of the Morgan's classic epoch division of stages of development the man has passed through in respect of the history of family, but on the other hand, he is a critic also wherever possible. For example, he says, "Morgan had at his disposal almost exclusively second hand sources. . . ."²² He further shows sheer disagreement to the conclusion drawn by Bachofen about the evolution from "Mataerism" to monogamy, and from mother-right to father-

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¹⁷ Ibid.
¹⁸ Id at 57.
¹⁹ Id at 58.
²⁰ Quoted by Engels, Supra note 3 at p. 59.
²¹ Engels, Supra note 3 at p. 6.
²² Id at 8.
right and not because of the development of the only religion. Engels argues for this "Clearly, such a conception which regards religion as the decisive lever in world history must finally end in sheer mysticism." It is, therefore, an arduous and by no means always profitable task to wade through Bachofen's bulky quarto volume. Engels disbelieves the Morgan's systems of kinship as merely precepts and justifies his disbelief taking example of the Indians who also address stranger as "brother" or "father" and therefore, he seems to be quite right also when he says that the terms "father" "mother" "brother" and "sister" are simply empty forms of addresses. Engels does certainly agree to the Morgan's discovery of the system of consanguinity, that is, an extinct form of the family which had once existed. He further holds the Morgan's view by questioning and answering himself "what,

23 Id at 15.
24 Id at 19.
25 Id at 23.
26 Id at 24.
27 Id at 47.
then does promiscuous sexual intercourse mean? That the restrictions in force at present or in earlier times did not exist. We have already witnessed the collapse of the barrier of jealousy. If any thing is certain, it is that jealousy is an emotion of comparatively later development. The same applies to the conception of incest. Not only did brother and sister live as man and wife originally, but sexual relations between the parents and children are permitted among many peoples even to this day.\(^2\) It means Engels admitted that there was a period of unrestricted sexual promiscuity in the most primitive time the relics of which are found even today. But he rules out the animal theories propounded by Letourneau\(^2\) and Westermark\(^3\) regarding monogamy among anthropoid apes for want of sufficient proof,\(^3\) agreeing to Espinas\(^4\) in regard to his statement that higher animals' horde and the family are not any way complementary, but antagonistic to each other.\(^5\) Espina has been quoted by Giraud-Teulon also\(^6\) for his observations. Engels attacks on animal theories on the ground of the animal family and primitive family being two incompatible things, giving further reasons.\(^7\)

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28 Id at 55, 56.
31 Engels, Supra note 3 at 52.
32 Espinas, \textit{Animal Societies}, (1877).
33 Engels, Supra note 3 at 52.
35 Engels, Supra note 3 at 54.
The great merit of Engels lies in his most outstanding, analytical, rational and realistic approach which he has given in tracing the main factors, historically, leading to the emergence of the present concept of marriage that is the monogamous marriage in entirely different manner from that of other evolutionists referred to above. He gives a very faithful sketch of the events which gave birth to monogamous marriages.36

He gives the picture of that stage of the progress of mankind when hunting became merely a luxury instead of a means of acquiring food or subsistence. At this stage primitive man started domestication of animals and breeding of herds which became the source of wealth. Before the lower stage of barbarism there was only fixed wealth comprising most probably implements, house, boats, weapons and other household utensils. With the herds of various kinds of domesticated animals like horses, donkeys, camels, oxen, sheep, and goats etc. the advanced agricultural peoples acquired possessions which required an immense amount of supervision and care for their proper upkeep and propagation in ever-increasing numbers. The question arose as to whom this new properties should belong. Originally, this belonged to the gens. But the concept of private property appears to have already been developed. It seems to be almost certain that at the outset of the written history the herds were already the separate property of the heads of the families. Since then the slavery had also been invented which was unknown and fruitless to the lower stage of barbarians. That was why the slaves were either killed or made part of the conqueror tribe as brothers. The females were either married or adopted as such with their offspring. These slaves became useful only in this

36 Id at 86-136.
era when the cattle breeding and animal of domestication alone with the field ploughing started and ultimately the herds were converted into family possessions. The multiplication of the race was not responding in comparison to the number of cattles. Therefore the captured women were used for this purpose as well as for breeding like cattle. The people became rich who gave a death blow to a society based onpairing marriage and mother-right gens. In the pairing marriages the implements of acquiring food were taken by the man by virtue of ownership on the fact of separation while the household goods were retained by the woman herself. The man was also the owner of the new sources like food stuffs and the cattle and the slaves, if any, while his children belonged to his wife on the basis of the mother-right then prevailing as a customs and consequently the children could not inherit from him. On his death his property had to go to his gens because his children did not belong to his gens but to the mother's gens. Therefore, the children could inherit from their mother only with her blood relations. As the wealth increased a man acquired better status than a woman. He thereupon became bent upon upsetting the traditional order of inheritance in favour of his children. Unless the mother-right system had gone it was not possible for him to bestow inheritance of his property on his children. A revolutionary change was therefore brought about by the man who decided that in future the children of the male members would remain in his gens. In this way, tracing lineage of the descent right of inheritance through mother was discarded and now the male lineage and the inheritance from the father was installed. The overthrow of mother-right was characterised as the world historic defeat of the female sex.  

37 Id at 92.
became the master and lord of the house and women became
therely a source of breeding children and as slave to the
man's lust. The beginning of the sole rule of men gave
birth to patriarchal family which not only attributed to
the germination of polygamy but also to the organisation
of a number of persons whether bond or free into this
family system under the patriarchal control of the family
head who later on acquired the power of life and death
over all of them. Such was the great transition of the
patriarchal family from pairing marriage to monogamy.
The woman came under the absolute thumb and control of the
man which guaranteed not only the fidelity of the wife but
also the paternity of his children. Mankind with the
commencement of such patriarchal form of family stepped in
the period of the written history. Gradually this type of
family diffused almost over all parts of the globe.\textsuperscript{38}
Such catchwords as 'polygamy' and 'polyandry' did also
develop immediately following the overthrow of the mother-
right, but only as exceptions. Although the mass of the
people lived in monogamy but the rich and the family
chiefs exercised polygamy which was due to the reason of
the purchase of female slaves or otherwise. The polyandry
was / is still in vogue but exceptionally rare as a survival
of group marriages or due to extreme poverty and dearth
of women by one reason or the other. But it is certain
that monogamy has come to stay which no doubt emerged out
of the pairing marriage most probably during the transition
period from the middle to the upper stage of barbarism.\textsuperscript{39}
From this point of time civilization started. The earliest
period of civilization witnessed the supremacy of man with

\textsuperscript{38} Id at 94-97.
\textsuperscript{39} Id at 100.
the express object of begetting his own children beyond any dispute of paternity in order to enable the children to inherit from their father as his natural heirs, and the monogamous marriage as the most logical consequence but hetaerism and adultery as its adjuncts. The monogamous marriage differs from the pairing marriage in the fact that the former could not be dissolved by woman and only man could dissolve and discard his wife while the latter could have been dissolved at the will of either party, and, further difference lay in the fact that in the monogamous marriage the parties to it had exclusive access to each other while it was not so in the pairing marriage. The element of permanence crept in the monogamous marriage. Adultery on the part of the wife came to be regarded as being severely punished while the right of conjugal infidelity on the part of the husband continued as it was by custom or otherwise. Although the institution of marriage by way of monogamy was fully established in the society yet in fact it remained monogamy only for woman and not for man which retained such character even to this day. The sterile wives were either divorced or could be superseded by more wives as evident everywhere. The kind Anateandridas in 650 BC took another wife in addition to his first who was childless. 40 Gradually it became a duty for every man to get married by way of his duty to God or to the state or to their ancestors in the form of religious injunctions or state laws almost in all the civilised societies and countries. Monogamy in this way was a great historical achievement in the development of mankind, and really a boon to the society, properly understood. In the words of Engels "We have, then seen, three chief forms of marriage

40 Id at 102.
which... conform to three main stages of human development. For savagery group marriage, for barbarism pairing marriage, for civilization-monogamy, supplemented by adultery and prostitution." But the Engels' monogamy is chiefly and mainly based upon economic foundations i.e. private property and inheritance which still holds good even to this day. He fears that this concept of marriage will disappear as and when these characteristics i.e. property and economic consideration will stand removed from Man's hands. And the ensuing social revolution is approaching this day by day.  

Edward Westermarck

He was the Finnish anthropologist and sociologist and one of the older evolutionary anthropologists who through his work *History of Human Marriage*, 1891 made some universally acceptable conclusions after doing extensive survey pertaining to marital relations amongst many primitive peoples. He puts that monogamy has been prevailing generally as a type of human family relationship from the earliest days while other forms of family relations used to be only exceptional but sometimes frequent also according to end in certain times and places. To arrive at such conclusion he takes the support of biology and shows considerably a permanent type of pairing relationships prevailing in the higher apes and emphasises upon the prolongation of human infancy as a free making to reach up to the human monogamy.  

41 Id at 122.  
42 Id at 123.  
Harry Elmer Barnes

He lays the basis of the idea of marriage i.e. permanent human mating on the Simian heritage of traits who have full resemblance with those of human beings. According to him like Simians man has also no distinct mating season but unlike those of animals. He concludes "The primates and other Siminians, . . . , are constantly accessible to sex stimulation. This trait naturally facilitated and encouraged permanent sex pairing." He further says that other Siminian traits like that child's dependence on mother for long time and its remaining helpless for a considerable period etc. are found in human race also. He finds support from John the First who also attributed the origin of the organised society to this fact. But he maintains "modesty, chastity, aversion to incest, social approval of sex activities, and the like are purely cultural in their origin. None of these can be called instinctive with man." He fully endorses the conclusions arrived at by Edward Westermarck in regard to the way he found out in tracing the evolution of human monogamy. To quote him "Westermarck's concept / conclusions have been generally accepted, (with a qualification) as the accurate interpretation of the nature and development of the human family. They were the more convincing because Westermarck, a tolerant liberal on sexual matters, had no personal axe to grind in defending monogamy."

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44 Id at 601.
45 Ibid.
46 Id at 602.
In regard to polyandry and polygyny he observes that they existed alongside of monogamy being the types of family relationships. Polyandry existed moderately rare as the main explanation for the existence of which could be that it served the biological needs of the man in the best possible manner in an area where nature had been quite hostile and unproductive and thereby the non-sufficient resources of that society did not afford a man to practise monogamy as a universal and general usage. For the existence of polygany he gives a variety of reasons, for example, sexual craving, adventuresomeness, the desire for demonstrating social prestige, perpetuation of race and family members, and richness. He finds polygyny as the relic of the primitive practice of woman-capture in war and female-slavery etc. Political and military considerations also did play a very important part in encouraging the polygyny.47

Bertrand Russel

According to him it is the instinct which implanted the seed of monogamy among the man and animal both. He cites the examples of animal marriages being purely monogamous.48 An animal marries when it remains in need of the male’s cooperation for the purpose of rearing the children and those marriages are monogamous. Anthropoid apes do so. These animals do not face any problem because the male once married ceases to be attracted to any other females and the vice-versa but this is because of 'instinct' which is sufficient to produce virtue. Among human beings

47 Id at 604.
48 Bertrand Russel, Marriage and Morals, Chap. X, p. 68.
it is not so because of his mental peculiarity which generates vices and virtues and their intelligence to overthrow old habits replacing new ones. Russel claims that the monogamy prevalent among animals by way of instinct existed among the lowest races of the savages in the most similar way. For the existence of polygyny he adduces this explanation that the primitive monogamy did start breaking up because of the intrusion of economic motives - which exerted their influence over sexual behaviour and consequently these economic motives gave birth to slavery and female-purchase. In the primitive agricultural and pastoral societies the economic assets included the wives and children also who used to be useful for the man in increasing wealth. The possessors of the wealth, invariably man, started having wives in a number he liked. Although the relative number of the females was not in excess and therefore, polygyny could not be adopted as a general practice but remained the privilege of the rich and the chiefs. Here the degradation of women started from as a necessary logical consequence loosening the monogamous ties. In such circumstances, he believes, that divorce for a man was easy while most difficult or almost impossible for a woman, but that germinated adultery as an act of sexual pleasure outside the marriage particularly for the wife.

D.N. Mazumdar
and
T.N. Madan

They are the Indian anthropologists who, through their book An Introduction to Social Anthropology have not traced

49 Id at 69.
the evolution and historical development of the present concept of a monogamous marriage, but, they have certainly discussed the customs prevailing in different tribes of India pertaining to various forms of marriage and family and other loose forms of sex relationship. The book is informative, so far as the Indian tribes are concerned in which different kinds of sex relationships are found. They, in the light of those cases reported hitherto, do not accept the evolution of marriage as a sequential scheme. Furthermore, they see it difficult to accept that monogamy is natural instinct and primeval habit because polygyny is still universally in vogue which can be said on the basis of the fact that 195 societies out of 250 societies have polygyny as studied by Murdock. They further generalise on the basis of the data collected that among the Indian tribes there is wide practice of polygyny and the restrictions, if any, on polygyny are found to be more socio-economic than strongly moral and instinctive. They believe that the historical data simply show as to why a particular society has developed a particular form of marriage but not as to why institution itself has developed. They appear to endorse the Lowie's view that promiscuity, of course, seems to have existed during the period when the forefathers of today's man had not yet evolved a culture with principles to judge the sexual behaviour but even the simplest of temporary cultures do not show us any relic of group marriages as to substantiate the evolution scheme. The Indian data also conform to this rule. They, however, 

51 Ibid.
52 Ibid.
53 Ibid.
say that sex-gratification, care and rearing of children, also the transition of culture all these constitute the important motives for marriage, so, according to them marriage is a social mechanism to fulfil the said motives.  

Sir Guru Das Banerjee

In his famous Tagore Law Lutures for 1878 on Hindu Law of Marriage and Stridhan he did not deal with the evolution of the present concept of marriage i.e. monogamy, being it beyond the scope of his lectures. But he shows his full agreement to evolutionary study of Spencer and observed "hence by the law of the 'survival of the fittest' in the 'struggle for existence,' groups having definite sexual relations would evolve out of groups with prevailing promiscuity. I cannot describe this process of evolution better than in the words of Herbert Spencer Sociology." He thus, though in the minutest as well as in the briefest by implication admits that there, at the earliest period of mankind, existed a state of promiscuity and the groups having definite sexual relations, which most probably meant the present concept of monogamous marriage, evolved out of that promiscuity as a result of the Darvian's survival of the fittest.

The aforementioned account reveals that during the prehistoric, or, say the preliterate time different kinds of conjugal and sexual relations were in vogue and the notion of marriage as we find today was absolutely and

54 Ibid.
55 3rd Ed. Revised 1913.
56 Id at 22.
57 Spencer, Sociology, Part III, Chapters III-VIII.
58 Id at 295. Also see Guru Das Banerjee, Supra note 55 at p 23.
entirely different in that primitive period. Some of the forms of conjugal relations may seem to us to be most uncivilized, unethical, and even eye-opener as well as startling, for example, the Morgan's discovery of 'Consanguine families' permitting sexual intercourse by way of intermarriage even in between the brothers and sisters and punaluan families that were more or less group marriages but barring the marriage between brothers and sisters. The traces of such of the conjugal relations are still found in existence among the Hawaiians and Polynesians in America. The present concept of marriage was, of course, not known to the primitive man as agreed also by most of the chief sociologists and anthropologists like Bachofen, McLennan, and Morgan who have seriously and with great devotion studied the origin of the marriage institution and there was a state of utter and unrestricted sexual promiscuous relations with men and women during the earliest stage of mankind in the history of its development. The discovery of the mother-right by Bachofen as an original form of family testifies to the fact that the paternity of the children was not at all ascertainable because a woman was having sexual relations with more than one man and, therefore, the lineage was traceable only through females i.e. mothers. The state of affairs does not permit us to conclude anything except that of the state of promiscuity or at most as sex-communism which is called as communal marriage by Sir John Lubbock which, it is submitted, cannot be anything more than euphemism for unchecked sexual promiscuity. So, the idea of the present concept of marriage

appears to have been evolved as an improvement of pairing marriage which was an improved form of punaluan family system and which itself did come of the consanguine system of marriage and family in the Morganic sense. On the other hand, the present marriage system did originate as a result of transition from mother-right to the father-right rule not because of changes or development in the actual conditions in which men used to live but of the intrusion of the religious doctrines for the testification of which Bachofen adduces the example of the Greeks. In addition to these theories of Morgan and Bachofen, a third theory of inheritance stands to have been implanted by Engels according to whom the present shape and form of marriage i.e. monogamy and patriarchal family system has emerged only because of the concentration of wealth into the hands of man by way of victory of separate and private property on the common property and the man wished to bequeath this newly wealth to his own children. Since it was impossible until and unless the mother-right rule is not overthrown. He, i.e. man, being the possessor of wealth unlike the women had acquired a strong position in the society and he then immediately overthrew the mother-right and ruled that the children in future would remain in his kins and gens and, therefore, as a logical consequence the woman had to be the mate of one person only. His children could be identified only when the monogamy at least for the woman is established. So, the cause of inheritance germinated and established the very idea of marriage at least in the form of monogamy according to Engels. It means he bases the foundation of present monogamy, with two adjuncts i.e. adultery and prostitution, on the inheritance and economic consideration to which he traced the origin of the present institution of marriage. This period of origin and development of monogamy
or say polygyny has been attributed by Engels to the commencement of civilization and matured in the modern times. The philosopher and thinker like Bertrand Russel rules out any period of utter promiscuity in sexes even in the earliest period of mankind on the ground that the present form of marriage i.e. monogamy among men and animals since inception of the society as the man like animal was instinctive to pair with one only of opposite sex. Gradually the instinctive behaviour started to be dominated by habit, and the economic consideration came into play which loosened the monogamy principle and the rich started purchasing the women and made them their wives or concubines. This culminated into the origination of polygamy and prostitution. Since the relative sex ratio in number was fairly equal and no other form of marriage except that monogamy could guarantee one woman to one and each man and that was not possible if the rich and family heads had two or more wives. With the result the mass of men had to be rest content with the wives left to them. The polygyny made the dearth of marriageable women which originated the practice of polyandry according to Russel. Much appeal lies in the sequential schemes in regard to the origin and development of the human marriage offered by Bachofen, Morgan and Engels as they base their theories of origin of marriage on the actual practice found existing among the rudest and sporadic aboriginal tribes wherever available in the world. Different types of tribes prove different types of sex and conjugal relationships, for example, consanguine marriage, group marriage, communal marriage, club marriage, pairing marriage and punaluan marriage etc. as the existence of such forms of marriage in those tribes have been well discussed by these authors in their famous works, books, and treatises. Since the
sociologists and anthropologists regard the existence of polygyny, polyandry, and various loose sexual connections alongside of the matrimony, which are still evident, are the relics of the consanguine and group marriages which existed in the primitive and prehistoric societies out of which the present concept of monogamy did originate due to one or other reasons. As the state of free sex in the form of absolute sex promiscuity and non-existence of the institution of marriage among the primitive men gets further support to have existed in the earliest period of mankind, from the Indian scholar Paras Diwan. According to him the man in its earliest period of progress could not have thought of any kind of refinement over the sex promiscuity state as he was badly gripped in meeting out his elementary needs of hunger and shelter. Sex regulation was, of course, naturally next to them. He was not more than an animal in this sense. But the discoveries made by the man of domesticating animals, particularly milch cattle, the idea of possessions and ownership gradually made their appearance. By that stage of development, according to Professor Diwan, men had started group marriage system or even if not so, sex communism existed because of which only maternity in regard to children, could be known but not paternity. But the notions of possession and ownership, which he used to exercise in all other respects over non-living entities and substances, now had driven him to exercise possession and ownership even over his own children but he was unable to know his own children. Man's quest to know the paternity of his children probably led him to evolve marriage as an exclusive union of a man and a woman or women so that he could know as to who were his own children. It is submitted

that there is hardly any reason to differ from him to the extent, at least, that the notions of 'possession' and 'ownership' gave rise to and have been the basic cause for evolution of the institution of marriage between a man and a woman to the exclusion of all others, yet with the greatest deference to him, it is submitted that probably marriage did evolve from the notions of 'possession' and 'ownership' but not through paternity, although it may be that paternity might have been a by-product or a necessary logical consequence of the exclusive union of man and woman which came to be known as 'marriage' in the modern sense.

MARRIAGE AS A SACRAMENT

It appears that the hard fact and reality of the necessity of marriage was much stressed and overstressed by mankind so that marriage became not only an individual concern but also a social institution and different colours had been painted by the man over the clean board of the marriage assigning different nature and sanctity. Hinduism conferred upon the marriage the character of purely 'sacrament' even beyond the life time of the couples while the Christianity held the marriage to be though sacrament yet perpetuable only during the life time of either of the spouses as the death could dissolve the marriage unlike that of the Hindu.

Marriage among Hindus

So far as the nature of the Hindu marriage is concerned it is submitted that it had always assumed the different shapes and forms according to the social and individual urges at various places and times.
The Vedic Aryans and sages regarded marriage to be not an individual, social, economic and holy institution but also a divine institution the reason being that the sanction of marriage under the sacred law emanating from the Vedas which have / are termed as 'Revelation' directly from God although through the highly spiritualistic Hindu rishis. Since divinity has been attached to religion and thereby the marriage has since then been recognised to be a well-founded religious institution also. Under the sacred law of the Hindus the marriage came to be treated as unavoidable and not a contract at all. The sacrament meant the essential rites as ordained by God the Creator at the universe for the human beings. The sacrament used to govern a man according to the 'Dharma' the law of God. Under the Hindu sacred texts there were more than ten major samskars or sacraments prescribed for every Hindu to progress on the orgainsed way in his life. There are four goals of the life, viz Dharma, Artha, Kama and Moksha. Here the 'Dharma' meant not only the duties of a person towards others but also good conduct according to its principles. The 'Dharma' includes and contains the ten characteristics, viz, tolerance, forgive, self-control, honesty, purity, control over the organs, intellect, craze to learn knowledge, truth and to keep temper. The man can remain blameless if he would adopt all these virtues in his life. It can be said that the 'Dharma' is the aggregate of

61 Unavoidable is in the sense that a man for 'moksha' should be blessed with a son or sons and that is not possible unless there is a wife. Manu XVI.35. P.V. Kane, HD, Vol. II, Pt. I, p. 561, 2nd Ed.

62 Rg. X. 85.36; V.3.2; V.28.3.

63 Ibid.

64 Manu II Colebrook's Digest, Book V. 122.
values the observance of which by a man would make him happy. The next purpose of life is the 'Artha' which is essential to go according to the 'Dharma' for a man. The 'Dharma' can not be practised without 'Artha'. The 'Artha' makes it worth possible. It is also a fact that the 'Dharma' teaches a man to earn money or the like according to its basic tenets. Donation, forgiving, generosity and financial help to the needy and the poor is not possible without monetary-values. The third in rank is the 'Kama' the truth and fact of the life. Sex is the biological necessity and the worldly charm. While practising 'Dharma' through 'Artha' and enjoying the worldly things through - sex, the man should try to attain the 'salvation' the release from the bondage of his chain of birth and rebirth in the world. For happy and successful life a man should practise all these four. There is no sense or meaning of his being born if he can not attain all these four purposes and ends of life. The people who do not fulfil the four objects of life are meant only to be born and dead that too come to them without any efforts being made by them. Marriage is the only alternative through which man can easily attain all these. The main centre of the marriage is the wife and, therefore, wife has been divinely regarded as the chief source of Dharma, Artha, Kama and Moksa. By sacrament the marriage has been made ceremonious not a mere contract to be voluntarily entered into by the parties to it. The man remains pure in heart and soul if marriage is entered into by a sanctimonious process. The entry into

65 'Dharma' is meaningless if it can not prevent a man from leading to the wrong path - Valmiki.
66 This fact is proved by one of the Kautilya's injunctions. See his Arthashastra, 3.20.
67 Rg. II. 53.4 that wife is herself the 'home'.
marriage and exit to go out do not at all depend, according to the Hindu textual law, upon the mere wish of the parties to it. It is undoubtedly a sacrasanct union entered into with sacred rites. The marriage in its growth purely interalia is essentially a sacrament not only for the twice born castes but also for women and 'Sudras.' For women and the 'Sudras' marriage is the only samskar to be inevitably entered into and performed by him/her.

The most vital incidents of the sacramental character of the marriage lie in the fact that it is the most idealised institution of the Hindus. Sir, T. Strange remarks that "By no people is greater importance attached to marriage than by Hindus." Under the Hindu textual law the sacramental and pious nature of the marriage admits into its folds a variety of features and incidents:

1. The marriage is a holy and pious union sanctioned by the ordinances of Gods for being observed essentially by every Hindu-regenerate and digenerate classes and women. It is void for want of proper sacred and prescribed rites and ceremonies.

2. The marriage confers the status of husband and wife upon the bridegroom and bride and of legitimacy.

71 Manu II, 67-68; Max Muller, SBE, Vol. 25.
72 Manu II, Colebrook's Digest, Book V, 122.
73 Sir T. Strange, Elements of Hindu Law, Vol I, p. 35.
74 Vyavastha Chandrika, V. II, 432 says that the marriage also partook the nature of a contract.
75 'Pati'
76 'Patni'.
upon the child, if any, born of such union to them. The husband is not only the protector of his wife but also the maintainer of the household and is, therefore, supposed legally the bread winner while living outside the home. The wife is the mistress of his household calling to be 'grahapati.' She is the inseparable companion of her husband is not only for worldly but religious matters also.\textsuperscript{78} The ceremonies and religious rites cannot be performed by a man without his wife being present at the spot and offered oblation with him. That is why she is called 'dharmapati' and 'Sahadharmini' also. The best example of it can be quoted of lord Rama who had to put a statue of his deserted wife 'Sita'\textsuperscript{79} alongwith himself while performing a 'Yajna.'\textsuperscript{80} She is called 'Graha luxmi'\textsuperscript{81} because she is the source of gaining 'artha.' She is treated to be a good omen for the purpose and that is why she is denominated as 'saubhagyavati.' She is shastrically half her husband giving thereby upon her the status of 'Aradhangini.'\textsuperscript{82} without whom a man is never complete but only a half man.\textsuperscript{83} She herself is the home and dwelling and that is why she has been called as 'Meghavan.'

\textsuperscript{78} See Vedic tenets in Grihya Sutras which say that marriage is a spiritual and holy bond and therefore at the moments of 'Saptapadi' the man says to his wife, "Into my will I take thy heart thy mind shall follow me." It is further said that the men who have had wives might fulfil their due obligations in this world. Also see Shyama Charan, Sarkar, Vyavastha Chandrika, Vol. II, 480, according to whom marriage is a union of "bones with bones, flesh with flesh and skin with skin, the husband and wife become as if they were one person."

\textsuperscript{79} Ramayana VII 91. 25.
\textsuperscript{80} Also see Manu IX, 64-68.
\textsuperscript{82} Ibid.
\textsuperscript{83} Manu IX. 28.45; Sat. Br. V. 2.1.10; At. Ar. 1.2.4; Tai Hiriya Samhita, II, 1.2.57. Also see D.M. Derret, A Critique of Modern Hindu Law, p. 287 (1970).
by old Rishi Vishvamitra. Since the wife is the source and means of progenition and perpetuation of the lineage of her husband, she is named as the 'Putravati' also. Whatever the nomenclatures are super added to her (wife), it is of course certain and well recognised that the wife is the source of Dharma, Arth, Kama and Moksa - the real purposes of the successful human life.

3 The marriage is divinely enjoined upon by every Hindu for doing good deeds both worldly and spiritual according to the following verses:

I hope your hand for saubhagya (good luck that you may grow old with your husband, you are given to me by the first, the creator the wise and by the learned people.

Keeping in view the marriage as a divinely ordained institution, the marriage came to be regarded as a permanent, inviolable and immutable union. Marriage is a motive to have an urge to merge the heart of the husband with that of the wife. In this regard Professor Diwan very nicely depicts the picture of the Hindu marriage in his words, "Marriage is a tie which once tied cannot be untied." Permanent means that the marriage cannot in any circumstances be for a temporary period of time fixed by the parties. In the Shastras marriage is a transfer of dominion of the damsel by her father

84 Rg. III, 53.4.
85 Manu IX, 28, Yaj. I. 78.
86 Hindus have divided human life into four stages, viz. Brahmacharya ashrama, Grahastha ashrama, Vanaprastha ashrama and Sanyasa ashrama. Also see Manu, IX, 96.
87 Manu, VIII, 227.
88 Modern Hindu Law, p. 84 (1981).
to that of the bride-groom. This implies two things: firstly, that the damsel was not a party to the marriage but simply an object of the gift to be made by her father or other paternal kinsmen; and, secondly that the bride not being the party to the marriage was unable legally to dissolve the marriage whatsoever be the ground. Even death of the husband could not dissolve the marital tie as she would then belong to her husband's paternal kinsmen. This ecology gave birth to the indissolubility element perpetrated into the marriage concept. Manu enjoined upon the Hindu wives, if they are true, to preserve and maintain their chastity as much after as before their husbands' death. Thus, the Hindu marriage was a permanent tie during the whole life time of the husband and the wife conjointly. The Hindu marriage is inviolable because it is the exclusive union of the husband and wife in order to have a free access to each other with the entire exclusion of all others. No third party other than the husband and the wife can violate the marital bed of any of the spouses otherwise it tantamounts to violation against God. Furthermore, the Hindu marriage has came to be regarded as an immutable union in the sense that the marriage is a divine institution. The husband and wife derive the sanction of their marriage from God and, therefore, they are not authorised to change or alter the terms of the marital bond ordained by God. If marriage once entered, it was entered

89 P.V. Kane, Supra note 77 at pp. 427-429.
90 Id at 619.
91 Manu IX. 47. a maiden can be given only once.
92 Manu V. 160-162; VIII.25. IX. 65.
The sacramental character of the Hindu marriage gave rise to its three main features, viz. eternity, permanence, and indissolubility. No doubt that the marriage among the Hindus is one of the essential samskaras to be followed by every Hindu. It is expected that every Hindu must invariably get married. "To be mothers were women created and to be fathers men, the Vedas ordain that Dharma must be practised by man together with his wife. The terms and duration of the marriage is for a permanent period and not subject to the wish of the parties to end it at any time and in any manner they like. It runs throughout the life time of the parties on the analogy that the damsel is only once given in marriage. There are many more verses which signify the observation that the Hindu marriage is not only permanent but also an eternal union. Here eternity means that the marriage is perpetuable even during the widowhood and beyond her death too. The parties to the marriage remain as husband and wife not only in this world but also in other words to come i.e. the next lives after the death, this later on came to be construed as against the permissibility of the widow-remarriage. The Hindu sages have enjoined upon the widows to remain chaste perpetuable during the whole of her life due to observance of which she

93 P.V. Kane, Supra note 77 at p. 619.
94 The necessary corollary of the sacramental concept of marriage is its 'indissolubility' for which see Kautilya, III, 3,19. P.V. Kane, Supra note 77 at p. 620; D.N. Mitter, The Position of Women in Hindu Law, at p. 195(1913).
95 Manu, IX, 96.
96 Manu, IX, 46-47-48 to the effect: "The husband is declared to be one with the wife. Neither by sale nor repudiation is the wife released from her husband. Once only a maiden is given in marriage."
97 Manu, V. 160-161.
can on her death, attain the heaven even if she is without a male issue, and an unfaithful widow forfeits her claim in her deceased husband's property leading to her being ex-communed too. The remarkable feature of ideality bestowed upon the marriage is that the wife loses her personality on marriage and merges into that of her husband acquiring his 'gotra' with her and then she ceases to be known by her maiden name—right from the Rigvedic time even to the present day. This fact is further approbated in the Satpatha Brahman also proclaiming the wife to be verily the half of her husband. The Taittiriya Samhita is more explicit on the point that "half is she of the husband, that is wife." The Vedas and Brahamanas give concept of two-in-onesship that overwhelmingly stressed by Manu. In this way the marriage came to be known as eternal beside the permanent one. The indissolubility, as a necessary corollary then comes out of these two elements. To quote Manu,

"Let the mutual fidelity continue till death"
"that is the supreme law between husband and wife"
"Let a man and woman, united by marriage, constantly beware, lest at disunited, they violate their mutual fidelity."

98 Manu, V. 151. Yaj. 1.76; Vishnu XXV. 13-14.
99 Manu V, 169; Yaj. 1.75; Parasara, IV, 26; Vishnu, XXV, 17, and Barad, XII, 81.
1 "Be thou mother of heroic children, devoted to the God. Be thou queen in thy father-in-law's household. May all the Gods unite the hearts of us two into one."
Rg. IX. 85.
2 Satpatha Brahmana, V, 1.6.10.
3 Taittiriya Samhita, III, 1.2. 570.
4 XI, 45.
5 IX, 101.
6 IX, 102.
Manu, Yajnavalkya and other sages did not seem to have permitted divorce under any circumstances. The wife is onerously commanded positively to respect her husband even if he is devoid of all virtues.

Thus, the Hindu marriage was regarded as permanent and eternal, and the indissoluble and it became the rule. Only some of the sages speak of women's remarriage as a result of abandonment or death of her husband. Vasistha enumerates certain conditions, viz. betrothal to a bad character man, husband's impotency, blindness and the like or an outcaste, infidelity, or an incurable disease, in which the husband can be abandoned by the wife and she take another husband. But the text is however confined to betrothal only. Narad and Parasara are the only two sages who permit a wife to abandon her husband and take another one in the following circumstances, viz. the husband's disappear ance for a long time or death, reunciation of the world to enter into a religious or spiritual order, impotency or patita.

It seems that these texts prescribing abandonment and remarriage by the wife in certain cases only were not viewed with favour and the prominent authority prevailed upon unchallenged and uninterruptedly in favour of the indissolubility of marriage.

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7 As revealed from some of their verses to the effect that the husband must be worshipped like God, even though he is a man of bad character, with no qualities. Manu V. 154; Yaj. I. 77; Vishnu, XXV, 15; Katyayana, 836; Ramayana 24.26.27.
8 Manu, V, 147-154; Radha Binod Pal, History of Hindu Law, p.375,(1958). P.V.Kane, Supra note 77 at p. 611.
9 Paras Diwan, Supra note 88, at p. 64.
10 Narada, Stripurma V. 97; Parasara IV, 30. Agnipurana, 154. 5-6 have the same verse. Some like Parasara Madhavaya and Medhatithi give different explanations for these verses. Great controversies have therefore arisen. See P.V. Kane, Supra note 77, at p. 611.
11 Also see P.V. Kane, Supra note 77, at pp. 611, 620.
The present form of marriage in the European countries has come out from different sources namely the Roman Law, the customs practised by the Germans who succeeded to the Roman empire and the doctrines of the Christian Churches.\(^\text{12}\) The main characteristics of the Roman marriage were the monogamy, free mutual consent of parties to enter into it, the contractuality, and easy dissolubility. The marriage was governed by the civil law and authorities. The husband and the wife were regarded as equal to each other in the eye of law.\(^\text{13}\) The wife used to enjoy enormous powers in regard to her dowry brought by her to the matrimonial home. The marriage was purely a contract in nature based upon the mutual consent of the parties and capable of being freely dissolved like any other contract which might be broken.\(^\text{14}\) A life long union was no longer a normal duty for a Roman people under the then prevailing law but was, however, a subject of the State to provide safeguards against depopulation and endeavour to make the marriage as much stable as possible to be the foundation of the society. During Cicero there was informal marriages without manus\(^\text{15}\) that came to be recognised as Justum matrimonium according to which the offspring of the marriage through males were subjected to the husband's power while the wife did not come under his power.\(^\text{16}\)

\(^\text{14}\) Code Justinian, S. 38, 2 as referred to by Nirmal Yadava, Theories of Dissolution - - - - - of Marriage - an LL.M. Thesis, Law Department, P.U. Chandigarh, 1977,p.28.
\(^\text{15}\) Wife without losing her own legal personality.
\(^\text{16}\) Supra note 14, at p. 27.
The Germanic customs and usages were quite in contrast from those of the aforesaid Roman Law. They were part of the social organisation comprising the patriarchal kinship groups. Marriages were the normal feature in every man's life to enter into it by way of mutual go-between or understanding of the families of the bride and bridegroom. The bargaining of marriage comprised the property consideration also which used to pass, during the early period, to the husband's family but later became the wife's property for her use. The unequal divorce rights to be exercised by the husband and the wife were common and normal features of the patriarchal form of the then society. Polygamy was not prescribed although it was the upper society's preserve.

The Roman law of marriage based upon the individualistic contentment and the German social set-up based upon the patriarchal rule came under a severe attack and impact of the doctrines of the Christian churches. The marriages since then were declared to be 'sacrament' and a divine institution. The Church of Rome became the supreme ecclesiastical authority and governed the marriages by the canon law. Mutual consent became the rule to enter into the holy bond of marriage by the parties to it. The consummation became the true purpose of marriage. Legally speaking, both the consent and consummation were ordained essential to rendering the marriage valid and one without the other was not sufficient. The Christianity depicted marriage as an institution enacted and ordained by God and could not in any way be classed as even special contract. It is, however, a contract in formation based upon purely free volition of the parties to marriage but a sacrament in consequence, that is, the marriage would stand indissoluble. Marriage being a sacred and divine as well as religious institution.

17 Gratium - De retum, p. 34.
originated as a means to work against the fornication, to remedy and avert the loose living and concupiscence.\textsuperscript{18}

It was proclaimed and deemed better to marry than burn. It was St. Paul who first propounded the idea of marriage to be a sacrament and recognised since the Augustine time.\textsuperscript{19}

It was only St. Paul who first saw the image of the husband and wife in that of the Christ and his Church.\textsuperscript{20}

Casti Caunubi declared the Christian doctrine to be an immutable, inviolable and fundamental one indicating the marriage was instituted and/or restored not by man but by God - who promulgated the relevant law being the author or the nature and by Christ and these laws were therefore beyond the pale of the human decrees and even if it was contrary to the spouses' interest.\textsuperscript{21} This was said to be a doctrine of Holy Scripture which stated the God to be the Author of the constant stability of the marriage bond, its unity and its firmness.\textsuperscript{22} Friedmann describes the dissolution of Christian marriage as illegitimate, except by death, as being contrary to the law of God and nature.\textsuperscript{23}

In the words of Mathew, "what, therefore, God has put together, let not man put asunder."\textsuperscript{24}

\begin{enumerate}
\item The Exhortion at the beginning of marriage service in prayer book of 1962 and its omission proposed in 1928; Cambridge University Press, pp. 298-303.
\item Jackson, \textit{The Formation and Annulment of Marriage}, p. 7 (1956).
\item Eph. V, 23-32 referred to in Supra note 19.
\item Ibid.
\item Mathew 19:6.
\end{enumerate}
St. Augustine said all human institutions as essentially sinful but redeemed only by grace of God; and if men and women select wrongly, should they suffer their cross as a duty owed to God. The indissolubility is the necessary corollary of the Christian marriage the basis of which being religious which gave rise to idea of 'sacrament' as the nature of marriage and thus came to be regarded as God-made. That was why the religious ceremony was made obligatory which might also indicate the only legal mode of consent per verba de praesenti. The more striking feature of the Christianity was the ascetism of the Christian fathers the radically changed attitude towards marriage emanated from. The virginity was so much desired and exalted as the highest spiritual state, so that the marriage in Christianity had to be reduced from the rank of the positive good to that of a lesser evil, fornication being regarded as a moral sin; and the celibacy was eventually made obligatory for the priesthood of the western Church. Since the indissolubility of marriage in the Christianity became the rule as a result of its recognised character of 'sacrament' there emerged a principle of 'annulment of marriage' to be decreed only by the Christian Churches as being the upholder of the religion and dispenser of justice by way of exercising the ecclesiastical jurisdiction over the matrimonial causes. According to the rule of annulment it was realised that there might be a marriage, if at all, forever or for never.

Thus, the Christianity declared the marriage as obligatory for each and every person, and sacrament as having been ordained by God, and indissoluble solemn union /

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25 Referred to by Friedman, Supra note 23.
pact entered into by the parties with their full and free volition for life as to prevent fornication being a moral sin and to provide safeguards against depopulation.

It was the Reformation and Counter-reformation responsible for the changes appeared in marriage that was the only question over which the whole Christian world divided into the Catholicism and Protestantism. The main charges were attitudinal on the nature of the marriage of God made and on the question of its dissolubility and indissolubility.

MARRIAGE
AS A DISSOLUBLE UNION

From the foregoing discussions it can be well concluded that the Hindu marriage under the Shastras is permanent, sacrament, eternal and indissoluble. The Christian marriage under the New Testament and canon law is permanent and sacrament in the sense of its indissolubility.

It is, therefore, in the fitness of things and demand of the propriety to discuss those factors and processes which brought a radical change in the outlook towards the Hindu marriage and the Christian marriage as well and altered their character from being sacramental and indissolubility to contractual and dissoluble union.

Christian Marriage

Of course, the solemn pact of husband and wife by way of marriage derives its sanction from religion which is claimed to be Godly - revealed - one assuming the character of the supreme law also. Therefore, the Christian marriage is a religious as well as legal institution and in this
respect this institution differs from all other human institutions having been in existence from time to time and place to place in terms of the societal structure. The main focus of the Christianity was centered purely on prevention of fornication and preference of the virginity. If the man could not prevent himself from falling into the fornication - a mortal sin he was then ordained to marry. So the marriage was evolved in the Christianity as a necessary evil but lesser than the fornication. Every man was desired to be celibate but if he could not avoid fornication he was permitted to marry a person he or she chooses. The churches in consequence assumed the ecclesiastical authority and jurisdiction over matrimonial matters besides the religious ones. Matrimonial matters included essentially marriage and divorce. Since the divorce was expressly forbidden, the ecclesiastical courts evolved and extended the grounds of nullity and included therein the importance and wilful refusal to consummate the marriage which was in fact nothing more than the failure to fulfill the very objects and obligations of marriage once validly entered into. Mathew's doctrine of "Putting Asunder" was applied. Even St. Augustine continued to buttress this concept of marriage and according to him "all human institutions were essentially sinful, and redeemed only by grace of God. If men and women have chosen wrongly, let them bear their cross, as a duty owed to God." 

The opposite view that a marriage ought to be a dissoluble union under certain circumstances is compounded of

26 "What, therefore, God has put together, let not man put asunder". Mathew 19:6.
27 Friedmann, Supra note 23.
different elements. The Council of Trent reiterated the full doctrine of sacramental marriage. The Council also abolished the demarcation between the illegality and invalidity in regard to marriage taking place by private exchange of vows and thenceforth the religious ceremony made obligatory even to the validity of marriage. But the other segment i.e. Protestants brought a serious attack on the Catholic - upheld fundamental - idea of marriage as a sacrament and the spiritual superiority of virginity. According to them the marriage was not a sacrament but a contrast which required to be supervised by the state and not by the Churches under their ecclesiastical jurisdiction and authority. In this way Reformation and counter-reformation took place leading to the attitudinal and substantial changes in the marriage among the Catholics and Protestants. According to Friedmann the only common factor in the policies and philosophies opposing the Augustinian and modern Catholic concept of indissoluble-sacrament of marriage points to the seeking of recognition of marriage as a human institution based on the free will of man and woman who are no doubt responsible but not infallible individuals who may or blunder. They should be given the right and liberty to get the burden over that has become intolerable and which is sapping the vital energy and moral fibre of the affected parties. Another philosophy which reflects from the Call of looking the marriage to be a human institution capable of being dissolved in case of necessity though imminent is the individualistic philosophy i.e. the individual happiness or the right of the individual to be happy. According to this individualistic philosophy one

28 Ibid.
29 Ibid.
desires to be able to live its life as much cheerful as possible in the conditions which may tend and persuade him to evolve and develop his personality, talent, capacities and potentialities. This will again mean the individual's right to correct errors and blunders in choosing his life partner or in deciding upon entering into the matrimony at all. Marriage no doubt is a bond and a contract but it should not become the jail in the garb of the super-imposed sacramentality and indissolubility of such marriage bond.

The so-called religionists and the blind upholders of the Christianity gave, besides Christian tenets, doctrines and canons, some other reason and justification also to reject the dissolubility theory. They endeavoured their best and ultimately succeeded in finding out the sanction of indissolubility of marriage in the New Testament ignoring the Old ones altogether. The reformers found their authority in support of the contractual theory of marriage and dissolubility thereof in the Old Testament rather than the New one.

The Catholics upheld and followed the Christian Church doctrinnaire concept of sacramental and indissolubility of marriage while the Protestants became liberals and upheld the marriage to be purely a human-made institution tracing its seeds in the contractuality and dissolubility of marriage in case of inevitable and recurring mischiefs and atrocities being committed by one spouse against the other or where the situation demands the separation of the spouses from each other by way of terminating the marital bond at all. In this way there came to be known the Catholics and Protestants - the two segments of the same Christian race and world. They started having their own churches with the headquarters at Rome and England for the Catholics and Protestants respectively. The Catholics regarded marriage
as a purely religious institution while the Protestants regarded it as a purely secular institution to be governed by the secular and civil authorities as contradistinguished from the Catholic ecclesiastical in matters of marriage. The English Reformation resulted in a perpetuation of ecclesiastical control through the High Commission and in a failure to do the unregistered marriage away with. The Civil marriages established under the Commonwealth were although abolished at the Restoration but again set up with an effective system of the public notice and registration of marriage under and by the Lord Hardwicke's Act of 1753.

**English Law of Marriage**

In the Anglo-Saxon time, marriage was dissoluble even by mutual consent besides other guilt grounds i.e. wife's desertion or adultery. The concept of indissolubility gained full ground during the Norman times that is after 1066. The Papal authority assumed the supreme ecclesiastical jurisdiction over marriage under the Church doctrine of sacrament of marriage and it started to be governed by the canon law. The ecclesiastical courts were therefore established for the purpose but they had no authority to grant divorce in order to enable the parties to remarry.\(^{30}\) Only three kinds of relief except divorce were permitted. They were the nullity\(^{31}\) restitution of conjugal rights and the judicial separation.\(^{32}\) Until 1857 but after the Reformation, the supreme Papal authority was replaced by

\(^{30}\) a decree a *vinculo matrimonii*.

\(^{31}\) Where there was no valid marriage.

\(^{32}\) divorce a *mensa et thoro*. 
that of the Crown. During this period the jurisdiction of the ecclesiastical courts was, however, not affected and the canon law doctrine of marital indissolubility continued to be as such. The divorce a vinculo matrimonii could, however, be obtained by the Private Act of the Parliament on the basis of each case individually that was nothing but a rich-preserve because of exorbitant cost involved in it. The husband but not the wife could avail himself of this amenity of divorce on the ground of the latter's adultery that too simple not coupled with anything more. The wife could initiate the Bill when her husband's adultery was aggravated by incest or bigamy.

The Matrimonial Causes Act 1857 was the first in the history of the English matrimonial legislation which made the English marriage de jure dissoluble by way of judicial divorce, though only on limited grounds i.e. wife's adultery simplicitor and husband's aggravated adultery.

Marriage as a Dissoluble Union under Hindu Law

As we have seen, marriage among the Hindus was a sacramental union which meant an eternal, permanent and indissoluble union. Even the death did not dissolve the marriage. Thus, the question of divorce could hardly arise among the Hindus.

33 Supra note 30.

34 Thereafter several legislations were passed extending grounds for divorce from a single guilt ground of adultery to desertion, cruelty, insanity, presumption of death and irretrievable breakdown of marriage as a sole ground for divorce. See the Matrimonial Causes Act (hereinafter referred to as MCA) 1923, 1937, 1965, 1967, Divorce Reform Act, 1969, and the Current MCA, 1973 which have been dealt with and discussed in the following chapters.

35 Also P.V. Kane, Supra note 77, at pp. 619-620.
However, divorce among certain castes and tribes was recognised under custom and usage. In the words of Mulla, "Divorce is not known to the general Hindu law. The reason is that a marriage, from the Hindu point of view, creates an indissoluble tie between the husband and the wife. Neither party, therefore, to a marriage can divorce the other unless divorce is allowed by custom." He has drawn this statement on the basis of a chain of judicially decided cases. A customary divorce was obtainable through the media of the panchayats or caste assemblies by the private act of the parties whether oral or in writing under a written instrument like that of the bill of divorcement or tyag patra or forkat-name. A custom permitting divorce must however be valid one. Banerjee stated that a divorce among the inferior class could be obtained either on the basis of mutual consent of the parties to the marriage in which the husband granted in favour of his wife a chor-chitti / letter of release on establishing the matrimonial offence. The custom permitting divorce against the wishes of the other party to the marriage was, however, held void as opposed to the public policy and the spirit of the Hindu Law. Although customary divorces are still legally permissible to be

37 Kudomee v. Joteeram (1878) 3 Cal. 305; Sankarlingam v. Subban (1894), 17 Mad. 479; Talayya v. Nakaraju AIR 1958 AP 611. According to Paras Diwan, "Before, the coming into force of the Hindu Marriage Act, divorce under Hindu law was recognised only under custom. Divorce under custom, then, was available unless a particular ground or mode of divorce was found to be contrary to public policy or morality." Modern Hindu Law, p. 148 (1981).
38 Ibid.
39 Ibid. Also see GuruDas Banerjee, Hindu Law of Marriage and Stridhan, Revised Ed. p. 190 (1913).
obtained under Section 29 of the Hindu Marriage Act, 1955, without any intervention of the court, the divorce obtained by one spouse against the wishes of the other has been held void for such custom being an unreasonable and against the public policy. It is, however, open for the court to interfere with a customary divorce in certain circumstances as to see the validity of custom and jurisdiction of the gram panchayat or caste panchayats etc. granting divorce.

Apart from divorce by custom some inroads were made in the sacramental concept of marriage by legislations. In 1856, the Widow Remarriage Act was passed permitting the Hindu Widows to remarry, with the result that since 1856 the Hindu marriage ceased to be an eternal union and remained permanent only during the life time of the parties to it. The characteristic of permanency of a Hindu marriage did however remain present up to mid of the instant century. The third characteristic of the Hindu marriage was its indissolubility. But this characteristic did also disappear through sporadic legislations of the various erstwhile Indian states or the British parliament the Indian Central Legislature. The first divorce provision for the non-Christians residing in India including the Hindus appeared on the Indian legal scene in 1866 when the Native Converts' Marriage Dissolution Act was passed and enforced. When a Hindu became convert to Christianity and thereupon the husband or the wife deserted or repudiated the convert the court might grant a decree of divorce dissolving such marriage if the convert

41 Gurdit v. Angrej AIR 1968 SC 142 in which customary divorce among Hindu Jats of Jullundur has been recognised.
had presented petition therefor. The parties thenafter could remarry if the previous marriage had been dissolved by death. The mere fact of conversion would, however, not work as a dissolution of the Hindu Marriage ipso facto. This seemed to be because of this fact also that there was no provision in the traditional Hindu law which could prescribe the subsistence of a marriage if one party of which was a non-Hindu. Thus the indissolubility of a Hindu marriage had broken although slightly by the said Act of 1866. Thenafter some states before and after independence passed the laws which made the marriage dissoluble for the Hindus living in their territories, viz, the Malabar Marriage Act, 1896; the Baroda Hindu Lagnavichheda Nibandha (Hindu dissolution of Marriage Act 1931 replaced later on by the Baroda Hindu Nibandha of 1937), the Bombay Hindu Divorce Act 22 of 1947, the Madras Hindu (Bigamy Prevention and Divorce ) Act 6 of 1949, the Saurashtra Hindu Divorce Act 30 of 1952. In addition to these there was already a general law like the Special Marriage Act, 1872 owing to amendment in 1923 - now repealed by the Special Marriage Act, 1954 under which divorce provisions were made available to those Hindus who married under the above Acts.

Thus, the Hindu marriage became dissoluble in some of such states while it remained indissoluble in rest parts of India. It was only in 1955 when the Hindu Marriage Act was passed by the Independent Indian Parliament and enforced with effect from 18th May, 1955 with the presidential assent thereto, introducing divorce, for the first time, for all the Hindus in India uniformly, making a Hindu marriage which was hitherto an indissoluble union as dissoluble one.

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43 Gobardhan v. Jasuda moni (1891) 18 Cal. 225.
Hence it is now beyond doubt and dispute that a marriage under the Hindu Law has now become completely a dissoluble union and the elements of eternity and permanancy and indissolubility are out of legal scene.

As regards the exact nature of the Hindu marriage, today, it is submitted that it is neither a sacrament nor a contract as well for the Hindu Marriage Act, 1955 still does not positively require consent of the parties as a condition precedent to the validity of their marriage. The Act simply makes the marriage voidable, not void if the consent of either party to it has been obtained by force or fraud for his / her marriage. Therefore, the consenting mind was indispensable neither under the pre-1955 nor under the present Hindu Law. The Hindu marriage, in this respect, differs from the English marriage which requires the element of 'meeting of mind' and thus real consent for the parties for their marriage. Moreover, the mere existence of a mandatory provision that a Hindu marriage is to be solemnized through the age-old and religiously ordained 'saptapadi' ceremony does not also give the character of sacrament to the Hindu marriage because other customary and non-shastric rites and ceremonies are also recognised for a valid Hindu marriage to be solemnized. The courts taking the view that the Hindu marriage is still a sacrament and the Act, 1955 has retained its nature as a religious sacrament are:

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45 Section 12(1) (C), the Hindu Marriage Act, 1955.
47 Section 7 of the Hindu Marriage Act, 1955.
The sacramentality of a Hindu marriage has lost its legal sanctity now-a-days especially after the passing of the Hindu Marriage Act, 1955. It also cannot be said that a Hindu marriage is sacrament as well as a contract for the reason that sacramental features have already got destroyed while the contractual elements like real consent etc. in terms of the commercial laws have also not been fully envisaged and required to be fulfilled under the Hindu Marriage Act, 1955. It is submitted that the Hindu marriage in such situation remains, however, as social institution essentially in the nature of contract conferring status on the parties and giving rise the multifarious rights and obligations for not only the parties but also for and against the whole world. This is further proved by the fact that the consent on the one hand has not expressly been required and on the other hand the Act 1955 provides for avoiding the forced and defrauded marriages. With the result, the minors, impotent and lunatics are still deemed competent to marry.

Thus, it is clear that today the Hindus marriage should be understood as a social institution in the nature of the contract giving rise to status but not as a sacrament in the 'shastric' sense nor purely a contract in the contractual and commercial sense. Since marriage is one of the most important, utilitarian and social institutions, the public and the state are naturally and vitally interested in its preservation, prosperisation and stability. The state should make every reasonable endeavour for the stability of the marriage.

The marriage of the minors is valid even in violation of the condition which prescribes minimum marriageable ages 18 and 21 years for female and male respectively under Section 5 of the Hindu Marriage Act, 1955. The marriages of impotent and lunatics are only voidable and continue to be valid unless and until got annulled at the instance of either party or non-impotent spouse in a specific / reasonable period of time under Section 12 of the Act, 1955.