PART I

GENERAL
CHAPTER I

EVOLUTION OF INSTITUTION OF MARRIAGE

The Beginning

Culture plays an important role in the evolution of socio-legal system in human society. The term 'Culture' cannot be precisely defined. It includes beside other things the religion, traditions and customs etc. of particular community. In other words culture implies a way of life of members of a particular society. Every society has its own modes of living depending upon its socio-economic needs.

There was a time in the evolution of human society when men and women lived together without marital bounds. Jealously and muscular strength were the main deciding factors in courtship, mating and cohabitation. Marriage was a later development closely linked with the formation of social organisations which ensured individual rights through some sort of administrative machinery.

The earliest form of conjugal relationship in India may be found in the socio-urban set-up of Harrapan people. The archeological evidences in the form of bathing halls, defined on sex distinction, public halls and private dwellings etc. of that period discovered at Harrapa, Mohenjodaro, Ropar and many other Indus sites suggest that some type of
institution which defined marital relationship existed at that age. The skeletal male and female remains found buried together also lends credence to the assumption that some type of intimate and socially recognised conjugal relationship existed between the deceased couple and for that reason were buried together. Or, it may be conjunctured that a practice existed among the Harrapan people to bury husband and wife together in case both died simultaneously. Discovery of skeletal remains of couple with breast feeding child proves it beyond doubt that a well established family set-up existed in that urban civilization. The female skeletal remains discovered in those sites suggest that the woman was considered a personal possession and also enjoyed respectable position in the society. This all would suggest that some definite type of marital relationship existed at that age. What type of that conjugal relationship was, can not be precisely defined nor can it be suggested whether some extra-marital relationship existed in that society or not? But on the strength of an evidence of famous Harrapan dancing girl it may be suggested that some form of extra-marital relationship must have continued side by side. But no specific evidences of socio-cultural conditions of that period are

2. Ibid.
available because the Harrapan civilization is considered to belong to a period 3000 B.C.\textsuperscript{3} while the Aryans made their in-road to the Indian sub-continent after 2500 B.C.\textsuperscript{4}

Thus, there is a distinct gap of 500 years between the extinction of Indus civilization and rise of Aryans which must have wiped out all distinct and striking features of the Indus civilization and it may be for this reason that no significant evidences of Indus culture were found on the Indo-Vedic and subsequent traditions. Besides this temporal gap, there seems a significant factor also responsible for the absence of Indus traditions among the Indo-Vedic culture. The Aryans, on the course of their advance in this sub-continent, remained confined to the outer himalayan terrain region and upper Indo-gangatic plains. Thus, they remained geographically quite far off the main cultural centres of the Harrapan civilization.

**Traces of Early Promiscuity**

The spatio-temporal gap of 500 years was a factor potent enough to obliterate any significant socio-cultural impact of the Indus traditions that could have been registered

\begin{itemize}
\item S.K. Chatterji, "Race Movement and Prehistoric Culture" in *The History and Culture of the Indian People, The Vedic Age*, Ed. R.C. Majumdar (1952), pp. 151-55.
\item Ibid.
\end{itemize}
its influence on the vedic culture. But in order to understand the evolution of socio-cultural traditions, particularly pertaining to conjugal relationship in a sequential order, it may be assumed that the residual traces of customs and traditions of conjugal relationship prevalent among the Harrapan society were adopted, assimilated, codified and sanctified by the Vedic people. Vedic traditions have, thus, naturally preserved some traces of promiscuity existing in pre-historical times. There are few passages in the two great Epics namely Ramayana and Mahabharata showing that a state of promiscuity may not have been an impossibility at an early period. They show an astounding laxity in sexual morality. The birth of Rama brothers, the heroes of the Epic Ramayana⁵ and the marriage of Bhim⁶ and Arjuna⁷ with the rakshasa lady Hidimba and Naga lady Ulupi respectively are few of the instances which give credence to the above statement. In this connection the legend of Devyani, the daughter of sage Sukra and King Yayati deserve special mention. Thus, Sarmishtha the maid servant of Devyani observes that there is no difference between one's own husband and the husband of a friend.⁸

7. Ibid.
8. Ibid.
When eventually King Yayati yields to Sarmishtha's importunities and is taken to task by Sukra, his father-in-law, he observes that duty and chivalry rendered it necessary for him to comply with Sarmishtha's desire. The traces of such lex sex ties that we get in the Epics have to be located to pre-vedic times, for we find the institution of marriage well established in the Rigvedic period which may also inversely suggest the violation of marriage institution. Hence the need for strict code of marital relationships.

Marriage Institution During Vedic Period

There must have been various practices of establishing conjugal ties existing before the Aryan inroad into the Indian sub-continent and all those native practices must have been adopted by the Aryans in their socio-cultural fold as is revealed from the Vedic literature in which various types of marriages are specified. Rgvedic tradition hold 'Agni' in utmost reverence and all acts performed before 'Agni' were considered to be irrevocable. In order to make the conjugal ties everlasting the sacrament

9. Ibid.
10. Infra, pp. 10-12.
for that was performed before 'Agni'. This would inversely suggest that other methods of establishing conjugal relationships also existed which were considered more lax and prone to be revoked. The practice of holding 'Agni' as witness to conjugal tie would also suggest that highest importance was given to the sacrament of marriage. How irrevocable and firm were the conjugal bond established before 'Agni' as witness can best be explained by the episode of 'Agni Pariksha of Sita'.

However, other probably less rigid practices also were in vogue among the Vedic people. In this connection the concept of 'Niyog' or appointment of agents for raising sons to dead or impotent men is worth mentioning. The idea was closely linked with the proprietary rights in women. The notion that crop raised in the field of a man belonged to the owner of the land and not to the sower of seed. The birth of Rama brothers, the heroes of the Epic Ramayana and the birth of Karna in the Epic Mahabharata are some

13. Ramayana, VI, 265.8.
15. In Rgveda word 'Savitan' has been used in this context which should not be considered to imply female child because none of the Vedic or hindu death rites can be performed by the daughter nor she can be considered responsible for the furtherence of lineage.
16. Supra f.n. 5.
17. Mahabharata, Adiparva.
of the examples which can not otherwise be explained except by Niyog. Sexual relationship in the form of Niyog used to be a secretly guarded act not to be admitted openly and as such we find that the Epic writers have concocted stories with devine overtone to conceal the fact. Manu Smriti also propagated the idea of Niyog.  

In order to revive the vedic traditions Maharishi Daya Nand also supported the institution of Niyog. The present day concept of artificial insainination is nothing but the modified form of Niyog. The institution of Niyog with unequivocal overtone of rigidity about emotional attachment would suggest that despite such moral evils out of Niyog utmost emphasis as laid on the perpetuation of the institution of marriage.

A study of vedic literature reveals that not only the institution of marriage was well established in the Vedic age but it was also regarded as a social and religious obligation and a necessity. A vedic passage says that a person who is unmarried is lopsided. From the religious point of view he remains incomplete and is not eligible to participate in the performance of sacraments. Thus at the

time of performance of Asvamedha Yagna by Rama, the officiating priest told the former that without the participation of 'ardhangani' Sita, the Yagna cannot be fruitful. We are told that a gold idol of Sita was brought and only then the Yagna could be performed. Thus it can be said that the significance of matrimony has been equally valid and relevant all through the ages till present day society.

The institution of marriage, thus, strike a stage between the primitivism and the man as social being. This institution has been essentially responsible for the formation of civilized and ordered society. The Rgveda also acknowledges the importance of marriage institution in this context, when it says that through it the man is led to the altar of truth and duty i.e. the ideal of the ordered society.

Marriage Institution During Post-Vedic Era

Thus, marriage, as a rule has been emphasised upon the man and woman for the survival of society. But instances of unmarried men and women are also found in the ancient

22. Ramayana, VIII, 30.6.
The Vedic literature at times refers to the spinster, Anajah, i.e., a woman who grows old in her parents' house, is the significant term used to denote an old maid. However, the usual causes that compelled maidens to remain unmarried was some serious physical defect or disease. But due to predominating Brahmanic influence over the society, the institution of marriage became the epicentre of all the intricate sacraments and rituals in which animal sacrifice and other social vices got religious sanctions. It was, therefore, a natural corollary to that social evil that a revolution broke out in the form of unorthodox and inhilistic movements under Jainism and Buddhism. Under these movements hundreds of youths began to enter the monastic institutions to lead celibate life. Women like Subha, kisa, Gautami, Soma etc. renounced the world with a view to achieve spiritual salvation. The commentary on the Therigatha shows that some women used to join Buddhist Sangha before their marriage. This trend must have assumed alarming proportion in the literate urbanities as more of the women opted for the celibate order.


Thus, we find that by about 300 B.C. marriage was regarded as obligatory for girls. There were many cases for this. In the first place there was a reaction produced in the society by maidens joining the Buddhist and Jain Orders either without genuine spiritual urge or without a free and spontaneous permission of their elders. Some of these were unable to live up to their high ideals and were the target of the public abuse. Thus, in order to avoid such situations, it was thought to make marriage obligatory upon the girls and this must have set trend for early marriage of the girls which subsequently during the medieval times, became a regular feature among the social elites and urbanites under entirely different circumstances.

With the disintegration of the Centralised administrative systems and external invasions in the early 20th centuries, the country was engulfed by the insecure socio-political conditions. The internal strifes made the security of young girls all the more problematic. This fear-psychosis culminated into an universal trend of infant marriage. The infant marriage in the medieval society was, of course, not an evolution of some social

trend but a projection of fear psychosis that gripped the medieval society. Instances are not wanting in the history in which the parents are known to have chopped their newly born female child due to the fear of being molested by the invaders. Thus, this sense of insecurity for the girls was one of the potent reasons for infant marriage during the medieval times. However, this practice of infant marriage remained largely confined to the urban areas in the country and it only influenced the people in the rural areas to some extent. But the inaccessible and far-flung regions inhabited by the native people remained uninfluenced from this practice and the young girls enjoyed full freedom and security under the protection of the entire community. The protection of girls in such communities was and is still the liability and responsibility of the entire community.

Forms of Marriage

Marriage as an institution had a sound footing during the Rgveda period. Available literature of that period clearly reveals the fact that the ceremonials of marriage had assumed by that time more or less distinct shapes in the

Smrities and Sutras in multiplied forms. It is important to note that though various forms of marriage have been recognised yet Rgveda itself does not mention by name any specific form of marriage. In this connection it has been rightly observed: 28

It is most likely that the so-called forms of marriage which appeared in Gṛhyasutras, Dharmasutras and the Smriti texts mainly, did not assume actual shape in this period. But from the different accounts of marriage as are available in the Rgveda, we may form an idea of marriages similar to those which are associated with the following forms of marriage.

There are, however, the following eight forms of marriage recorded in Manu Smriti: 29

1. **Brahma**: In this form of marriage the father of the bride makes her a gift adored with dress and ornament, to a bachelor of good character and learned in Vedas.

2. **Daiva**: In this form a gift of the bride is made to a person who officiates as a priest in the sacrifice in recognition of the services rendered.

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29. Manu, III, 27-34.
3. ** Arsā:** The bridegroom in this form accepts the bride from her father/guardian by making presentation of a pair or two of cattle.

4. ** Prajapatya:** Here the girl is given to the suitor with the specific stipulation that the two should be partner for life for performing secular and religious duties.

5. ** Asura:** In this form the father or guardian of the maiden gives his daughter in marriage to the suitor who pleases them with wealth.

6. ** Gandharva:** It is the voluntary union of a man and a woman.

7. ** Raksasa:** It is the forcible abduction from home of a maiden crying out and weeping, after slaying and wounding her relatives.

8. ** Paischa:** In this form a man secretly ravishes a girl while she is asleep, intoxicated or confused.

Several other forms of marriage might have been prevailing in different sections of the contemporary society which find no mention in the later vedic literature. The first four forms of marriage has been called as Blessed (approved) while the remaining as
Blameable (un-approved). This classification in itself suggests that the blameable forms were not meant for the vedic people but if they underwent such conjugal relationship, these were required to be sanctified by the vedic rituals and ceremonies. Any violation of this could deprive the child born out of unapproved conjugal relationship from inheritance and gotra privilege. The example of Ghatotakacha and Karna in Mahabharat are the examples to the case.\textsuperscript{30}

The generic names of the blameable forms of marriage further suggests that such types of marriages were prevalent among the non Aryan communities like Raksasa, Gandharva etc. who lived in the mountaineous north in the close proximity to the Aryans. With the passage of time there have been fusion and inter-mixing of these two different societies which suggests that the blameable forms might have been adopted in the Aryan society from non-Aryan sources. In this connection Dr. Sengupta while discussing the adoption of inferior forms of marriage by vedic society has rightly observed:\textsuperscript{31}

\textsuperscript{30} Mahabharata, Adiparva.

\textsuperscript{31} N.C. Sengupta, \textit{Evolution of Ancient Indian Law}, p. 89.
They may have been the forms practised by people who were not with in the Aryan society consisting of three upper classes. They may have been immigrants to Arya settlement who had come from abroad or they may have been the Aryas who have adopted Arya Culture and religion. It seems extremely probable that in one or other way these civil forms of marriage came to be adopted gradually in the sacred literature of the Hindus.

**Shastrakars** were strictly particular about the marital rites. In the absence of such marriage rites, marriage was not regarded as complete and valid. In the forms of marriage like Gandharva and others, the formalities of marriage were supposed to be observed before *Agni*. The observance of necessary ceremonies in such cases suggests that such practices were looked down upon in the vedic society generally. This shows that the blameable forms of marriage must have been in vogue without any stigma in the other section of the contemporary society.

As has already been noted that the institution of marriage is the later development in the evolution of human society. It must have passed through various stages of development in order to attain the position and stature of definite sociological institution. Among the primitive societies where sex morals were not of high

standard, it is possible that woman might have been procured by means of force for the sake of man's sexual satisfaction. With the development of the idea of proprietary rights in woman, the procurement of bride by means of use of force began to be recognised by the society. Thus marriage by capture forms the most important basis of individual marriage in primitive society which seems to have been survived as Raksasa form of marriage among the people in the later periods as enumerated in the Vedic literature.

In Vedic literature we find the reference of various communities like Raksasa, Paisach, Gandharva, Asur etc.33 These were the people who resisted and opposed the Aryan invasion into the Indian Sub continent in the North-Western region. Aryans called them Dasys. In the fitness of things, it seems most probable that the forms of marriage namely Gandharva, Asur, Raksasa and Paisach were the names given to the forms of conjugal relationship prevalent in these communities. These non-Aryan communities were looked down upon in the society and were treated like untouchable. With the passage of time there have been fusion and intermixing of the various sections of the

33. Manu, I, 37.
society. As a result the modes of establishing conjugal relationships prevailing among the lower section of the society were adopted by the other people. Marital relationships established by resorting to such practices were not treated as complete and valid without the performance of the usual marital ceremony. In due course of time the blameable forms of marriage found their way in the society and were recognised with certain reservations. In the Epics we find examples of such practices. Thus the marriage of Arjuna with Subhadra, the sister of Lord Krishna, is the example of Raksasa form of marriage. Lord Krishna, praised the abduction of Subhadra by Arjuna. In the same Epic we also find that Pandu paid bride price for securing Madri, as his wife. Salya, brother of Madri, supported this form of marriage on the ground that the age old customs set up by his predecessors should not be dishonoured and as such the question of its merit or demerit should not be brought under discussion. The marriage of Shakuntla with Dushyant was in the Gandharva form.

34. G.D. Banarjee, Hindu Law of Marriage and Stridhan, (1879), p. 84.
36. Ibid.
Though these blameable forms of marriage have been looked down upon by the society in general, they are still in vogue in some communities with certain variation, particularly in the tribal communities of North-Western region including Himachal Pradesh. The mode of performance may have been changed but the spirit continues to be the same. Raksasa form of marriage is in vogue among the Kinnauras in the form of marriage by elopement. Asura form of marriage is still being practised among Gaddis under the name of 'Batta-Satta' i.e. marriage by exchange. Among Pangwals the practice where bridegroom agrees to serve his would be father-in law for seven years in lieu of the payment of the bride price is still in vogue. However, this custom is not referred to anywhere in the hindu traditions or literature. Gandharva form of marriage is in vogue in Kinnaura and other tribal communities particularly among the young and educated people as a reaction against the traditional and orthodox practices prevailing in their communities.

Marriage Institution Prior to the Hindu Marriage Act, 1955:

After the later hindu period, child marriages were the general rule. There were various factors which lead the society to follow this practice. The custom of bride-price, prevailing in the society was exploited by the
people for their own selfish ends by marrying their girls at an early age. The ramification of the caste system into sub castes and prohibition of inter caste marriages among them, thereby narrowing down the choice for suitable bridegroom, lead the parents not to take risk of losing a good bridegroom at hand by postponing the marriage of a later date. Custom of Sati also helped the cause of early marriage by providing father-in-law as additional guardian if the father of the child happened to die and the mother following him on the funeral pyre. Therefore, society became more and more conscious of the advantages of early marriages. The early marriage, therefore, went on increasing in medieval times. However, post puberty marriages continued amongst the communities under the influence of the pre-Aryan culture.

By the time Britishers came to India in 1600, things at home were not satisfactory. The position of Mughals deteriorated with the passage of time. There was a state of chaos in the society. In such a situation situation certain evils cropped up in the society. Thus, the practices of child marriage, custom of Sati, Pardah system and the like were being followed by the people. These were the social evils which have been cropped up due to the sense of insecurity among the people during
the medieval period. These were the things which Britishers inherited from the Mughals. Since the Britishers who came to India as the servants of the East India Company were not the persons of repute and of high moral character, the sense of insecurity still continued in the minds of native people. However, this state of affairs did not last long. With the expansion of the territorial possessions of the East India Company, Britishers at home began to take an increasing interest in Indian affairs. At the time of renewal of the Company's Charter in 1813, the British Parliament allowed the missionaries to visit India. As a result missionaries and Clergymen regularly came to India along with civil servants and army officers. Things began to improve and the foundation of a sound European society was laid down. A sense of security was being felt by the masses at large. In these circumstances Britishers decided to remove the social evils prevailing in the society. Not only the Britishers but a section of the Indian society was also in favour of removing the social evils prevailing in the society. Consequently, in December 1829, a regulation was passed. Accordingly 'Sati' was made a crime of culpable homicide punishable with fines or imprisonment or both. Since widow remarriage was not in vogue at that time and it was the custom of
sati which saved the widows from the humiliation which they otherwise would have met from the society. But with the abolition of the custom of 'Sati', widows were the worst affected. Since child marriage was prevalent, the position of child widow was the worst of them all. Natural consequence of the abolition of Sati was the recognition of the right of the widow to remarry but the Britishers were reluctant to recognise this right of the widow. They treated the question of widow remarriage as a purely social matter to be decided by the Hindus themselves. Fortunately, there were many enlightened Hindus who took up the cause of widow remarriage. Ishwer Chand Vidyasagar was the champion to make up the cause of widow remarriage. In 1856, Britishers in spite of the great opposition from orthodox Hindus passed a law in favour of widow remarriage.

For all practical purposes, the Hindu Widow-Remarriage Act remained a dead letter. Reasons were not far to seek. Sati could be stopped by the police, but policemen could not arrange the remarriage of the widows. Social reforms can not be made without the actual change in the social attitude of the society. Legislation on widow remarriage could make a little head way in the society. Even after

more than a century has been passed since the Hindu Widow Remarriage Act, but widow remarriage are still rare. However, with the spread of female education, widow remarriage is making some head way in the society.

Child marriage were prevalent in the society when the Britishers took over the Indian sub-continent. With the introduction of western ideas and civilization a sense of security was felt by the society. The educated section of the society began to feel the necessity of deferring marriages to a more advanced age. The gradual disruption of the joint family system, increasing interest in female education and above all the hard necessities of the economic struggle for existence eventually induced the advanced section of the society to throw over board the age old practice of pre-puberty marriage and to adopt post puberty marriage. This practice of the society was given legal effect by the Child Marriage Restraint Act, 1929 which laid down the marriageable age for boy and girl as 18 and 15 respectively. 38

The inflation caused by the 2nd World War deteriorated the economic conditions of the people and as such women began to seek employment out of sheer economic necessity. With the spread of western influence the idea

38. Sec. 2.
of equal sex rights developed in the minds of people. More and more vocational avenues were available for girls. This necessitated a higher education for girls and thereby increased the marriageable age to about 20 or 21 for girls.

In 1947, Britishers left India leaving behind a society which was totally shaken in respect of its social values. A conflict had developed in the minds of people between the age old social customs and traditions and their requirements in the changed circumstances. Efforts have been made by the national leaders and in spite of tough resistance from the orthodox members of the society, Hindu personal laws have been codified. First among all was the codification of marriage laws in the form of Hindu Marriage Act, 1955.

There have been some reaction in the orthodox society against penalising the child marriages. The fact is that all those secular causes, which favoured the customs of child marriage are rapidly disappearing now. The joint family system is loosening its hold, the economic struggle is becoming hard and the theory that girls need not be educated like boys has ceased to appeal the society and as such it can be said that the society is returning to the old custom of post puberty marriage of vedic and epic periods.
Conceptual Transformation Under the Hindu Marriage Act, 1955

Marriage is necessarily the bases of social organisation and the foundation of important legal rights and obligations. Right from the Vedic period it had assumed the sacred character of a sacrament. It was thought that marriage alone could enable a person to discharge properly his religious and secular obligations. In Hindu law, marriage has been treated as a sacrament till the passing of Hindu Marriage Act 1955. This Act to some extent has abolished the sacramental aspect of Hindu marriage by incorporating certain secular provisions viz. divorce, re-marriage, matrimonial reliefs etc. thereby ensuring equal social, legal and economic privileges and rights to the women.

As has been mentioned earlier that there were eight different forms of marriage prevailing in the society which have been classified as Blessed (approved) and Blameable (unapproved) categories. Basic difference between these two categories seems to be that in the former case there is a gift of the bride to the bridegroom whereas the element of gift is not present in the later category. This implies that there must be prior consent of the guardian of the bride at the time of marriage.
Prior consent may not be there in case the conjugal relations are established in any one of the blameable forms of marriage. Moreover, it is only in the blessed forms that the union is completed from the religious point of view by bringing about the change in the Gotra of the bride at the end of the Saptapadi ritual. However, in the blameable forms of marriage there is no free gift of the bride and as such she retains the Gotra of her father even after the marriage. It is because of this difference that the questions of ownership, inheritance or succession etc. are decided differently. With the passage of time the different names of forms of marriage in the two categories came to disuse and the marriages performed in the blessed category or in the blameable category came to be designated as Brahma and Asura marriages respectively. It is because of this reason, it seems, that only two forms of marriage namely Brahma and Asura have been recognised under the law in force before the commencement of the Hindu Marriage Act, 1955. Though the Gandharva form of marriage has also been in


vogue in the society. Though originally unapproved, it counted as approved for the purpose of succession.  

The Hindu Marriage Act, 1955 has altogether altered the classification of marriages in various forms. The Act does not provide for any form of marriages. The Act calls marriage performed under this Act as Hindu Marriage which may be performed in accordance with the Shastric rites and ceremonies or in accordance with the customary ceremonies prevalent in the community to which the bride or bridegroom belongs. However, this does not mean that a marriage cannot now take place in any one of the forms recognised prior to the commencement of the Act. Marriage can still be entered into in any one of the recognised forms by performing necessary ceremonies and rites required under the Act, though distinction between approved and unapproved marriages is no longer tenable, and all marriages performed after the commencement of the Act are in approved form.

The Hindu Marriage Act, 1955 has reformed Hindu law of marriage. Sacramental aspect of the Hindu marriage has been materially changed. Clauses (ii) and (iii) of section 5 of the Act deal with the mental capacity and


42. Sec. 7.
age of the parties to the marriage and relate to the consensual element of marriage. If marriage is considered as a contract, consent of both the parties is a condition precedent to marriage. The contract of a minor or a person of unsound mind is void. If we apply this test to a marriage contract, the marriage of a person of unsound mind is void. But under the Hindu Marriage Act, 1955 the marriage of a person of unsound mind is a valid marriage. Not only this, the violation of the requirements of Sec. 5(ii) and (iii) does not render the marriage void. Under Sec. 12, the violation of the former requirement renders the marriage merely voidable, while violation of the latter condition does not render the marriage void or voidable but, if performed, a perfectly valid marriage. Contract Act, provides that a contract for want of capacity is void ab initio. Thus it is clear that the Hindu Marriage Act, 1955 does not consider the question of consent as of much importance. It does desire that persons below certain ages should not marry. But it is not serious about it. It does not attach the same consequences which are attached to the violation of such conditions in an ordinary contract. In respect of age

43. Indian Contract Act, 1872, Sec. 11.
the Act maintains a continuity with the old Hindu law under which such marriages were valid. Thus a marriage without consent is valid. However, Sec. 12(1) (c) provides that if the consent is obtained by force or fraud, the marriage is voidable. In other words if one shows that one's consent was not obtained, the marriage is valid, and if one shows that consent was obtained by fraud, or force, then marriage is voidable at the instance of the party whose consent was so obtained. This means that despite the fact that a party is able to prove the absence of consenting mind the marriage will continue to remain valid. On the other hand we know that the sacramental marriage among Hindus has three characteristics namely, indissoluble union, eternal union and a holy union. By recognising divorce under the Act and widow remarriage under the Hindu Widow Remarriage Act, 1856 the first two characteristics of sacramental marriage has been destroyed. However, the third element, to some extent, has been retained under section 7 of the Act. But the ceremonial aspect of the Sacramental marriage is a least importance.

In view of the above discussion it can be concluded that the sacramental aspect of hindu marriage has been materially changed, though it is not purely a contract
between the parties to the marriage. However, it has
semblance of both.

Hindu Marriage Act and Its Relevance to Scheduled Tribes

Section 2(1) of the Hindu Marriage Act, 1955 generally
provides the categories of persons to whom the provisions
of this Act shall apply. However, Sec. 2(2) lays down
an exception. It provides:

Notwithstanding anything contained in sub-section
(i) nothing contained in this Act shall apply to
the members of any scheduled Tribe 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, practically whole of the Scheduled Tribes
population of Himachal Pradesh is hindu by religion, they
have been excluded from the operation of the Act. However,
they shall be governed in their personal matters including
marriage, by their respective personal laws which were
hitherto applied to them. The provisions of the Act
shall not be applied to them unless the Central Government
by notification directs that any such provisions should
be applicable to them.44 Thus the tribal communities who
have been declared Scheduled Tribes are to be governed their
respective tribal customs in respect of marriage and
divorce. With the exception of Gaddis, marriage among

44. Dasarath Vs. Guru Bewa, AIR, 1972, Orissa, p.78.
other Scheduled Tribes of Himachal Pradesh is not a sacrament but a secular transaction in which, apart from contract between the parties or their guardians, as the case may be, the main features are the transfer of dominion over the woman and her actual or constructive appropriation as wife. Divorce and widow remarriage are practised without any social stigma.

Section 2(2) of the Hindu Marriage Act, 1955 has significant implications in the context of Himachal Pradesh where 43.2 per cent of geographical areas and 4.61 per cent of population comes under different categories of Scheduled Tribes. Due to diversified customary practices regulating different marriages in different Scheduled Tribes the judicial machinery has been confronted with the problem of deciding various disputes. On the face of the fact that the Hindu Marriage Act, 1955 does not apply to them, the judicial machinery does not have any codified law to decide such disputes. Necessity has, therefore, been felt to document and interpret the customary marriage and divorce laws of the Scheduled Tribes of Himachal Pradesh with a view to evaluate their contribution in the regulation of tribal social system and to establish a cognizent relevance of these customary laws with the universal law of the land in
respect of marriage and divorce.

Thus the interest of this study is two fold. In the first place it reveals a body of law which though applicable generally, to a Hindu people, differs from the recognised systems of Hindu law in certain respects. Secondly, it shows that with the socio-economic development of the tribal people and the inter-mixing of tribals with non-tribals, a situation is bound to come when there would be a conflict between the age old customs on the one hand and the new social trends on the other. In such circumstances it would be desirable to have a system which would take into consideration the new trends emerging in the tribal society and at the same time not destroying the cultural herringage of the tribal people.