CHAPTER - I
INTRODUCTION

Importance Given by the Act to the Custom:

Custom is a habitual course of conduct observed uniformly and voluntarily by the people concerned. It obtains the force of law on account of being used from immemorial time. Custom is the oldest form of law making. In primitive societies human conduct was regulated by practices which grew up spontaneously and were later adopted by the people. In early political societies the king did not make laws but administered justice according to the popular notions of the right and wrong, which were enshrined in the course of conduct pursued by the people in general. What was accepted by the generality of the people and embodied in their custom was deemed to be right; that which was disapproved by them or not embodied in their customs was deemed to be wrong. In this way custom played the role of law in the early stages of society. Law in this sense was nothing else but the general customs of the community. With the emergence of the state the sovereign authority changed the complex custom by putting its *imprimatur* upon them and transforming them into law. The sovereign is thus deemed to have an absolute authority to enunciate laws, which the people are bound to obey implicitly.\(^1\)

Custom is frequently the embodiment of those principles which have commended themselves to the national conscience as principles of justice and public utility. The fact that any rule has already the sanction of custom raises a

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presumption that it deserves to obtain the sanction of the law also. The courts of justice should accept those rules which have already in their favour the prestige and authority of long acceptance. Custom is to society what law is to the state. Each is expression and realization, to the measure of men's insight and ability of the principles of right and justice. When the state takes up its function and administering justice, it accepts as true and valid the rules of right already accepted by the society of which it is itself a product and it finds those principles already realized in the custom of the realm. The law creative efficacy of custom is to be found in the fact that the existence of an established usages is the basis of a rational expectation of its continuance in the future, even if customs are not ideally just and reasonable even it can be shown that the national conscience has gone stray in establishing them, even if better rules might be formulated and enforced by the wisdom of the judicature, it may yet be wise to accept them as they are rather than to disappoint the expectations which are based upon established practice. 

Litigation is a modern source of Hindu law. As a matter of policy, the Government during the British rule was slow and cautious to change Hindu law by legislative intervention. In the primitive society, custom was the sole source of law. However, with the passage of time, the importance of custom began to decline. The law-creative activity of custom is now have become a part of the law of the land. One of the tests of a valid custom is that it should be ancient. In England, a valid custom must have its origin at least as far back as 1189 A.D. This shows that at present custom cannot be a living and operative source of law.

Now situations arise in quick succession. Modern society is changing at a very rapid pace. What was ten years ago is not the same today. Modern society cannot wait for generations so that a custom becomes ancient and is recognized by court. Custom as a source of law has lost its former position and importance. Modern man looks to legislatures for enacting laws at a speed which is demanded by the atomic age. But, at the same time the legislatures try to save the customs and usages, specially in case of personal laws.

In section 3 (a) of the Hindu Marriage Act, 1955, custom and usage have been defined thus:

"the expression ‘custom’ and ‘usage’ signify any rule which having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community group or family; provided that the rule is certain and not unreasonable or opposed to public policy; and provided further that in the case of a rule applicable only to a family it has not been discontinued by the family”.

It appears that the legislature while defining custom and usage has incorporated all the essential ingredients of a valid custom, known to the Western jurisprudence.  

Under section 4(a) of the Act, the Act prevails over any text or rule of Hindu law, or any custom or usage in regard to matters provided under the Act. Clause (b) provided that any other law in force at the commencement of this Act will cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act. This is a corollary to the Article 252 of the Constitution which provides that law made by the Parliament which it is competent to enact will prevail over other laws to the extent of the repugnancy.

Section 4 of the Act however starts by using the expression “save as otherwise provided by this Act”. In other words if there are provisions in the Act which expressly save any text rule, custom or usage, then section 4(a) has no application. For example: (i) Under sections 5(iv) and 5(v) of the Hindu Marriage Act a marriage cannot be solemnized between parties within the degrees of prohibited relationship or who are sapindas of each other, unless the custom or the usage governing each of them permits such a marriage, (ii) Again under section 7, it is provided that a marriage may be solemnized in accordance with customary rites and ceremonies. (iii) Section 29(2) saves rights recognized by customs by special enactments to obtain dissolution of marriage.

Section 5(iv) of the Act lays down the condition that the parties to a Hindu marriage should not be within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two; whereas under section 5(v) of the Act the parties should not be sapinda of each other. The expression “degrees of prohibited relationship” and “sapinda

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5 Mayne, Treatise on Hindu Law and Usage (14th edition 1996)p. 178
relationship” are to be interpreted according to the definitions given in sub-clause (f) and (g) of section 3 of the Act. As the Act itself defines “sapinda relationship” and “degrees of prohibited relationship” according to the texts and rules of Hindu law which under section 4(a) of the Act ceased to have effect in respect of matters provided for in the Act. But if custom or usage permits marriages between persons in “prohibited degrees of relationship” or “sapinda relationship” as defined in sections 3(g) and 3(f) of the Act, such a custom is saved and the marriage would be valid.

Wherever custom is relied upon, it must be a valid custom as defined in section 3 (a) of this Act. Under these provisions when a custom is pleaded in relation of the rule of the prohibited degrees of relationship for purpose of marriage or of sapinda relationship, each of the spouses should be governed by that custom. It follows that even if one of the spouses is not governed by such a custom, the marriage cannot be held to be valid. A marriage in contravention of any of these two clauses is a void marriage under section 11 and is also liable for punishment under section 18(b) of the Act. Proving one instance where marriage took place in contravention of either of these clauses is not sufficient to prove custom.6

Section 7 of the Hindu Marriage Act provides for choice of the parties as to the form of marriage rites and ceremonies to be observed. Where the form adopted includes the Saptapadi, the marriage becomes complete and binding when 7th step is taken.7 The expression “customary rites and ceremonies” means such shastric ceremonies which the caste or community to which the party

7  Section 7(2) of the Hindu Marriage Act, 1955.
belongs is customarily following. The customary rites and ceremonies to be accepted must be shown that such custom as an essence of marriage ceremony had been followed definitely from ancient times and that the members of the caste community or sub-caste had recognized such ceremonies as obligatory.  

Section 7 of the Act provides

(1) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.

(2) Where such rites and ceremonies include the Saptapadi (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken.

The expression “may be solemnized” means that it “shall be solemnized”. This seems to be the intention. The word ‘may’ has been advisedly used to leave the option in the matter of ceremonies, and that too of either party thereto, but it proceeds on the assumption that the transaction of marriage is ordinarily accompanied by some ceremony and such a ceremony has to be undergone to lend solemnity to the relationship. Under section 7 of the Act, the validity of a marriage depends on the observance of the customary rites and ceremonies of either party with no hard and fast connection with those religious ceremonies as enjoined in the Hindu Shastras. But ‘customary ceremonies’ cannot be taken to mean that ‘shastric ceremonies’ have been totally ignored. It naturally means those ceremonies which the caste or the community to which the parties belong have customarily followed. Section 7(2) makes it clear that where such rites and ceremonies include the Saptapadi (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken.

ceremonies include the saptapadi, the marriage is complete and binding when the seventh step is taken. When it is proved that saptapadi is not a part of the customary rite, it need not be performed.  

This section 7 speaks of solemnization of marriage in accordance with customary rites and ceremonies. The word ‘solemnized’ means to celebrate the marriage with proper ceremonies with the intention that the parties should be considered to be married. Merely going through certain ceremonies with the intention that the parties be taken to be married would not make the ceremonies prescribed by law or approved by an established custom. Under the section it is sufficient if the marriage is solemnized in accordance with customary rites and ceremonies of either party. It is not necessary that the customary rites and ceremonies of both the parties should be followed. Where a marriage is performed according to the customary rites and ceremonies of one of the parties which does not include saptapadi, even though according to the customary rites and ceremonies of the other party saptapadi is an essential ceremony, it will be a valid marriage. Customary ceremony may not include any one of the shastric ceremonies. It may be totally non-religious ceremony or very simple ceremony. For instance, among Santhals smearing of vermilion by bridegroom on the forehead of the bride is the only essential ceremony. Among the Nayahan of the South India the only ceremony is the tying of a vadu veeta thali into the neck of the bride.

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12. Dr Paras Diwan, Modern Hindu Law, (13th.edn.2000)p.79  
Prior to the Hindu Marriage Act, 1955 though in Hindu law there was no right of divorce, dissolution of marriage was recognized under the customary law\textsuperscript{15} or certain special enactments which were antecedent to the Hindu Marriage Act, 1955. Now, section 29(2) of the Act saves any right recognized by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnized before or after the commencement of this Act.\textsuperscript{16} As the customary dissolution of marriage is saved by section 29(2); it is not necessary for the parties to such a divorce to have again to go before the court under sections 10 and 13 of the Act seeking judicial separation or divorce in order that the divorce or dissolution be rendered valid and they can still adhere to the customary form of divorce.\textsuperscript{17}

Saving clause (2) of Section 29 of the Hindu Marriage Act is quite significant. This clause protects the sources of divorce. The present Act, therefore, did not oust the earlier sources and allowed them to remain in tact. It is, therefore, obvious that if there is a custom, allowing divorce and also a special enactment allowing it, the parties will have an option between the three, viz. (i) custom, (ii) special enactment, and (iii) Hindu Marriage Act. And if there is a custom allowing divorce, the parties will have an option between that custom and the divorce provisions of the Hindu Marriage Act, 1955. Lastly, in case there is a special enactment allowing divorce, the parties will have an option between the enactment and the divorce provisions of the Hindu Marriage Act.\textsuperscript{18} 


\textsuperscript{17} Mayne, op cit. p.371

protects customary divorce but the party relying on custom must prove the existence of such custom and that it is ancient, certain, reasonable and not opposed to public policy.\textsuperscript{19}

The words "nothing contained in this Act shall deemed to affect any right" in sub-section (2) of section 29 of the Hindu Marriage Act clearly indicate the limited scope of section 13 of the said Act, limited in the sense that it will not override the provisions in special enactments and of customs conferring right to obtain dissolution of Hindu marriages. Some of High Courts have been quite liberal in scrutinizing the legality of customary law of divorce. High Courts of Madras, Madhya Pradesh and Manipur have shown least interference.\textsuperscript{20} The Andhra Pradesh High Court in \textit{Edamma} v. Hussainappa,\textsuperscript{21} recognized the grant of divorce based on the ancient customs prevalent in a particular community. A judgement delivered in \textit{Puyam Liklai Singh} v. \textit{Moirangthem Maipak Singh},\textsuperscript{22} was based on the grant of customary divorce. In this case it was observed that according to the report of the customs prevailing in Manipur, divorce (\textit{Khainaba}) was permissible amongst the Hindus of Manipuri and it could be from the husband's side or from the wife's side. There is no condition attached and it can be done at pleasure. The custom among Sikh Jats of Amritsar according to which a husband can dissolve a marriage out of court preferably by written instrument is saved by section 29(2) of the Hindu Marriage Act.\textsuperscript{23} Customs permitting dissolution of marriage is not abrogated by section 4(a) of the Act.

\textsuperscript{21} A.I.R. 1965 A.P. 455.
\textsuperscript{22} A.I.R. 1956 Man 18
Definitions of Customs

Customs are habits of action or patterns of conduct which are generally observed by classes or groups of people. They may relate to dress or to etiquette or to rites surrounding important events of life, such as birth, marriage, or death. They may also pertain to the conclusion of transaction or the fulfillment of obligations. Custom is coeval with the very birth of the community itself. It is now well recognized that in all early societies, custom has been not merely the main, but the only, vehicle of legal development. The moment man starts leading some organized life, weather in small nomadic groups or whether in small settled or semi-settled abodes, the stage is set for the evolution of custom. When two or more human beings live together their living together, of necessity, implies some adjustment between them so that they could continue to live together and live harmoniously. As the human life grows and human beings engage themselves in multifarious activities, there emerge certain uniform patterns of human behaviour. As man gains experience in group life, he learns that a particular mode of behaviour or conduct is conducive to collective living. In this process certain patterns of behaviour which are found useless or of no utility, are shed, while some other receive universal recognition and become settled mode of human behaviour. Simultaneously, as new individual and social needs arise, new patterns of human behaviour emerge. And this process goes on. Probably, this process continued in all human societies till they evolved a conscious law making machinery. Those patterns of human behaviour which receive universal

acceptance and recognition are called usage and in course of time when they get established they are given the name of custom. Customs are of slow growth. When a large section of the populace are in the habit of doing a thing over a very much longer period, it may become necessary for courts to take notice of it.

Custom is a habitual course of conduct observed uniformly and voluntarily by the people concerned. When they find any act to be good and beneficial, which is agreeable to their disposition, they practise it and in course of time by frequent iteration and multiplication and on account of its approval and acceptance by the community for generations, there is evolved a custom. It obtains the force of law on account of being used from time to which the memory of man runneth not to the contrary. Moreover, custom is the oldest form of law making. In primitive societies human conduct was regulated by practices which grew up spontaneously and were later adopted by the people. According to Hindus custom is transcendental law.

At this juncture, we may usefully notice some of the definitions of custom given by eminent authors. According to Carter, the simplest definition of custom is that it is the uniformity of conduct of all persons under like circumstances. According to Holland, custom is generally observed course of conduct. According to Austin, custom is a rule of conduct which the governed observe spontaneously and not in pursuance of law settled by a political superior. According to Allen, custom as a legal and social phenomenon grows up by forces inherent in society, forces partly of reason and necessity and partly of suggestion and limitation.

26. Supra note 12 at p.8.
28. Supra note1 at p. 240.
According to Halsbury, a custom is a particular rule which has existed either actually or presumptively from time immemorial and has obtained the force of law in a particular locality, although contrary to or not consistent with the general common law of the realm. It must be ancient, certain and reasonable and being in the derogation of general rules of law, must be constructed strictly.

**Kinds of Custom**

The Smritikars mentioned four types of custom:

(i) Local Custom.

(ii) Family Custom.

(iii) Class (Caste or Community) Custom.

(iv) Guild custom.

The guild custom i.e. custom of traders and merchants, is not a part of personal law of Hindus. Here we are concerned only with the first three types of custom.

**Local Custom:** A local custom is one binding on all persons in the local areas within which it prevails, and differs entirely from a family custom binding only on members of the family as to rules of descent and so forth. It is one which must be pleaded with particularly as to the local limits of the area in which it is alleged to be the custom and the evidence must be the evidence as to the prevalence of the custom in that area. Local custom is a kind of legal custom. According to Salmond, local custom is the custom which is prevalent and having the force of law in a particular locality only. The term custom in its narrowest sense means local custom exclusively. The local custom

29 Supra note 3 at p.29.
31 Supra note 26 at p.44
32. Mayne op cit p 57
constitutes a source of law for that place only. In order that a local custom may
be valid and operative as a source of law, it must conform to certain
requirements. It must be reasonable. It must conform to statute law. It must
have been observed as obligatory. It must be of immemorial antiquity. Here, the
word ‘locality’ has a wide connotation. It may be the whole country, or a state, or
a district, town or even a village. In so far as continuity is concerned, the
omission of individuals to follow the local custom cannot have the effect of
destroying it, as it is a part of the law of the land and binds all the persons within
the local limits in which it prevails. The divorced daughters amongst Manipuris
are entitled to the right of residence in the paternal home and in Himachal
Pradesh according to custom a daughter has got a right of representation in non-
ancestral property including property of a collateral are the instances of a local
custom.

Family Custom :

Family custom is confined and binding only on the members of the particular
family. As early as 1868 the Privy Council said that custom binding only on
members of family has been long recognized as Hindu law. A family custom
different from the law or custom of the locality in which family is living can be
proved and is enforceable. Impartible estate and succession by the rule of
primogeniture are two important examples of family custom. In case of family

33. Supra note 2 at p.198.
34. Supra note 29 at p.267.
37. Soorendranath v. Heeramonee, 12 M.I.A. 91, cited in Dr. Paras Diwan, Modern Hindu Law
(13th Edition 2000)p.45
38. Ibid p.45.
custom, it is competent to the family to discontinue the custom e.g. a family custom that property should remain impartible is destroyed by the family subsequently treating it as if it is partible.\textsuperscript{39}

**Class (Caste or Community) Custom**

This custom is of a caste, or of sect or of the followers of a particular profession or occupation, such as agriculture, trade, mechanical, art and the like.\textsuperscript{40} By far as the largest area of custom in personal law of the Hindus is covered by caste or community custom. A caste or community is binding on all the members of the caste or community wherever they may be. Most of the Punjab customary law is of this nature.\textsuperscript{41} Among the Krishnavaka community and Nattukottai Chetties of Tamilnadu there is custom of patnibhagam prevalent according to which the division of the property is made according to the number of wives and sons by each wife constitute a unit. The wives themselves are not entitled to any share.\textsuperscript{42} The custom among the Kammas of Andhra Pradesh that the presents given to the bridegroom by the bride’s party should be returned to them in the event of the bride dying issueless and intestate.\textsuperscript{43} ‘Gurwat’ custom prevailing among Agarwal community of the Chhatisgarh region of the State of Madhya Pradesh and custom of Illatom adoption i.e. adoption of a son-in-law prevailing among Reddi and Kamma Castes in the territories falling under erstwhile Madras Presidency\textsuperscript{45} are the instances of a class (caste or community) custom.


\textsuperscript{41} Supra note 31 at p.45

\textsuperscript{42} \textit{Umaraparvarthy v. Bhagvathy Amma}, A.I R. 1972 Mad. 151


Origin of Meiteis:

The origin of the *Meiteis* is shrouded in mystery and the study on the subject is greatly influenced by the religious faiths and the political ideology of the *Meiteis* themselves. Thus making the problem highly speculative and controversy comes from the loss of history. The ethnic name, *Meitei*, B.H. Hodgson on the mid nineteenth century thought, was a “combined appellate of Siamese ‘Tai’ and Kochin Chinese ‘Moi’ (*Moi* Tai = *Moytai*=*Moitai*=*Meitei*) and the *Meiteis* belong to the *Moi* section of the great *Tai* race”.\(^{46}\)

T.C. Hodson suggested that it was derived from the blending of two words “Mei” means man or people and “Tei” meaning separate: *Meitei* = Separate people.\(^{47}\) Chongtham Budhi Singh proposes that this ethnonym is a blending of two tribes of ancient China. *Mei* and *Ti*=*Mei*+*ti*=*Meiti*=*Meitei*.\(^{48}\) The *Meiteis* or the Manipuris belong to the Tibeto Burmese group. According to Colonel Mc Culloch,\(^{49}\) “The *Meiteis* were the strongest of several clans inhabiting the Manipur valley who eventually obtained the mastery and gave their name to all the other clans”. The Manipuris proper (meaning the *Meiteis*) were regarded by Captain Pemberton as “The descendants of a Tartar Colony which emigrated from the North West borders of China during the sanguinary conflicts for supremacy which took place between the different members of the Chinese and Tartar dynasties in the thirteenth and fourteenth centuries.\(^{50}\) The Bengals and

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49. He was the Political agent of Manipur for the period 1844-62 and 1863-67
proto-Bengals who came by the Southern route had contact with the Marems (Tibeto-Burman tribe of protosino-Tibetan origin) first and accordingly they also used to call the tribes inhabiting the foothills by the name Moi-Tai. The Bengals could not differentiate between a Moi-Tai and a non-Moi-Tai from their Mongoloid appearances and used to call Mongoloid inhabitants of the Valley by the name Moi-Tai.

Thus Poireis (inhabitants of Northern Imphal Valley and was derived from the name of Poireiton the founder of Chakkhan dynasty) were also called Moi-Tai by the Bengals. Any new immigrant arriving by the Southern route like the Moirang (Mahui) used to call the Poireis by the name Poirei-Moitai to differentiate from the real Moi-tai. From Moi-tai it changed to Meitei. Before changing to Meitei the sound Moitai probably lasted for decades. When the Bengals used to sound the consonants with and ending sound of “o”, the Tibeto-Burmans and other Mongoloids used to pronounce them with a short “a”. Thus a Bengal word of Moitai (মৌইতাই) would have been pronounced by other Mongoloids as Meitai (মেইতাই). Hence from Moitai it changed to Meitai and finally to Meitei. The name of Poirei to all incoming tribes was thus known as Meitei.⁵¹

Different theories, propositions and inventions have been postulated on the origin of the appellation Meitei. Again there are two schools of thought on the name itself. One school of thought sticks to the spelling MEITEI while the other claims the spelling MEETEI. We cannot give a positive decision, but it appears that most revivalists prefer to the name MEETEI. The essence of the latter school is that the Supreme Guru creates a living being resembling his image of which is

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said ‘*imi*’. So from ‘*imi*’ it comes to ‘*mee*’ the man and so on. If we leave them as fables there is nothing wrong. But some people take it as a dictum. It must be borne in mind that the word ‘*mee*’ is in existence long before the human habitation on the valley of Imphal. It is a word of most of the Tibeto-Burmans and other Mongoloids. Some of them further feel from different records which describe the Ningthemchas as *Meiteis*, that there was a tribe called *Meitei* they invented a theory that the name was derived from *Mee-Atei* meaning the *Meitei*. From *Mee-Atei* it changed to *Meetei*.\(^{52}\) So the name *Meetei* is for the mass other than the ruling clan. Some of the upholders of the name *Meetei* however, appear to be very aggressive in their propaganda for the popularization of the name *Meetei*, while some others simply believe the name to be correct one without any prejudice to others.\(^{53}\)

No doubts, the *Meiteis* are one of the few Indo-Mongoloids who possess a written script and a fairly rich literature from an early age. From time immemorial the central valley of Manipur had been the home of the *Meiteis* while the surrounding hilly regions of the state are inhabitants by the *Nagas* and other tribal communities. The *Meiteis* had a sense of history and most of their manuscripts are historical records. The history of Manipur is undoubtedly the history of the *Meiteis* began from the second quarter of the Christian era. From the most credible tradition we find that the *Meitei* community was a product of an amalgamation of not less than seven different community viz. *Angom, Chenglei, Khaba-Nganba, Khuman, Luwang, Moirang and Ningthouja*. Each of them came to be recognized as an exogamous unit known as ‘*Salai*’ of the

\(^{52}\) ibid pp 421-422

\(^{53}\) ibid
Meiteis. The amalgamation was very much like the league of the Iroquois of Manhattan (New York State). The league of seven communities in the central valley of Manipur to constitute the Meiteis proved too strong for invaders from the neighbouring areas and was responsible through the centuries for the development of a few culture called the Meitei culture.  

Meaning of Rites and Ceremonies

Rite is a formal or ceremonial act or procedure or customary in religious or other solemn use; a particular form of system of religious or other ceremonial practice. Ceremony is the formalities observed on some solemn or important public or state occasion; a formal religious or sacred observance; a solemn rite.  

Rite is a prescribed form or manner of conducting a ceremony especially a religious ceremony. Ceremony is a formal act, or series of acts, often of a symbolical character, prescribed by law, custom, or authority, in the conduct of important matters, as in the performance of religious duties, the transaction of affairs of state, and the celebration of notable events etc.

Rite is a formal procedure or act in a religious or other solemn observance. Ceremony is an outward rite or observance, religious or held sacred; the performance of some solemn act according to prescribed form.

From the meanings of these two words ‘rite’ and ‘ceremony’, as noted above, we come to know that these two words of the phrase ‘rites and ceremonies’ cannot be understood separately. It will be difficult to differentiate between rite and ceremony. These two terms go together at their performances and at the same time they are very closely tied together. Rites may be the constituent performances to constitute a complete performance of ceremony of any kind. In other words, ceremonies are the goals or destinations and rites are the paths towards such destinations. For instance, with reference to the Shastric rites and ceremonies of marriage, for the performance of Saptapadi (the last performance in the solemnization of marriage) other things such as Virdhi Sradha (offering to the departed ancestors with a view to obtaining their blessings for the marriage performed by the father of bride on the forenoon of the day of the solemnization of the marriage), Sampradana (presentation to the bridegroom on the arrival of the bridegroom at the bride’s place), Kanyadana (giving the bride to the bridegroom), Panigrahana (taking hold of bride’s hand by the bridegroom), Agni-parayana (going round the nuptial fire and water pot and mounting the milestone by both the couple) are performed56. However, it may be difficult to differentiate which ones are rites and which ones are ceremonies. Rite seems to imply the particularity or specificity in performance and ceremony in general or formal.

In the present scenario of the Hindu society in India, the meaning of ‘rites and ceremonies’ should be followed in its wider meaning in case of personal laws.

It should not be in strict sense of its literal or dictionary meaning only. The rites and ceremonies need not be religious based on the orthodoxy beliefs of Hindu Shastras, rather, it may also be secular or social to suit with the changing tendency of the Hindu society in modern India. No doubt, in India personal laws have their genesis in religion. Yet there is clear distinction between the two. Personal laws regulate the personal life of an individual in society. That is, there are some norms regulating human relations primarily in the field of marriage. Religion on the other hand has reference to one’s views of his relation to his Creator and to the obligation they impose of reverence for his being and character and of obedience to his will. In contemporary times when the sharp rising expectations and pressing demands for radical redistribution made in the name of justice are cutting wide in practice and regulations of human relations and behaviour, state principles of religion cannot be the guiding factors. Thus, although the origin of personal laws (as in case of Hindu law) is in religion, but they have to conform to modern needs. It must be noted that religion and law have different fields of influence in the life of the individual in the present context.57

Hinduism has never been a homogeneous creed. It has always consisted of great variety of sectarian creeds of varying degrees of orthodoxy. There are Hindu tribes, Hindu families and Hindu sects, which from differences in habits, sentiments and doctrine and from other causes are found to observe practices (may not necessarily involve religious rite) in relation to marriage widely different from those enjoined by the Hindu Shastras; and from the position assigned to custom as a source of law in Hindu jurisprudence, these

practices are regarded as legal. In regard to marriage, therefore, the ordinary Hindu law does not and cannot form the common rule for all sects alike.\textsuperscript{58} When we see the strict meaning of ‘rites and ceremonies’ it always incorporate some sort of religious observations and obligations like devotion of some articles to ancestors and Gods with chanting of mantras as it happens in case of Shastric rites and ceremonies of marriage. But, it is the time for liberalizing the meaning of ‘rites and ceremonies’ in both Hindu Shastric and Customary systems in order to conform with the changing Hindu society.

The solemnization of marriage by observing either the religious ceremonies or certain secular forms prescribed by law is a symbolic expression of the fact that the parties are accepting each other as spouses or where they are of nonage, their parents or guardians deem them to have become spouses. The formalities of marriage prescribed by various Hindu communities in India are, in fact, varied and complex, their nature differing according to whether a particular community considers marriage as a religious or secular union. The marriage formalities in many communities are, indeed, a bundle of ceremonies involving religious, economic, legal and aesthetic motives thereby rendering the separation of legal requirements from their other adjuncts difficult. Marriage among Hindus is solemnized either by observing the customary rites of the community to which the parties belong or by performing the Dhamashastric ceremonies. It is indeed a question of fact to be ascertained the status of husband and wife from the social practices of the community to which the parties belong, Dharmashastras have,

\textsuperscript{58} S.K. Ghosh, "The Hindu Marriage Act-An Analysis", a seminar paper presented in "All India Seminar on Hindu Law" at University of Rajashthan from 5th January to 8th January, 1965.
however, specified elaborate and complex ceremonies for establishing the matrimonial nexus. Beginning with a set of Vedic ceremonies, the Hindu society has formulated by a gradual process of addition and elaboration of plethora of ceremonies. The baffling number of ceremonies have come into existence due to the practices of Hindu sacredotalism which has ceremonialized each and every activity relating to marriage. For instance, the arrival of the bridegroom at the residence of the bride has been made ‘varapuja’, throwing a party in his honour has become ‘madhuparka’, giving new clothes to the bridegroom for wearing on the occasion ‘vastra paridhanam’, gifting of the bride by the father or guardian ‘kanyadana’, hand clasping ‘panigrahana’ and so on. Even though there exist some differences regarding the observance of certain ceremonies and their orders, there is wide agreement among the leading works with regard to the performance of certain necessary ceremonies such as kanyadana, panigrahana, saptapadi and lajahoma.

It is indeed very difficult to say with any degree of certainly which of these ceremonies occasions the creation of matrimonial status. However, from legal standpoint it is the ceremony of ‘Saptapadi’ which effectuates the matrimonial status, for this ceremony alone according to judicial dicta puts the stamp of finality on the transaction. There may be a significant number of Hindus who are agnostics or who do not subscribe to Hindu ritualism and who may, for conscientious reasons, be unwilling to marry under the traditional system. Certain sects and organization (as in case of self respecters association in Madras) which do not believe in Hindu ritualism have alternate provisions to avail of for the purpose of solemnization. For a number of people the Dharmashastric
ceremonies may be mere mumbo-jumbo, the customary rites may appear to be too crude or primitive.\textsuperscript{59}

The present law of Hindu marriage requires the parties to be married to fulfil certain conditions laid down in the relevant sections of the Hindu Marriage Act, 1955 which seeks to secularize and simplify the ceremony of marriage. The concept of Hindu marriage has undergone a tremendous change under the Act, according to which marriage means a lawful consensual union of man and woman to the exclusion of others, accompanied by certain formalities which may be religious, customary and statutory. The Dharmic institution of marriage, in which marriage was meant to be an indissoluble religious union of man and woman, is sought to be transformed into a union of convenience. Hindu Marriage Act, in its basic ideology, is the repudiation of the Dharmic institution of marriage.\textsuperscript{60} A prominent feature of the present law is that it has done away with all traditional rigidity. Marriage is made more secular and contractual than it was under the old system.\textsuperscript{61} The Hindu Marriage Act, 1955, is now more secular and consensual than sacramental.\textsuperscript{62} This Act insists that every marriage must be solemnized through a ceremony. As to the question “whether a ceremony or not” the answer of the Act seems to be an imperative “yes”, but as regards the question “what ceremony” it gives an option to the parties to follow “customary rites and ceremonies of either party”.\textsuperscript{63} Custom and usage have, in the course of time, modified the scriptural marriage rites in different parts of the country. Hence the


\textsuperscript{60} S.Venkataram, ‘Matrimonial Causes among Hindus’, (1962)1 \textit{S.C.J.} p.1

\textsuperscript{61} V.Bagga (ed.) \textit{op.cit.} p.60.


\textsuperscript{63} Section 7 of the Hindu Marriage Act, 1955
Act does not want the purely scriptural ceremonies to be observed. It only requires that the rites and ceremonies chosen must be customary with at least one of the parties. Nothing more beyond observation of such rites and ceremonies is required for the solemnization of marriage. In the State of Tamilnadu, some locally prevailing customary marriage rites which are not necessarily religious (in the sense of doing pooja to Gods may be in Dharmashastric form or customary form) were specifically protected in 1967 by the Hindu Marriage (Madras Amendment) Act of 1967 and inserted section 7A in the Hindu Marriage Act, 1955. The Sikh Marriage rites called anand also remain legally protected by special legislation.64 Since only the ceremony employed for the purpose of marriage (whether scriptural or customary) completes a marriage under the Hindu Marriage Act, an important is at what stage of the ceremony a marriage will be deemed to be complete and binding. The Act only says that where the scriptural rite of saptapadi is observed, the seventh step will mark the finale of the ceremony.65 However, where customary non-scriptural rites are observed, the stage of completion of the marriage remains an open question.66

Now in contemporary India we find a strange situation and a new constellation with regard to marriage solemnization. We observe not merely the familiar pattern of diversity of Hindu tradition, but apparent misconceptions of these traditions and their genesis, and obvious contradictions between what people do and what the modern laws of India have to say on this particular topic of marriage

64. The Anand Marriage Act, 1909 (not repealed by the Hindu Marriage Act)
65. Section 7 (2) of the Hindu Marriage Act, 1955
solemnization. If the words ‘rites and ceremonies’ under section 7 of the Hindu Marriage Act has been interpreted by giving emphasis on the religious performances, it may be a difficult to bring the customary rites and ceremonies of some communities under the umbrella of rites and ceremonies given in the Act. In some communities the customary ceremony of marriage is validly performed in the lack of any religious performances. Ceremony of marriage should be a mere declaration to the society that the man and the woman become spouses, it should not give much importance to religious performance. The modern Hindu law should give emphasis more to the intention of the parties to the marriage to enter into matrimony than to observance of religious customary rites and ceremonies. The Madras legislature has given more emphasis on substance that on declaration or intention to enter into matrimony than observance of orthodoxy customary rites and ceremonies which generally religious in nature. The conception of a Hindu marriage since the days of Manu has undergone a radical change. A tendency is now for giving more emphasis to substance than to form. The liberal interpretation of the words rites and ceremonies under section 7 of the Act is of great importance in this deteriorating modern Hindu society. The time for interpretation it in Dharmic and Shastric conceptualization of Hindu law has gone and perhaps unsuitable to this changing Hindu society. Law is never intended to be static; it is to be progressive with the progress and change in the society.

There is tremendous changing in ceremony of marriage since the time of the Manusmrtri. This changes affect not on the customary ceremony but also on the Hindu Shastric ‘Saptapadi’ itself. The saptapadi, it appears, has been performed in various ways, accompanied by a number of ritual mantras. In the performance
of the Saptapadi in our days, further ritual changes have become apparent. In some parts of India (e.g. Gujarat) the saptapadi and agniparinayana, the walking of the spouses around the sacred fire, three or four (less than five, but sometimes seven) times have been merged into one ritual. The extent of this ritual diversity is creating some confusion. Even in one and the same locality the various communities perform marriage rituals in quite different ways, and that the saptapadi in one case may well involve in taking of seven steps by the couple, while their immediate neighbours from a different community may merely circumambulate the fire for four times. The Hindu priest said that the sanskrit verses spoken during the latter ritual could well be those pertaining to the saptapadi, with the result that after the fourth round the priest may speak - presumably in an astonishing speed - the remaining three mantras that would belong here. In view of this fact there is little agreement in the ancient texts as to what mantras should be used, and that the priest generally does not bother to instruct the spouses, we can thus hardly expect that couple have got the slightest idea of what has been expressed on their behalf. Sometime, the one and same priest perform quite different marriage rituals for spouses from neighbouring, yet different communities.\(^\text{67}\) It seems to be true that the rituals in the performances of Shastric saptapadi has diverted from its originality as it was in the time of the Manusmriti.

Hindu law, though has survived too long, more or less in its original form was by no means conservative. Changes in law were effected concomitantly with the changes in the society. As the society grew gradually and slowly, is the

\(^{67}\) Werner F. Menski, "Solemnisation of Hindu Marriage, the Law and Reality", 1985 Ker.L.T. pp.2-4
changes in law also were introduced slowly and quietly. The sage Parashara himself specified the different smritis for the different ages. Thus according to him the Manu smriti was meant to govern the Satya Yuga, the smriti of Shamkha Likhita was meant to govern the Dapara yuga and the Parashara smriti was meant to govern the Kali Yuga 68

Now, the question that occurs to every one is what is the ideal form of marriage that suits the modern conditions? Marriage ceremony in the present society must be a simple one, secular or civil, without any pomp and show, and it should combine all the sanctity and solemnity of the Shastric marriage and the secular content and modernity of marriage by choice in which the parties to the marriage activity participate without undue interference from elders, who may be at the most consulted before marriage. The values cherished by the participants must not be merely materialistic, but also human in their nature. Marriage is not merely meant for sexual enjoyment but also for a long and happy association of man and woman to constitute an orderly family which contribute to the progress of society. Mutual love, affection and understanding must build the bonds of matrimony and bind them together for a happy harmonious conjugal life. Further, the process of industrialization, urbanization, secularization, the increasing number of married working woman and the alarming population growth have brought about significant change in the attitude of the people. New norms of marriage and new values of life are in the offing. The attitude of educated men and women towards marriage and family has been changed very much. Several demands are made by husbands and wives

on each other. They depend on each other for emotional security and peace of mind. In the light of these developments, the laws of marriage are to be revised suitably and new laws formulated. So far as the development of secular outlook is concerned, the Hindu Marriage Act tends to promote high secular values. This law is secular in the sense that it permits inter-caste, inter-sect and inter-religious marriages. But some of the provisions under the Act are tainted with religious influence. For instance section 7 of the Act speaks about the observance of ceremonies like saptapadi and other customary rites. The Act also permits the solemnization of Shastric marriage with all religious paraphernalia and provides saving clauses for customary marriage and divorces. Provisions of these types are hindrances to the realization of secular values in full measure. The retention and recognition of Shastric marriage under the present law of marriage is a retrograde step or backward, for the development of secular outlook sought to be cherished by the modern law of marriage among Hindus. It should be either amended suitably so as to break the religious shell of the marriage or be removed completely from the statute book.69

The particular communities, now a days may adjust to new environmental circumstances whatever, for the moment, these may be, should not surprise us at all. Among the communities of Hindus living in foreign countries, new customs of marriage solemnization have been developing, at times under the explicit influence of legal requirement of the new lex loci.70 Even in modern Indian Hindu society, a non-Sanskritic wedding the ceremonial is symbolic and traditional, not conveying any particular intention except by association of

69. Supra note 58 at pp.63 & 68
70 Werner FMenski, op.cit.p.5
ideas - people unacquainted with it (sanskritic wedding) would describe it as mumbo-jumbo. Even the tying of the thread round a woman’s neck does not invincibly imply that she is to be a wife (as opposed to a concubine), though everyone knows by tradition that a thread implies marriage and that it has to be broken if a divorce takes place. The judiciary also seems to liberalize in interpreting rites and ceremonies provided under section 7 of the Hindu Marriage Act. The rites and ceremonies in personal laws may not be necessarily co-relate with the religious performances of a community especially in case of customary marriage ceremony. The umbrella of the words rites and ceremonies should reach and cover all the customary marriage ceremonies of all Hindu communities provided these ceremonies fulfils all the requirements of a valid custom. However, the validity of such custom of marriage ceremony should not be tested on the basis of the observance or non-observance of some sort of religious performances. For instance, so far as the Reddi communities of Telengana are concerned neither homa nor saptapadi is essential ceremony of marriage. In their community the essential ceremony must be tying of mangal-sutra and putting to toe ring, throwing rice over each other’s head, on performance of these ceremonies marriage amongst the Reddi community of Telengana becomes complete and binding. Smearing of vermilion by a santhal boy on the forehead of a santhal girl amounts to ceremony of marriage - a form called itut form of marriage. Among the Nayahans of the South India the only ceremony necessary is the tying of a vadu veeta thali into the neck of the bride.

71. J. Duncan M. Derrett, A Critique of Modern Hindu Law, (1st publication 1970) p. 301
72. In re Dalgonti Raghava Reddi, A.I.R 1968 AP 117