EXPANDING THE PARADIGM OF LEGALITY: AN APPRAISAL OF PANCHAYATS AND THE CUSTOMARY LAW IN HARYANA

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Introduction

“Every caste in every village or town has its own rules and regulations, and elects representatives, and furnishes an exact prototype of the Saxon Witans, from which have sprung the present Parliamentary institutions.”

M.K. Gandhi

The process of globalization has turned the entire world into a global village. Boundaries of village, state, nation and time have become blurred, space and time have almost conjured in one another. At the same time, this transition has, albeit indirectly, raised questions about the existence and relevance of the very basis of the village communities – the panchayats. There structure, procedure and decisions have evoked a thorough discourse among the people, the media as well as the courts of law. During the past few years, their decisions annuling marriages and preventing marriages on the ground that they violate the established customary practices, have forced them into the category of “talibani” and “kangaroo courts”. Question arises - what exactly are these panchayats, what had been their role in the society, how they continue to coexist within a modern political system and exercise influence over a vast population in rural India. The present paper tries to understand this complex interface of custom with the modern legal system and attempts to explain how the modern legal system is transforming the rural reality, supplanting the customary people’s law, which is indigenous to the local community, with one which is palpably foreign in its origin and inspiration.

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Panchayat – Meaning and Definition

The word panchayat is a derivative of Sanskrit root *panc*, meaning five, but in rural India, it is referred to as any community meeting of any number of men. It is the most commonly used dispute-processing forum in a village. The panchayat usually entails a series of meetings with differing degrees of privacy, leadership, and consultation with various members [Cohn 1959; Meschievitz and Galanter 1982; Moog 1989, 1991; Sharma 1978].

The *panchayat* is the oldest form of dispute processing practice in rural India. However, such a practice is not unique to India only. Rather it is an ancient practice and is found almost all over the world in one form or the other. In Persian it is known as *Majlis*, in Pashto it is called *Jirga*, in Bangladesh it is called *Shalish* and in Arabic it is known as *Sulha*. This institution is similar in many respects to the institution of *Jirga* in Afghanistan [Carter and Connor 1989; Elphinstone 1992; Gletzer 1998; Olesen 1995], Soviet in former Soviet Union [Jeffrey 1988: 55], Mediation Committees in China [Clark 1989; Li 1978] and tribal councils in Pakistan.

These types of traditional panchayats are found throughout the Indian subcontinent. They are called by different names at different places like *Khap* in Haryana, *Pal* among Meos of Haryana and Rajasthan, *Hatu* panchayat and *Parga* panchayat among Munda Tribe of Jharkhand, *Peddala* panchayats (elders) in Visakhapatnam district, *Kula* caste panchayats elders in East and West Godavari districts of Andhra Pradesh respectively.

This type of local informal justice system has been the basis for administering rural justice in the Indian subcontinent since the ancient time [Khan, M.Z. and Kamlesh Sharma 1973: 1]. Although they are called by different names, but their main characteristics are more or less the same, that is, informal and localized.

According to Justice S.B. Sinha, Judge, Supreme Court of India, “the mechanism to settle the dispute by reference to a third person had been in practice in ancient India, wherein people used to get their disputes resolved by arbitrator or tribunal not established by the King. Yajnavalkya and Narda stated that Village Councils (*Kulani*), Corporation (*Sreni*) and Assemblies (*Gorth/Puga*) used to decide law suits. These institutions have been described as arbitral tribunals which have the status of *panchayat* in modern India.”
Panchayat: An Ancient Customary Judicial Institution

It is the function of the Panchayat to revive honesty and industry.... It is the function of the Panchayats to teach the villagers to avoid disputes, if they have to settle them. This will ensure speedy justice without any expenditure.

M.K. Gandhi

The customs, traditions and institutions of any society have their own strength and act as a survival mechanism for the society. Acknowledging the self regulating and self maintaining nature of these village institutions, Lord Charles Metcalfe noted that, one single factor that had contributed most to the tranquility and happiness of village life is the well knit and well ordered life of the village communities [Punit 107]. These communities came into existence as a system maintenance mechanism in agrarian societies and acted as important agencies of social control. James Caird observed that, the decay of traditional village institutions like the panchayat was one of the chief causes for the decadence of the entire social life in general and agricultural distress in particular.

The tribal society’s hold this traditional institution quiet sacred to them and have allowed it to rule them throughout their known histories. These panchayats settled disputes in an inexpensive and prompt way ensuring fast, cheap and inexpensive justice in conformity with local customs, traditions and culture. They also imparted tremendous social stability. Kings came and went, but the society remained stable inspite of all invasions, wars and political instability. The panchayat looked upon the people under their jurisdiction in a decentralized way. They have played a leading role in “social service” by ruling on issues such as education for women, leading to land being donated for the purpose. There are instances of their role in the movement of prohibition, resistance to the emergency regime and state oppression on various occasions. They have also resolved long-standing family feuds going back to generations. They have made efforts, to check the malaise of female foeticide [Hindustan Times, 19 November 2010], promote girls education, curb the evil practices in marriage [Pradhan 1966; Sangwan 1986; The Times of India, 8 March 2011]10, maintaining the productivity of land [The Tribune, 10 January 2012]11 and have also tried to promote inter-clan brotherhood feelings [Ranbir Singh 2010]. They continue to be called upon to dole out justice, especially by the poor, for whom it is a cheap, quick and effective way of settling disputes [Hindustan Times, 15 May 2011].

Panchayat operates in rural culture in many horizontal and vertical ways. It is thought of as a customary judicial institution which exists at all levels of the rural society. It is considered as effective
and meaningful alternative to litigation through courts\textsuperscript{12} for resolution of disputes\textsuperscript{13} through the guidance and assistance of a neutral and impartial third party.\textsuperscript{14} It has legislative characteristics, plays a diplomatic role and enjoys many more roles that have rarely been articulated.

Panchayat in its current form is not a government or a ruling body. It is not a legislative body, nor is it a judicial entity. It is in fact an informal social institution, and an important agency of social control [Sangwan 1986]. It is probably the closest approach to Athenian democracy\textsuperscript{15} that has existed since time immemorial. It represents the essence of democracy in operation in which every individual has a say in deciding the course of things around him. It can be described as an indigenous institution of dispute resolution of many communities. Its influence is now confined to rural areas and its substantial part is governed by customs, traditions, rules of morality and ethics. The mass of rural India still remains traditional, conservative and devoted to its culture. Their loyalty to panchayat as a traditional social institution earns them a sense of pride, sometimes leading to ethnocentric attitudes, which others find it difficult to accept. The rural society practices a combination of norms and ethos unusual to others, but this combination gives shape to a composite culture and a closely knit society.

**Tribal Origin(s) of Customary Law: Beyond Scriptures and Personal Laws**

Many communities in India were originally tribal groups who came under the influence of religion and became castes. Inspite of their assimilation into the caste system, they retained their tribal organizations (in varying degrees), as also customs and traditions of the time when they had possessed independent organizations of their own [Risley 76]. It is true of communities all over India but is so particularly true about Haryana. The customary law is among the most distinctive features of the people of this region. In the face of recurring foreign invasions, they were subjected to economic, social and political pressures. Such pressures have eroded many of their systems, but most continue to retain and observe their customary law even without formal recognition by the State.

Regardless of its formal status, most of these castes/tribes regulate their community and social affairs according to the customary law and treat it as integral to their culture and basic to their identity. This law reinforces the tribe’s age-old traditions and binds it together through normative rules by regulating the social and personal relations of its members. Through the institutions such as the village council/panchayat based on it, the people manage the internal affairs of the village. A common peasant whether Hindu or Muslim remains unaware or oblivious of the existence of the statutory law.

In the expressive words of Sir Charles Row:
The Hindu Law cannot be applied to the Hindu tribes, because they have never in fact followed, or even heard of it, and it is framed for a different state of society. But Muhammadan law is still more inapplicable to Muhammadan tribes. Those of them who are converted Hindus know nothing of the Sharia except perhaps its name. The purely Muhammadan tribes of the Frontier Province [Now in Pakistan] have no doubt heard of it, but they have the vaguest notion of its provisions. Being bigoted Muhammadans, and much under the influence of the Mullahs, they are ready to assert, in opposition to the plainest facts, that they follow the Sharia in all things.... When we examine the Riwaj-i-ams we shall find that few tribes even profess to follow Muhammadan law, and that those who do profess to follow it evade it in practice. The assertion that Muhammadan law is followed is dictated partly by bigotry and partly by ignorance. [Charles, Roe: 1895]

Rattigan concluded that customary law in this area of Punjab (present Haryana) is more tribal in character than communal [Rattigan 1960:xvii,89; Diwan, Paras 52]. The Hindu agriculturist of Punjab knows nothing of caste, except as represented by his tribe [Charles, Roe: 1895]. The customary law has little or no connection with either Hindu or Muhammadan Law, and has an independent origin and general principles of its own. Hindu and Muhammadan though differing in religion are united together in the village community by the same common rules. The peasant is not in the habit of comparing the customs of his community or tribe with those of other groups and other tracts of the country and thus has no idea of law (statutory law) of the land to which some of his tribal customs are exceptions. In such matters as adoption, inheritance and partition, whatever is consistent with the principles underlying the general custom of his tribe, whatever does not strike him as unusual or unfair, is considered by him to be in accordance with his tribal custom.16

Inspite of the passage of various laws discarding legal pluralism and native or customary law, family law (of which marriage law is an essential part) continues to remain predominantly customary in character [Choudhary 3].17 The principle of got (clan or kinship) exogamy, village exogamy and Khap exogamy19 are observed by all caste groups of the heterogeneous population, which reflects a homogeneity of culture which transcends caste and religious lines [Choudhary 4].20 Although the influence of Muhammadan law and religion has broken down some of the barriers imposed by the ancient tribal custom in the matter of marriage yet most of the Muslims continue to follow the principle of got exogamy.21 The recent case of social boycott of Ikhlash of Mewat for marrying within same got reaffirms this point. Said Ramzan Chaudhary, head of Khap of 360 villages of Meow Muslims, “We follow Islam. But, at the same time we strongly follow our tradition derived from Haryana. We don't allow same gotra marriages.”22 The tribal feeling is too strong to allow such marriages to be numerous and has hitherto withstood the influence of Muhammadan law on this point.

*The Gap Between State Law and Local Practice*
The most numerous tribe in this region is called Jat\textsuperscript{23}. Their gots (Hindu Jat, Sikh Jat and Mulle Jat\textsuperscript{24}) are in many cases the same and both sides admit that they are descendent from the common ancestor and have adopted different religions either by choice or by compulsion. The Hindu Jat and Mula Jat, the Hindu Gujar and Mohammadan Gujar think more of the common ancestor from whom they have ascended than the fact that he is a Hindu or the other a Mohammadan and live in the same village with as much peace as if they were members of the same race and religion.\textsuperscript{25} Haryana is a land of many contrasts and seemingly paradoxical cultural traits and customs, one that has historically seen people practice interreligious marriages\textsuperscript{26}, intercaste marriages, the established practice of karewa (levirate), customary form of marriages and divorces and numerous other customs and practices, peculiar to this region. Custom has always had a special place in the lives of people of this region. Both Hindus and Muslims follow a unique form of Hinduism and Muhammadan Law, an intermix of tribal customs and religion.

Despite the spread of Hinduism, the customary law of marriage has remained largely secular. Conversion to Islam too did not have any effect. The Musalman, Rajput, Gujar or Jat is for all social, tribal, political and administrative purposes exactly as much a Rajput, Gujar or Jat as his Hindu brother. His social customs are unaltered, his tribal restrictions are unrelaxed, his rule of marriage and inheritance unchanged.\textsuperscript{27} The different tribes follow different formalities for the performance of their marriages. Among certain tribes no ceremonies whatsoever are required to be performed and mere intention to live together as husband and wife followed by cohabitation is enough.\textsuperscript{28}

\textit{Customary marriages:} While rites constitute an important component of marriage among many communities, there are sections or groups of people who do not have religious rites in marriage. Marriages with no rites are referred as customary marriages which are based on simple practices. In some groups living in the Himalayan tract, putting a ring in the bride’s nose is a customary form of marriage. Among the Santhals, smearing of vermilion by bridegroom on the forehead of the bride is the only essential ceremony. Inter-religious marriages among Naga tribes of northeast and among the Jats of northern India enjoy the sanction of their community. Similar forms of customary marriages are prevalent among different communities all over Haryana.\textsuperscript{29} These practices can be compared to self respect marriages in the former Madras state,\textsuperscript{30} and might have been the result of a fusion of tribal culture with the Arya Samaj.\textsuperscript{31}

\textit{Widow Remarriages:} Certain sections of the Indian population have a tradition of widow remarriage. Levirate alliances are common among the Jats, Ahirs, several other castes in Haryana, and U.P. and among the Kodagu of Mysore.\textsuperscript{32} It is considered the duty of surviving brothers of the deceased husband to
look after the widow and her children by taking her as a wife. Among Muslims, the only ceremony is the *nikah*, the bare marriage ceremony of the Muhammadan Law. Among Hindus too hardly any formalities are required. Among the Jats, marriage with the widow (usually with a brother’s widow) is very common.\textsuperscript{33} When a man takes the wife of his deceased brother into his house without any marriage ceremony, and she bears him children, such children are accepted as legitimate in all respects, and the brother’s widow gets the status of a wife.\textsuperscript{34}

*Karewa or Nata*: karewa marriage can take place with any woman, relative or stranger, though usually the woman is a widow, divorcee or an abandoned wife. What distinguishes the karewa marriage from others is that no ceremonies (even a semblance of ceremony) whatsoever are required to be performed and mere cohabitation gives rise to marriage conferring on the parties the status of husband and wife and status of legitimacy on the children. It might also take place in *chadar-andazi* form.

The marriage in *chadar-andazi* form takes place in several modes. The two common modes are: the four corners of a *chadar* (sheet of cloth) are tied and then some saintly persons or relatives spread it and the bride and the bridegroom come under it, or sometimes it is spread over bride and the bridegroom at the place where they are seated to be married. In another mode, the bridegroom places the *chadar* over the bride who comes under it.\textsuperscript{35}

*Prohibited degrees*: The horror of incest, which almost without exception is said to be a characteristic feature of human race, lies at the root of the prohibitions against inter-marriage. But the degrees within which intercourse is forbidden vary to a considerable extent, and nowhere more so than amongst people in this province [Rattigan 458]. Speaking generally, it may be said that all Hindu are exogamous, that is, require a man to marry inside his own tribe, but outside his own and certain other *gots*, that Mohammedan are in practice the same [Charles, Roe 58].

*Polygyny*: Until recently the Hindus often practiced polygyny. Several Hindus of the older generation have more than one wife. Among the younger generation the tendency is on the decline but has not disappeared altogether. The Hindu Marriage Act 1955 declares polygyny illegal and a cognizable offence punishable by law.\textsuperscript{36}

*Bride price*: When a family for some reason is not able to get a bride for their boy, they get a bride (usually from outside the state) by paying a price for the girl [Jeffery and Jeffery 76]. Bride-price or the payment in cash and/or kind to the bride’s father by the groom’s father reflects the transfer of authority over the bride from her father to the groom and his family. The idea of compensation for the loss of a
productive worker is also implicit in it. The bride’s family loses a productive worker when the girl gets married and leaves her parental home. So, the bride’s family is paid a compensation for this loss.\textsuperscript{37} The girl/ woman may be from any caste or community or religion [Pradhan 1966: 84]. This custom is not confined to Jats or to the state of Haryana. Blanchet (2005) has highlighted the sale of Bangladeshi girls to men in Uttar Pradesh (U.P.). Even in eastern U.P., Bihar and northeast India this kind of transaction does exist.

\textit{Customary divorce:} Despite the legislation, recognizing the right to divorce, the number of those granted divorce through the courts remains less than 1\%.\textsuperscript{38} The customary forms of divorce – divorce by mutual consent, repudiation or abandonment, informal separation known as \textit{chhordena} (having left) etc., continues to be the popular modes of divorce. Divorce is granted in front of the traditional panchayat or caste panchayat or by an assembly of village elders. Among Hindus, this form of divorce has the validity of a socially recognized divorce under the Hindu Marriage Act 1955. Formal divorce has come to be associated only with the urban educated who are held responsible for breaking the societal norms. Divorce (formal divorce by courts) is perceived to be inimical to the rural ethos and norms of cultural practice, being dominated by the state power dominated by the urbanites who are accused of not understanding the rural problems [Choudhary 106].

\textit{The Question of Legal and Illegal}

Looking from the test of legality, these customary practices may not stand the test laid down by the modern law\textsuperscript{39} However, as stated earlier rural Haryana is hardly concerned with the state’s notion of legality and justice. State and its laws are blamed for all that goes against the traditional norms and customary practices.\textsuperscript{40} In case of any dispute, people have more faith in the traditional system and tend to place more faith in it. The sanctions it can command are ingrained in the thoughts of those it governs, to a greater degree than is the awareness of a new political system.

One wonders why, the present body of law, so elaborate, has become inconsistent with the actual practice of the vast majority of rural populace in Haryana. According to the Hindu law (old), where there was a conflict between custom and \textit{sastra}, the custom overrode the written text.\textsuperscript{41} But the result of the British rule was the elevation of the textual law over lesser bodies of customary law. While some more widespread and longstanding customs gained recognition, “the most distinct effect of continued judicial construction had been greatly to extend the operation of semi-sacred collections of written rules…at the expense of local customs which had been practiced over small territorial areas.” [Galanter 73; Gledhill
1954: 578; Maine 1895: 208]. However in case of Punjab, this dominance of custom over personal law continued to be recognized at least partially.

Under the Punjab Customary Law, custom had been given overriding effect over personal law. It was the exception rather than the rule for the personal law to be applied. The Punjab customary law was always an independent source of regulation of domestic and family relations for such tribes, regardless of religion. However, later on, with the passing of various laws this recognition was changed to one of partial recognition of customary law. For example, earlier the customary rules regulating marriages were not only observed, but also had the force of law. Much of if this changed after the passage of Hindu laws like Hindu Marriages Disabilities Removal Act 1946 which permitted same clan marriages, as well as the Special Marriage Act, 1954, which dispensed with the customary sanction to interreligious marriages, thus interfering in the rural way of life. However this does not had any effect on the actual practice.

Conclusion

India has what we might call a colonial type legal system, one in which the official law embodies norms and procedures congenial to the governing classes and remote from the attitudes and concerns of the masses. Such systems are typical of areas where governing power superimposes uniform law over a population governed by a diversity of local traditions and customs. Haryanvi society has been one capable of accommodating localism within the generality of customs. Faith in the traditional institutions such as a panchayat remains strong. The traditional panchayat is still perceived as parmeshwar (godly) and panchs as the five gods. It is generally known to work on the principle of balancing antagonistic factions and effecting a compromise. General view in the villages is that panchayats are empowered customary to deliver judgements on various issues. These must be honoured and in this alone lies the unity and prestige of the village generally and that of the biradari (community) specially [Choudhary 2004: 23]. From time to time, these panchayats have been relaxing the prohibitions on marriage between certain gots. Enforcing matters like these by legislation, courts and the law is in striking contrast to allowing them simply to be adopted gradually by various groups or communities. But these methods are too slow and irregular to appeal to the ruling group which views the society according to its own notions of equality and justice and has its own ideas of liberty.

A sizable portion of the statutory law in Haryana remains incongruent with the attitude and concerns of much of the rural population which lives under it. Contemporary legal system presents an
instance of a systematic and gradual displacement of the customary law. This process which begun with the introduction of common law in the nineteenth century, followed by the new constitutional models in the twentieth century has lead to a process of slow transformation of an hitherto cohesive multicultural rural society to an individualistic one in which the institution of morality is being replaced with technical expertise. Because of the situation, the people face multiple challenges. On one side they would like to reverse what they perceive as a policy of neglect by strengthening their traditional institutions. On the other they have to cope with the fact that the dynamics of the interface with the formal system have changed also their customary law and traditions. Some feel that the changes have been imposed on them and express their dissatisfaction with this reality by demanding recognition of their ancient customs or in the movements for self-determination.

Notes

1 See Bates and Basu (2005: 173).

2 The word panchayat has been used throughout this Article to mean the traditional panchayat and not the state instituted elective panchayat. This council is discussed in the literature as one of two types : a caste panchayat or a village panchayat. See Cohn (1959); Meschievitz and Galanter (1982); Moog (1989, 1991); Sharma (1978).


4 The formal structure of the panchayat may vary from area to area, tribe to tribe (clan), but its essential nature remains the same.


7 Harijan, January, 4, 1948.

8 James Caird’s opinion regarding decay of panchayats and subsequent comments on it by Henry Maine are found in the life and speeches of Henry Main 1982 p425 (London).

10 For more details see, Justice D.S. Singh Tevatia’s interview on youtube: “Ban marriage in same gotra”, Available at http://www.youtube.com/watch?v=TXkuZa8fGe4&feature=related (retrieved 16 October 2011). Justice Tevatia is the former Chief Justice of High Courts of Calcutta and Chandigarh. Prof. M.C. Pradhan also notes that dowry has declined on account of resolutions of khaps, See Pradhan (1966).

11 The dissatisfaction with the courts has lead to periodic reform demands that the Indian legal system should return to its traditional roots, especially by the creation of panchayats, or councils, to handle disputes from villages, See Galanter (1968: 65).

12 The panchayat decides both civil and criminal disputes of major and minor nature. Its role is basically of resolving disputes, rather than functioning as an adjudicating body.

13 The members of these panchayats are considered best judges of the merits of a case as they live in the very place where a given dispute arises. See ‘Courts and Alternatives’, Available at http://www.delhimediationcentre.gov.in/articles.htm#conciliation (retrieved 16 October 2011).

14 Athenian democracy developed in the Greek city-state of Athens, comprising the central city-state of Athens and the surrounding territory of Attica, around 508 BC. Athens was one of the first known democracies. Other Greek cities set up democracies, and even though most followed an Athenian model, none were as powerful, stable, or as well-documented as that of Athens. It remains a unique and intriguing experiment in direct democracy where the people do not elect representatives to vote on their behalf but vote on legislation and executive bills in their own right. Participation was by no means open, but the in-group of participants was constituted with no reference to economic class and they participated on a scale that was truly phenomenal.


16 The Hindu Marriages Disabilities Removal Act 1946 was passed, which permitted sagotra marriages between two Hindus notwithstanding any text, rule or interpretation of the Hindu law or any customary usage. The Hindu Marriage Validity Act which was, passed in 1949 validated inter-caste marriages, and The Hindu Marriage Act 1955 (a far more comprehensive Act), incorporated both these Acts and offered more freedom in marriage, separation and divorce. Many former colonial countries discarded legal pluralism and native or customary law upon attaining independence in favour of unitary systems ostensibly to encourage and expedite the development and modernisation. A person (whether Hindu and Muslim) is not permitted to marry into his or her clan/ got, nor with the mother’s, nor with the father’s mother nor usually with the mother’s mother. The last bar is however not universal and the restriction is apparently becoming less. For the same norms in other parts of northern India see Lewis (1958: 160–161). I have used got / gotra as synonymous with clan, meaning thereby that all those who claim to have descended from one common ancestor are known as gotra or clan.

17 Khap is a geographical area comprising a number of villages based upon exogamy, where people consider themselves to be brothers and sisters. Khap exogamy means that all men and women of the same clan, village and khap are classificatory siblings and thus marriage is prohibited between any of these units. For more details, see Hershman (1981: 133-134).
20 In all the villages the traditions and customs of the dominant clan are followed by all the clans. Although, in some parts of Haryana, namely in Sirsa district and Fatehbad there is no tradition of village exogamy as elsewhere in Haryana.

21 Muhamaddan law teaches that a marriage with any Muslim of whatever tribe is valid.


23 The Jat, Rajput, Pathan, Sayyed, Gujar, Sayyeed, Baloch and few others were designated as Agricultural tribes under the Punjab Land Alienation Act, 1900.

24 Mulle does not mean Muslim, but the word is a literal derivative of the hindi word ‘mool’ which means originally a Jat.

25 DC Rohtak to the Commissioner and Superintendent of Delhi division, in 1900, Confidential files from the Record Room (CFRP), Rohtak, I-V, VI, p. 101.

26 See Ibid. 29.


28 It was in this context that Chatterji, J had observed in Hariya v. Kanhya, 72 PR (1908) that among the Jats, it is well known that rules as to marriage are notoriously lax and among them sacerdotal notions of marriage have obtained little, if any, countenance. It is well known that Jats, especially Sikh Jats, hold very liberal views on question relating to marriage and even at the height of Brahmanical supremacy they did not show much inclination to be bound by the caste iron rules laid down in the later Hindu Smritis, interdicting marriage outside the caste and prescribing elaborate rituals for the performance of the marriage ceremony. The notions of marriage as a sacramental union and holy bond have not invaded customary law. The Hindu tribes who have converted to Islam continue to follow and practice custom. Marriage has always been a very simple affair based on the mutual consent of the parties or their guardians and essentially a contractual union dissoluble at the free volition of the parties. See [Diwan, Paras 1978:67].

29 These customary form of marriages are sanctified by the khaps (the traditional panchayats in Haryana), and continues to remain customarily accepted. Marriages among Hindu Jats (and sikh Jats) and Mulle Jats although once common have declined lately. The khaps have advocated for the continuance of such marriages between different religious groups of Jats but have met with only limited success. One such copy of resolution of Khap panchayat is available in the PhD thesis of Prof. K. S. Sangwan (1986) titled “The Rural Elite and Multi Village Panchayats in Haryana: The Case of Chaubisi in District Rohtak” (unpublished). The author’s grandfather also conducted his marriage ceremony by himself and was solemnized only by chanting of gayatri mantra.

30 Self Respect marriages were initiated in the former Madras state, to do away with the priest and traditional rites and ceremonies. They were conducted in a few minutes rather than over the course of a few days. Their proponents were harsh critics of lavish spending and praised thrift in wedding expenditure. The single most important feature of these marriages was the absence of Brahmin priest to officiate and solemnize the marriage.
These marriages were often referred to as *parppan olintat tirumanam*, or Brahmin-less marriages. For detail study, see Sarah Hodges (2005).

31 The Arya Samaj was founded by Dayanand Saraswati in 1877. It does not approve of certain aspects of Hindu mythology and religious practice. It is against child marriages, encourages widow marriages and allows inter-caste marriages.

32 See Gazetteer of India (1965: 541).


34 Chat Singh v. Asu 54 PR 1900.

35 However, according to Paras diwan, in karewa, so also in chadar-andazi no formal ceremony of marriage is required. See Paras Diwan, customary law in Punjab and Haryana, pg-69-70. In either case the marriage comes into existence when the parties cohabit for sometime. See Dalip Kumar v Fatti 99 PR 1913. If we apply the language of the contract, chadar-andazi marriage is like a contractual union, the placing of the chadar on the woman by the man is like is like making a proposal, and the acceptance of chadar is like the acceptance of the proposal.

36 Post independence, a new category of tribes known as scheduled Tribes were created. With regard to them, we found that the customary law of the tribals in general (except a few) has not forbidden polygamy. Polygamy is more widespread among the tribes of north and central India.


38 Census of India, Haryana, series 6, Part IV-A, Social and Cultural tables, New Delhi, 1986, pp.46-47.

39 A marriage between members of two different religions can only be solemnized under the Special Marriage Act of 1954. Also, a custom in order to be valid under law has to be proved and cogently established as immemorial or ancient, uniform, unvariable, continuous, certain, notorious, reasonable, peaceful obligatory and it must not be immoral or against public policy.

40 Haryana has what can be appropriately termed as a colonial type legal system, where the official law pronounces upon the validity of norms and practices (procedures), often leading to interpretation which is remote from the attitude and concerns of the rural reality. It would be unjust if the claims of people of Haryana are to be decided in accordance with the codified (personal) Law instead of their own immemorial tribal custom. These views were expressed by a professor at MDU University Rohtak (Name withheld on request), 14 March 2010.

41 Collector of Madura v. Mootoo Ramalinga, (1868) 12 M.I.A.397.

42 The intention of Section 5 of the Punjab Laws Act, 1872, was that the primary rule of decision in all question relating to inheritance, marriage, and the other matters shall be custom where a custom exists, and that the Hindu and Mohammedan Laws shall only be applied where no such customary rule prevails. Available at http://www.highcourtchd.gov.in/Left_menu/highcourtruleandorders/vol-l-pdf/chap1partMV1.pdf (retrieved 16 October 2011). The intention of the Legislature was to give the utmost prominence to custom. The Lieutenant Governor participating in the debate in the Legislative Council on 26th March 1872, said that, the object was, “to
provide in simple words, only in such a way that the officers of the Punjab in administering the law might not mistake, that custom came first, and that Hindu and Muhammadan law only came when custom failed.” (His remarks are quoted in Mr. Tupper’s Punjab Customary Law, Vol. I, page 80, seq.) It was the exception rather than the rule for the Hindu and Muhammadan Law to be applied.


44 The first, and very serious attempt to impose Muslim law on Muslims was made by the Shariat Act 1937. Section 5, Punjab laws Act 1872 stipulated that in certain matters all Punjabis will be governed by custom, unless on a particular matter there was no rule of custom. The Shariat Act 1937 repealed S. 5 of the Punjab Laws Act 1872 “in so far as it was inconsistent with its provisions”. After the coming into force of the Shariat Act, evidence of custom contrary to Muslim law is not admissible on questions of succession, special property of females, marriage, divorce, dower, adoption, guardianship and gifts (Section 6, the Shariat Act); Similarly the Hindu Laws of 1955 and 1956 (Hindu Marriage Act 1955, Hindu Succession Act 1956, Hindu Adoptions and Maintenance Act 1956, and the Hindu Minority and Guardianship Act 1956) too has left operative but a few areas of customary law (Section 4 Hindu Marriage Act 1955). See clauses (iv) and (v) of section 5, section 7 and section 29 (2) under which custom has been saved in certain matters.

Some aspects of the Punjab customary law have also been affected by other statutes, such as the Punjab Gram Panchayat Act, the Village Common Land Act, the Punjab Occupancy Tenants (Vesting of Proprietary Rights) Act, Punjab Custom (Power to Contest) Act, the Punjab Limitation (Custom) Act.

45 The British gave special recognition and protection to their unique culture, customs and traditions by the enactment of Punjab Laws Act, 1872, which gave prominence to custom over Hindu Law and Muslim law in all the matters concerning marriage, divorce, dower, adoption, guardianship, succession, special property of females, betrothal, minority, bastardy, family relations, wills, legacies, gifts, partitions, or any religious usage or institution, and the other related matters. It was explicitly stated in the Act that the rule of decision shall be custom where a custom exists, and that the Hindu and Mohammedan Laws shall only be applied where no such customary rule prevails. In case of agricultural tribes, this protection was further fortified under the Alienation of Land Bill 1900 under which restrictions were imposed on the transfer of land to a non-agricultural tribe.

46 In Punjab and Haryana, the general feeling in the rural areas after the passage of Hindu Code Bill, was one of sharp condemnation of the Indian National Congress. Most urbanites, were accused of not understanding the rural problems Interview of Hardwari Lal with Prem Choudhary, see (Choudhary 1993: 112). See also (The Tribune, 21 June 2010).

47 This is evident from the coexistence of plurality of customs in different areas of the state. For instance contrary to the general custom in Haryana, Sira and Fatehbad does not observe the principle of village exogamy.

48 The power of the panchayat lies in its fairness, its ability to carry the popular opinion of the village in its decision-making, and the social acceptance of its decisions. See Choudhary (2004: 25).

49 The Haryana Compulsory Registration of Marriages Bill which was passed in 2007 provides for compulsory registration of every marriage within a period of ninety days from the date of the marriage. The legal difficulty of proving such customary marriages is well known.; There is but one significant attempt to promote such indigenous law by devolving certain judicial responsibilities to the local elective village panchayat. But, these panchayats are
quiet a different sort of body than the traditional panchayat. It is suggested that rather than inspiring a resurgence of local law, they may instead effect a further displacement of local law with official law within the village. See Galanter (1968: 82).

The demand for the amendment of Hindu marriage Act has to be seen in this light. The problem is not that of khaps advocating the ban on same gotra marriages, but the issue is of systematic displacement of customary law by the State, by its own law. The issue is not confined to any caste or community or religion, but is a matter of cultural identity, established customs and identity of the rural populace.

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