PART III

CONCLUSIONS AND SUGGESTIONS
CHAPTER IX

Conclusion

Conclusion:

Marriage is regarded as one of the fundamental social institutions. It has always been considered as the instrument of propagation of human society. In other words, this institution is the fundamental basis of social existence of mankind. The earliest form of conjugal relationship in India may be found in the socio-urban set up of the Harrapan people. What type of that conjugal relationship was, can not be precisely defined due to the lack of specific evidences of socio-cultural conditions of that period. However, due to fusion of various races and cultures since prehistoric times in the north-western region of the Indian sub-continent, of which Himachal Pradesh is a part, the marriage institution must have passed through various stages of developments i.e. from promiscuity to monogamy.

Marriage involves certain legal consequences and these depend not on the will of the parties to marriage, but upon the law which governs them. In that sense,
marriage can not be designated as a contract. But actually speaking, marriage is a contract. It is a special type of contract as the duties arising from it are not left entirely to be regulated by the agreements of the parties, but are, to a certain extent, matters of community regulation, over which the parties have no control by any declaration of their will. The Hindu Law on this point retains its archaic character. According to this law, marriage is not merely a contract but also a sacrament and the rights and duties of the married parties are determined solely by law and are incapable of being varied by their agreement.

In the absence of the modern law making machinery, it was the customary law of the parties which was prevalent among different communities to determine the questions relating to conjugal relationship. For the Hindus this state of affairs continued till the Hindu Marriage Act, 1955 was passed by the Indian Parliament. This Act tried to alter the nature of Hindu marriage from sacrament to contract. But as the impact of age old customs dies hard, the sacramental aspect of Hindu marriage has still been retained by the Act.
In its application the Hindu Marriage Act, 1955 has excluded the Scheduled Tribes even though they may be Hindu by religion. Thus section 2(2) provides:

Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribes within the meaning of clause (25) of Article 366 of the Constitution unless the Central Government, by notification in the official-Gazette, otherwise directs.

Thus the Scheduled Tribes are still being governed by their respective tribal customs in the matters of marriage and divorce. Tribal customs differ from tribe to tribe depending upon the geophysical setting, socio-cultural backgrounds and the religious traits of the tribal community concerned.

In the present set-up of the circumstances no precise and satisfactory definition of the term 'tribe' is possible. Even the Constitution of India which provides some special provisions for the Scheduled Tribes does not define the term 'tribe'. Any community can be declared as Scheduled Tribe by a Presidential Order issued under Act 342 of the Constitution of India. Though no definite criteria is provided under the Constitution for declaring a community as Scheduled
Tribe yet certain basic characteristics of 'tribe' are taken into consideration before declaring a particular community as a Scheduled Tribe. As such certain tribal communities of Himachal Pradesh have been declared as Scheduled Tribes. Accordingly, at present Gaddi, Gujjar, Kinnaura, Lahula, Swangla, Pangwal, Jad, Lamba, Khampa, Bhot and Bodh tribal communities of Himachal Pradesh have been declared as Scheduled Tribes under the latest Scheduled Tribes Order (Amendment) Act, 1976. Except Muslim Gujjar, all the Scheduled Tribes of Himachal Pradesh are Hindu by religion. Because of Section 2(2), Hindu Marriage Act, 1955, the provisions of this Act do not apply to these Scheduled Tribes in determining the questions of marriage and divorce. They are still being governed by their respective customary law in this regard. What are the customs and traditions of these communities depend upon their respective way of life which in turn depends upon the history, surrounding circumstances, geo-climatic conditions, socio-cultural traits — and religious beliefs of the tribal community concerned.

In part I of this thesis the growth and development of the marriage institution since pre-historic
time to the present\textsuperscript{1} day and the different forms of marriage\textsuperscript{2} which were prevalent in the contemporary Aryan and non-Aryan society and their impact upon them has been discussed. It is clear from that discussion that Himalayas have been considered as the original home of many aboriginal tribes. Vedic literature reveals that some non-Aryan tribes inhabited this region long before the Aryan invasion of this region from the north-west. The Aryans were opposed by these non-Aryan tribes. With the passage of time a two way process of fusion of Aryans and non-Aryans started.

It is more or less accepted that the laws of Vedic age were largely in the form of customs, which had a long history of evolution in the framework of social conditions prevailing at that time. Though it is admitted that the Aryans brought certain notions, beliefs and ideals with them yet in the course of long social contacts between Aryans and non-Aryans, the resultant culture of the Aryans absorbed a good deal of non-Aryan customs. Thus customs and practices of the Aryan settlers of ancient India were largely moulded and influenced by forces, not always from within but from outside. What is the actual impact of

\begin{enumerate}
\item Supra, Chapter 1, pp.1-31.
\item Ibid., n.11.
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non-Aryan customs upon the Aryan people is difficult
to say but so far as the customs relating to marriage
and divorce are concerned we find the traces of non-
Aryan elements in them. The inferior forms of marriage
entered into the Vedic society by adoption or adaptation
from persons who did not belong to the Aryan culture.
They may have been the forms of marriage practised by
people who were not within the Aryan society. 3

In Vedic literature we find the references of
various tribes of western Himalayas like Raksasa,
Paisach, Gandharva, Asura, Kinners, Kirat etc. These
were the people who opposed the powerful Aryans in
the north-western region. Aryans called them 'Dasyus'
or 'Das'. In the fitness of things, it seems most
probable that the forms of marriages namely Gandharva,
Asura, Raksasa and Paisach, were the names given to
the forms of marriage prevalent in these tribes alongwith
the forms of marriage namely Brahma, Daiva, Arsa and
Prajapatya, prevalent among the Aryans. With the
passage of time the fusion of races and culture

took place and the various non-Aryan forms of marriage have been adopted by the Aryans with some reservations.\textsuperscript{4} This inter-mixing of customs and traditions continued even during the later Vedic period and beyond and as such we find the adaptation of various forms of marriage prevailing in one community by the others and vice-versa. Thus some customs and practices of Aryans have been followed by non-Aryans and also the customs of non-Aryans have been followed by Aryans while retaining their own cultural traits. The customs and traditions of the non-Aryans of the Vedic period are still being followed, though with some modifications, by the tribal communities of Himachal Pradesh who are considered, to some extent, the descendents of the non-Aryans of the Vedic period, depending upon the degree of isolation and inter-mixing with the contemporary society and the surrounding geographical and climatic conditions. Thus the customs relating to marriage and divorce of the non-Aryans of the Vedic period are still in vogue with some variations in the tribal communities of the north-western Himalayas including Himachal Pradesh. The

\textsuperscript{4} Supra, p.17.
mode of performance of marriage may have been changed but the spirit continues to be the same. Thus the Gandharva and Raksasa forms of marriage are still in vogue among the tribal communities of Kinnaur and Lahaul-Spiti districts of Himachal Pradesh named as marriage by elopement and marriage by culture respectively.

The tribal areas of Himachal Pradesh form a contiguous belt in the north and north-east of the Pradesh and also form international border with Tibet region of the Republic of China.\(^5\) This belt practically lies between the ranges of Cis-Himalayas where the climatic conditions are not conducive to the human habitation in normal situations. The tribal area of Himachal Pradesh constitutes 43.03 per cent of the State's geographical area and is inhabited by 197263 people which constitutes 4.61 per cent of the total population of the State. Though the tribal population is very small as compared to the total population of the State yet majority of the population of the tribal

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\(^5\) See map.
area belongs to the scheduled tribes of the State. This area of the State has tribal pockets which are inhabited by different tribal communities and are separated from each other by high mountain ranges and river valleys. Thus forcing these people to live in isolation and away from the mainstream of national development. Different geographical and harsh climatic conditions of the region have forced the tribal people to retain their cultural traits and develop their own way of life. These geophysical conditions act as cultural barriers between the people living in different pockets of the tribal belt though belonging to the same ethnic group. Thus the marriage customs of the Kinnaura tribal community inhabiting the upper region i.e. Pooh sub-division of the Kinnaur district bear the Tibetan influence due to the geographical proximity of the area with the Tibet. The Tibetan influence is not found in the marriage customs of the Kinnauras living in the lower region in the Nichar sub-division which in fact bears the influence of Hinduism of the mainland.6

6. Supra, Chapter IV, p.83.
It has been discussed that the scheduled tribes of Himachal Pradesh belong to different stocks of human races who invaded and inhabited this region from time to time. They have been classified into three broader categories, namely, the native pre-Aryans inhabitants, aliens as invaders or refugees and the fugitives from the mainland. With the passage of time fusion between native inhabitants and the invaders from outside was so extensive that at present there appears no distinction between the two groups. In due course of time they adopted each others customs, traditions and beliefs giving rise to a homogenous society. The customs and traditions of Kinnaura, Pangwal, Bhot and Swangla scheduled tribes of the present day lend support to this. Thus the scheduled tribes of Himachal Pradesh can be divided into two different groups. First group includes Pangwal, Swangla, Bhot, Jad, Lamba, Khampa and Kinnaura scheduled tribes.

7. Supra, pp.35-38.
8. Supra, Chapter IV, pp.79-151.
9. Supra, Chapter VI, pp.198-228.
10. Supra, Chapter VII, p.229.
who are inhabiting this region since ancient period. The other group includes Gaddi, Gujjar and Lahula scheduled tribes who migrated to the tribal area in the recent past and have been declared as scheduled tribes not because of their ethnic affiliation to any pre-historic community but because of the force of circumstances.\textsuperscript{11} Marriage is an occasion for marry-making to the people belonging to the first group as they remained away from influence of religious developments in the mainland throughout the past centuries. But the marriage ceremonies of the people belonging to the second group reflect the religious influence of the mainland. Thus Gaddi or Gujjar marriage i.e. \textit{Byah}\textsuperscript{12} is ritualistic in nature as compared to Pangwal's \textit{Janji}\textsuperscript{13} marriage which is devoid of rituals.

The value of custom lies in tradition and immemorial usage. Its birth and growth are determined by the geophysical, economical and cultural environments of the community. No tribe can settle down to

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\item \textsuperscript{11} Supra, Chapter V, p.158.
\item \textsuperscript{12} Supra, p.171.
\item \textsuperscript{13} Supra, p.211.
\end{itemize}
\end{flushleft}
order without adopting consciously or unconsciously certain definite rules governing reciprocal rights and duties of families or individuals. Society can not exist without rules of social order. These rules do not necessarily emanate from a political superior, but may be based on utility or social and communal necessity, and are enforced by the express or tacit sanction of the collective will of the people. Custom often grows and mould itself according to the internal economy of the community. The customs and traditions which a particular community adopts in its infancy and in its primitive seat are generally those which are best suited to promote its physical and moral well being. In other words, customs belong to the people and are best suited to, and in harmony with, their geophysical, economical and cultural environments. The custom of fraternal polyandry which is widely prevalent in Kinnaur and Lahaul-Spiti districts among Kinnaura\(^{14}\) and Bhot\(^{15}\) scheduled tribes is the need of the society in order to avoid the fragmentation of the holdings. The reason for such a trend is clearly visible. Now

\(^{14}\) Supra, p.183.

\(^{15}\) Supra, p.266.
the household economy is not dependent on agriculture. People are engaging themselves in other works in order to increase their economic status.\(^\text{16}\) Now the fear of fragmentation of holding is not a deterrent for them to take up separate wives. Hence polyandry is declining. If the developmental activities undertaken by the Central and State Governments continue, the custom of polyandry will die its natural death in due course of time. Similarly the customs of procuring the bride by resorting to short cut methods which are prevalent among the scheduled tribes of Himachal Pradesh will be absolved with the spread of education, development of means of communications and by providing better opportunities to raise the economic standard of the people of the tribal areas.

Tribal customs are meant for the people of the tribal community concerned. It is a pity that at times non-tribals take advantage of such customs by exploiting the simple, poor and uneducated tribals. Tribal marriage customs are generally understood by the non-

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tribals as lex sex relations. There are instances when a non-tribal under the garb of customary mode of performing the marriage has exploited the sentiments of tribals by resorting to marry with tribal girls and after enjoying few years of married life left the girl at the mercy of the fellow tribal folks. The case of Rattan Devi can be cited as an example. High Court of Himachal Pradesh at Shimla decided the case within the strict interpretation of law to the disadvantage of the poor Kinnaura woman. The Hon'ble Court did not take into consideration the recognised custom of marriage by capture prevalent among the Kinnaura tribe of Himachal Pradesh and gave the benefit of conflict of law to Padam Singh, a non-tribal.

The British administrators of pre-independence India were probably the first people who tried to grapple seriously with the problem of administration of tribal areas. In fact they had a vested interest in it. The tribals were isolated and their places of habitation were declared as prohibited areas. An Act

17. Supra, p.120.
18. Supra, p.140.
was passed in 1874 to specify tribal areas into 'Scheduled District'. This policy was further carried out under the Government of India Act, 1919 (Sec. 52 A) and also under Government of India Act, 1935 by incorporating more stringent provisions for a special treatment of the tribal areas by converting them into 'Totally and Partially Excluded Areas'. The Britishers did everything to ensure that the so-called aborigins remain isolated from the rest of the Indian masses because they had realised the potentiality of Indian tribes as explosive force in any national movement. 19

The Government of India Act, 1919 provided for the appointment of officers to administer civil and criminal justice and collection of public revenues within the 'Scheduled Districts'. However, in respect of tribal areas of Himachal Pradesh, the real powers of administration remained in the hands of Negi, Nono and the Wazirs who were hereditary officers for most of the time. 20 The social and religious matters were decided by the tribal councils in the light of their respective customary laws.

20. Supra, pp.52-58.
After independence in 1947, the policy of isolating the tribals has been reversed. The framers of the Constitution of India visualised a policy of progressive assimilation of the tribal people with the rest of the population. The Constitution provided special safeguards for the tribal communities for a period of ten years. This period continues to be extended till now. Article 244 of the Constitution of India provides for the administration of 'Scheduled Areas' in accordance with the Fifth Schedule.

In the matters of social importance the traditional tribal councils are still going very strong in Himachal Pradesh. Their functions have been primarily to decide social and religious matters in the light of customary practices followed by the tribal community concerned. However, with the consent of the people, the tribal council also decides judicial matters. Thus rarely a matter is taken to the law court by the tribal people.

These tribal councils are not elected bodies. Elderly and wise people of the community are made the members of these councils. Every person has an equal right to argue and put-forth any question and thus issues are settled through consensus. The decisions
of the councils are law to the tribals because they are based on their social customs and religious beliefs.

H.P. Panchayati Raj Act, 1968, has introduced the statutory panchayats in the tribal areas also. These statutory panchayats have in no way affected the authority of the traditional tribal councils. In some places the statutory panchayats have adopted all the functions of the traditional tribal council with the added responsibility of implementing developmental works too. Development of the scheduled tribes can only be achieved if the foundation of tribal life is not destroyed. The traditional tribal councils should not disappear. They should be revived where they are weak and encouraged where they are strong. The tribal councils have evolved naturally out of the conditions of life in the tribal areas and they command a ready allegiance from the people who are naturally more willing to co-operate with institutions which have an established positions among them through long usage and convention.

Scheduled tribes of Himachal Pradesh like tribal communities of other parts of India practise several
forms of marriage as a matter of convenience and social acclimatization in their respective cultural-ecological settings. Various forms of acquiring the bride prevalent among a particular community may be divided into two categories - (i) Regular form of marriage, (ii) Short-cut methods to perform the marriage. Every scheduled tribe follows a regular form of marriage which in all cases is performed with great pomp and show and with the participation of all the friends and relatives on both sides. Besides the regular marriage every tribal community has various short cut methods, which are socially recognised, to perform the marriage. These short cut ways of acquiring the bride which are prevalent among the various tribal communities of Himachal Pradesh may be summarised as:

1. Marriage by capture.
2. Marriage by elopement.
4. Marriage by service.
5. Haar marriage.

21. Supra, part II, pp.79-
Above short cut forms of marriage are known by different local names in different communities. Legally speaking, there is no difference between a marriage performed in a regular form and a marriage in any one of the above forms prevalent among a particular community. Socially, however, they are considered as inferior to the regular form. Reasons for the adoption of short cut methods of entering into matrimonial alliances by the people may be briefly stated as:

1. Economic conditions of the people.
2. Reluctance on the part of the parents to give their consent to the regular marriage.
3. Rivalry between two persons to marry the same girl.
4. Love at first sight may prompt a boy to resort to the method of marriage by capture.
5. When a wife finds another more suitable person to marry.

Marriage by capture, which is practised among the various scheduled tribes of Himachal Pradesh reveals another interesting point. Marriage is complete as soon as the girl is inducted into the family of the boy as
his wife.\textsuperscript{22} The induction of the girl as wife into the boy's family may or may not be with her consent or the consent of her guardian. The consent of the girl is, however, taken at a later stage after the marriage is performed. The consent of the guardian in such a case may or may not be taken when the girl has given her consent. In due course of time the parents of the girl reconcile with the fate and the ill-will towards the boy's family is lost.

Except among the Gaddi tribe, Hinduism has very little impact on the marriage and divorce customs of the scheduled tribes of Himachal Pradesh. Marriage is not considered as a sacrament among the tribals of Himachal Pradesh. Marriage is an occasion for rejoicing and marry-making. No religious ceremony is performed. Marriage is complete after the girl is brought into the house of the boy and the marriage feast is served to the assembled persons. Gaddi marriage reflect the impact of Hinduism as Hindu religious rites and ceremonies are performed by Purohit without which

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\textsuperscript{22} Supra, pp.146-47.
\end{footnotesize}
regular marriage can not be performed. This shows the affiliation of the Gaddis to the mainland before their migration to the inaccessible mountain ranges and inhospitable climatic conditions of the Bharmaur region of the Chamba district.

Generally speaking, marriage is not a religious sacrament among the scheduled tribes of Himachal Pradesh. Hence, divorce or dissolution of marriage is not only possible but widely practised. It may easily be obtained if the parties no longer wish to live in wedlock.

The grounds for divorce, however, varies from tribe to tribe. In some cases the party desiring the dissolution may have to pay compensation to the other party and remarriage between such people is not possible. In some cases the first husband is compensated for the marriage expenses incurred by him by dissolving the first marriage. The divorce, like marriage, has to be a public ceremony.

23. Supra, Chapter V, p.172.
Widow remarriage is a recognised custom of marriage and is practised almost among all the scheduled tribes of Himachal Pradesh. There is little likelihood of its discontinuation. Since widow remarriage carries no stigma among the tribal communities of Himachal Pradesh, the plight of a young woman falling widow is far from miserable.

Problems and Suggestions:

In the light of the above discussion we have been confronted with the following problems relating to the marriage and divorce customs of the scheduled tribes of Himachal Pradesh.

1. Economical aspect: Household economy of almost all the tribes under discussion is basically dependent upon agriculture with the exception of Gujjars. Due to harsh climatic conditions and scarcity of cultivable land generally one crop a year is harvested which is insufficient to support a large population. The fear of fragmentation of already small land-holdings gave rise to the custom of polyandry among the scheduled tribe communities of Kinnaur and Lahaul-Spiti districts.
2. Conflict between tribal councils and statutory panchayats: Every tribal community has its own tribal council. Matters of social and religious importance including marriage and divorce have been decided by the tribal council of the tribe concerned in the light of its customary laws. Statutory panchayats under H.P. Panchayati Raj Act, 1968 are also working at various places in the tribal area. To some extent the statutory panchayats are eroding the authority of the tribal councils. Thus giving rise to conflicts between the two institutions.

3. Misuse of tribal marriage customs by non-tribals: Various short cut methods of performing the marriage are in vogue among the scheduled tribes of Himachal Pradesh. At times the innocent tribals are cheated by the non-tribals for satisfying their sexual desire by resorting to the custom of performing the marriage by capture. The case of Rattan Devi Vs Padam Singh Kapur is an example to the point.

4. Ignorance of tribal marriage customs: Different tribal communities have different customs in regard to marriage etc. Such tribal customs have not been properly
understood by the courts and other administrative bodies. Thus great injustice is, at times, done to the tribal people.

In order to provide the answers to the above mentioned problems relating to the tribal marriage customs in Himachal Pradesh, the following suggestions are made:

1. Improvement in the economic conditions of the tribal people: More and more opportunities be provided by the State and Central Governments to the tribal people by taking up new projects in the tribal areas. Incentives should be provided to the people to raise the cash crops in their fields. With the improvement in the economic condition of the people, the custom of polyandry will die its own death. With the abolition of the custom of polyandry the miserable condition of a large number of Jomos can be improved.

2. Recognition to tribal councils: Tribal councils are the bedrock of the tribal social institutions. The foundation of tribal life should not be destroyed. The traditional tribal councils should not disappear. These tribal councils should be given statutory recognition
by making suitable amendment in the Himachal Pradesh Panchayati Raj Act, 1968. Social and religious functions of the tribal community be entrusted to the tribal councils. Functions of statutory panchayats in social and religious matters be taken away from them and should be entrusted to the tribal councils. The decisions of the tribal councils should be given due recognition.

3. Protection to tribals against non-tribals: Non-tribals be discouraged to enter into matrimonial alliances with the tribals. Special protection be accorded to the tribals against non-tribals in this regard on the lines of other protective measures already undertaken by the State Government. Under Article 46 of the Constitution of India a State is under a duty to protect the tribal people from social injustice and exploitation. A suitable amendment be made in the Hindu Marriage Act, 1955 to this effect. Accordingly, prior permission of the Court must be obtained by a non-tribal Hindu in case he wants to marry a tribal woman according to the tribal customs. Failure to comply such a provision be made an offence.
4. Wide publicity be given to the tribal matrimonial laws and customs: Tribals and non-tribals are part and parcel of the same nation and polity. Their interaction and social intercourse with the spread of education and developed means of communications, whether considered desirable or otherwise, appear to be inevitable. In this process the operation of the different sets of laws and rules governing the tribals and non-tribals leads to problems of conflict of laws. Such problems may increase considerably as the process of social intercourse between the two gets accelerated in years to come. While resolving such problems of conflict of laws, special care is needed to protect the tribals from social injustice. Tribal customary law be given wide publicity and special training be given to the officials in this regard. The approach of the State towards the tribal people is based on the theme of 'integration'. The social integration of the tribals with the non-tribals is of fundamental importance. To ensure this the non-tribals need education as well as the tribals themselves.