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Review Article

Customs into Customary Law: Marriage and Succession in Kandyan Customary Law - An Anthropological Review

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Customs are well-tested in diverse social situations and, as a result, they are efficient, sustainable, and practical. Their conversion into a customary legal system, however, requires a thorough understanding of their socioeconomic and cultural background. Otherwise, customary laws can become rigid, impractical, and sometimes unreasonable. This article discusses the close relationship between customs and customary law in the Kandyan region of Sri Lanka and the risks embedded in the interpretation and application of such laws in the current socioeconomic and cultural milieu. The article discusses a recent judgment of the Supreme Court of Sri Lanka that dealt with customary marriage and inheritance rights in the Kandyan region and held that a *diga* (patrilocally) married woman forfeits her inheritance rights to her father's intestate property. The article argues, using the findings of anthropological studies in the Kandyan region, that the judgment was incompatible with some of the Kandyan customs. In the absence of a codified legal system, at least an Interpretation Guide on Kandyan customary law is needed to help avoid such incompatibilities. Anthropologists and sociologists can provide a socioeconomic and politico-cultural context for the Guide.

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The Supreme Court of Sri Lanka recently held that under Kandyan customary law, if a woman leaves her *mulgedera* (ancestral house) after contracting a *diga* (patrilocal) marriage to join her husband at his residence in another village, she forfeits inheritance rights to her father's intestate estate. The court also held that the woman can only regain such rights by returning to her *mulgedera* with her father's approval and converting her *diga* marriage to a *binna* (matrilocal) marriage (Podimanika et al. vs Peiris Singho et al. 2021).

In this article, I will show that the above judgment has not evidently paid adequate attention to Kandyan marriage and succession customs and social practices, which constitute a key source of Kandyan customary

law. As a result, it has failed to appreciate that the conversion of a *diga* marriage to a *binna* marriage is only one of several options a *diga*-married woman has under Kandyan customary law to receive a share of her father's intestate estate.

The article first outlines the relationship between customs and customary laws, highlighting how their interaction and compatibility determine the flexibility and applicability of customary laws. Second, it discusses the social and cultural context of customary laws in the Kandyan region that is relevant to the judgment. Based on several anthropological studies¹, the article examines customs and rules regarding property, marriage, and succession by paying attention to *diga* and *binna* marriages in the Kandyan region. In this regard, the article addresses several key issues: (a)

why daughters are given away on *diga*; (b) what the relevance of *daevadda* (dowry) is in a *diga* marriage; (c) whether a *diga*-married daughter loses all her succession rights to her father's intestate estate; and (d) if not, what rights a *diga*-married daughter holds at her *mulgedera*. Third, the article reviews the judgment in the context of anthropological literature on marriage and succession in Sri Lanka to ascertain whether its interpretation of Kandyan customary law is compatible with customs and social practices in the Kandyan region.

From Customs to a Customary Legal System

Customs facilitate cooperative behavior. Customary laws usually emerge from customs when a community acts as if they were legally bound to observe customs (Orebech and Bossaelman, 2005; Schooten and Verschuuren, 2008; Klabbers, 2013). People tend to follow customs as customary rules or laws if they are purpose-oriented, time-tested, and flexible. Such acceptance helps the custom to become a rule, and then a law. Article 38 of the International Court of Justice Statute (ICJS) defines customary law as evidence of a general practice accepted as law. This definition has two parts. First, a social practice is widely applied; second, it is accepted as a rule accompanied by a sense of *opinio juris* (legal obligation).

Some customs take decades, and sometimes centuries, to evolve into customary laws. After some time, they gain a normative pattern that reflects the common understanding of the community's rights and obligations; such norms later become acknowledged law. Social or political changes in the community may accelerate this process, but a customary law must carry a widespread perception of a valid legal obligation. "The key to determining whether a custom constitutes customary law is whether the public acts as if the observance of the custom is legally obligated" (Orebech and Bossaelman 2005, 17).

A customary legal system is a collection of customs recognized as rules in a particular geographical area. It has the advantage of being accepted by the people who have generated, shaped, and sustained it over time. People become more committed to customary laws than to state laws which are external to them. Customary laws are a part of the local culture, and the locals can understand them. This makes a customary legal system effective and sustainable (Schooten and Verschuuren 2008).

Customary laws are generally compatible with their original customs. Compatibility does not mean full compatibility, as there will always be some incongruence between a custom and its corresponding law. A risk in converting a custom into a law is that the latter may fail to be compatible with its original customs that have evolved in a particular socio-economic and political context. In such an instance, the law could become too rigid, thereby limiting its applicability, compatibility, and flexibility.

Variability, diversity, and, sometimes, partial incompatibility with the state law of a country make a customary legal system less precise, but it is often more relevant and applicable to practical issues of day-to-day life. "While written law tends to be more precise, customary law has the advantage that precisely because it is based on social practices, it is usually deeply ingrained in the everyday life of that society" (Klabbers 2013:26).

Sometimes people disagree about the scope and validity of a customary law or how it is being applied. In that case, they can appeal to a higher authority such as the ruler of the area or a court to interpret and validate the custom or to prescribe an appropriate procedure for its application. If the community is strong, its members can discuss the custom in a participatory manner and agree to a general code of conduct which would become a rule. In irrigation systems, farmers form farmers' organizations and clarify their ancient irrigation customs and procedures. Such customs eventually become irrigation rules which, in turn, enter national irrigation ordinances and laws. Customary law thus enjoys an 'extra-judicial existence'.

As customary law becomes complex, people might challenge its manifold interpretations. If they approach a court, its function is to ascertain the most appropriate interpretation of the custom in the context of social practices and culture of the community after determining whether the customary law is compatible with its original custom. The court usually has a degree of discretion in deciding the reasonableness of a customary law. If the customary rule is reasonable and largely compatible with its original custom, the court is bound to recognise it as law (Orebech and Bossaelman 2005). The court's decision thus becomes a precedent that enriches the customary legal system.

Customary law reflects legal pluralism, which has three key ideas. One is that two or more customary legal systems can exist side by side within a country. In Sri Lanka, for example, there are several customary legal systems – Kandyan customary law, Muslim law, and Thesawalamai law. The second idea is that customary

legal systems have evolved from sources other than the state and could therefore exist as independent fields of law. The third is that they could either be territorial or community-specific. The Kandyan customary law, for example, was earlier territorial. In the mid-19th century, it became a community law, confined to the Kandyan Sinhalese (Cooray 2011).

During the past centuries, customary legal systems of Asian countries have been influenced by their colonizers' laws. Early Western colonizers found complex customary legal systems in countries that they subjugated, and some of them were as comprehensive as Western legal systems. But many of those countries did not have Western-style central states to operate them. Anthropologists, travelers, and missionaries attempted to understand how such people had maintained social order without having European-style legal systems and central states (Merry 1988).

In the Trobriand Islands in the Pacific, Malinowski, a social anthropologist, conducted a pioneer study of "all the rules conceived and acted upon as binding obligations, to find out the nature of the binding forces, and to classify the rules according to how they are made valid" (1926:15). He distinguished rules from customs by emphasizing that "they [rules] are felt and regarded as the obligation of one person and the rightful claims of the other" (1926:55). Such rules have incrementally contributed to the formation of colonial customary legal systems. On some occasions, in attempting to reformulate customs and social practices into customary legal systems, colonial administrators and judges also created customary laws.

After conquering the Kandyan kingdom in 1815, the British found many customs and mutual obligations in Kandyan society that constituted Sinhala law.² It revealed what had existed as Sinhala Law before the British occupation of the Kandyan Kingdom. Customs, rituals, religion, social practices, and caste and class relations in the kingdom contributed to the development of a customary legal framework. Clause 4 of the Kandyan Convention of 1815 affirmed that it had been agreed between "the British Governor and the Kandyan Chiefs that the person and property of all classes would be protected according to the laws, institutions, and customs established, and in force amongst them" (Pieris 1956:2). As Marasinghe pointed out, under clause 4 of the Kandyan Convention, "the British Administration inherited an entire legal system with very different and distinct societal underpinnings from those upon which the English Common Law traditions were founded" (1979:115). Such customs and practices were flexible, unwritten, sustained by oral

histories, and frequently applied to diverse social situations such as *diga* and *binna* marriages, inheritance, and succession in intestate estates.

Colonial administrators, commentators, and scholars studied Kandyan customs and customary rules with the help of knowledgeable local leaders who were members of Kandyan *radala* (aristocratic) families. The local leaders described and interpreted Kandyan customs, social practices, and rules to administrators, scholars, and judges. Such interpretations sometimes generated a class bias in favor of the Kandyan *radala* community, although they contributed to the shaping of a local customary legal system that fit into colonial law in Sri Lanka. The British rulers superimposed their common law on local customary laws, allowing them to subsist as long as they were not "repugnant to natural justice, equity, and good conscience" (Merry 1988:870).

Pre-British Sinhala courts paid attention to situational aspects of a particular case. For example, a person who assisted another over some time was morally 'entitled' to a share of the intestate estate of the latter, even if the person, so entitled, was a non-agnate or an outsider. This broad-canvass approach was underemphasized during the British period (Obeyesekere 1967:49). The Kandyan Law Declaration and Amendment Ordinance of 1938, for example, removed the ethical aspect of such assistance. Section 25 of the Ordinance states that "a person who has rendered assistance and support or any other benefit to a person who has died intestate shall not because of such assistance, support, or benefit, become entitled to succeed to any interest in the estate to which they would not have become entitled had such assistance, support, or benefit not been rendered."

When scholars, administrators, and judges abstracted customary legal principles from a complex system of customs, rules, and social practices in the Kandyan region, it was often difficult for them to contextualize the varying complex meanings, values, and interpretations that were intertwined with sub-regional and village-level customs and rules. As a result, some customary rules that were abstracted from local customs contradicted the original spirit of Kandyan customs. An example is the legal position regarding the inheritance rights of widows. Mainly through judicial decisions, the rule that widows cannot inherit their spouses' *paraveni* (ancestral land) land got established as a customary law (Hayleys 1923). Although it is logically consistent with the principle that land should not leave the agnatic line, it is inconsistent with the custom of family socialism. Widows are important members of a village and, especially, of a family. The clash between widows' rights and the patrilineal

succession rule has been resolved by giving widows a life interest in their deceased spouses' *paraveni* land, which takes precedence over the patrilineal succession rule.

The conversion of some Kandyan customs and social practices into Kandyan customary law has been a difficult task. An example is the customary rule of patrilineal succession in *paraveni* land. The function of the rule is to keep such land within a group of agnates in a village. But as Thambiah (1973) pointed out, the supremacy of the patrilineal succession could have been copied from Hindu law in India by British scholars, commentators, and administrators who had a good familiarity with Hindu law and its application in Indian territories. In fact, the patrilineal succession rule clashes with some important Kandyan customs on family socialism. The custom dictates that each family member must look after other family members regardless of the rule of patrilineal property transmission. The family takes precedence over patrilineal succession to property (Obeyesekere 1967; Cooray 2011).

British colonial administrators believed that Kandyan customary law needed more rigor and precision. They wanted clarity regarding customs and more agreement among local chiefs and informants over matters of detail. Scholars, commentators, and administrators such as Sawers (1826), Modder (1914), and Hayleys (1923) attempted to achieve the above goals. They understood Kandyan customary law as a body of customs. They learned from Kandyan chiefs the complexities involved in different interpretations of a custom in different social contexts and recorded detailed explanations of their application (Pieris 1956). Sometimes, this methodology reduced the flexibility of customary laws, causing difficulties and bias in their application to different sociocultural contexts.

Sawers (1826) explained some of the inconsistencies between customs and customary rules by referring to the rights of a *diga*-married daughter. The customary rule is that when a daughter leaves her parents' house after contracting a *diga* marriage, she forfeits her inheritance rights to her father's estate. Sawers modified this rule by adding two comments based on the prevailing customs in the Kandyan region: first, "Some of the chiefs are of the opinion that the daughter who was previously married in *binna* leaves her *mulgedera* on *diga*-marriage may preserve for herself and her children her own and their claim in her parents' estate, by visiting him [her father] frequently and administering to his comfort, especially being present, nursing and rendering him assistance in his last

illness" (1826:6). Second, a *diga*-married daughter, if she is the only child, will inherit her parents' property regardless of the type of marriage (i.e., *diga* or *binna*) she has contracted. The two comments show the flexibility and fluidity of Kandyan customary law and how customs facilitate the application of customary laws in complex social situations.

Customary Laws on Ownership, Inheritance, and Succession in the Kandyan Region

In Kandyan areas³, a *gama* (village) is a microcosm where customs and customary rules operate regarding economic cooperation, kinship and marriage, inheritance, and succession rights. Folklore generally describes how a *gama* has come into being, its geographical, administrative, and social boundaries, and what factors sustain it as a community. In Kandyan villages, patrilineal descendants of original ancestors claim ownership over the village territory. Land, especially paddy land, in a *gama* is known as *paraveni* land, which passes from one generation to the next, based on the prevailing inheritance and succession customs and rules. Customs ensure the sustainability and stability of the community's economic organization.

The function of patrilineality is to keep *paraveni* land of a *gama* among the male descendants of the original village ancestor and prevent outsiders from occupying it (Obeyesekere 1967; Yalman 1961; Thambiah 1958; Leach 1961). In day-to-day living, the primary unit of existence in a *gama* is the *paula* (family), comprising parents and their children. The cohesiveness of a family is strong, and sometimes, succession rules are bent to accommodate family members in inheritance and succession or to disinherit a recalcitrant son or a sibling.

Although patrilineality is emphasized in inheritance and succession rules, in practice, all children inherit equally their parents' *paraveni* land and other property (Hayley 1923). Kandyan customs solve this contradiction, namely, patrilineality vs. equal inheritance, by distinguishing temporary rights from permanent rights over *paraveni* land. As an agnatic descendant, a son enjoys permanent rights in his father's *paraveni* land. Robinson (1976) found in Kothmale, a village in the Kandyan area, sons own the family's *paraveni* land individually and, therefore, they can dispose of such land the way they want. As an absolute owner of a *punguwa* (share) of the family

estate, a son can even sell his share to an outsider, although his family would consider it unethical and improper.

A daughter, too, holds permanent rights in her father's *paraveni* land when she contracts a *binna* marriage or stays at her *mulgedera* as an unmarried daughter. A *binna*-married daughter gets her *punguwa*, which is equal to a brother's share. She holds the right to her *paraveni* *punguwa* so long as she remains in her *binna* marriage. She cannot claim her share in the family's *paraveni* land if she gives up her *binna* status. However, her *binna* children will eventually inherit their mother's share in their maternal grandfather's estate. A *diga*-married daughter, on the other hand, cannot claim a share in her father's *paraveni* land because she is holding a separate estate with her husband in another village. However, if she returns to her *mulgedera*, she will regain her inheritance rights equal to those of an unmarried daughter.

The distinction between temporary and permanent rights ensures the continuity of patrilineality and the convergence of property rights among a body of agnatic relatives (Obeyesekere 1967). Sawers (1826) summarized the logic of this arrangement as follows:

"While they [sons] remain in their father's house, daughters have a temporary joint interest with their brothers in the landed property of their parents. However, they lose this when given out in what is called a *deega* marriage, either by their parents or brothers after the parents' death. It is, however, reserved for the daughters, in the event of their being divorced from their *deega* husbands or becoming widows, or destitute of the means of support, that they have a right to return to the house of their parents and then to have lodging or support and clothing from their parents' estate – but the children born to *deega* husbands have no rights of inheritance in the estate of their mother's parents" (1826:5).

When a childless son dies, his property *punguwa* and other land revert to his parents, justifying the customary rule of the primacy of the family. Moreover, when there are no male heirs, daughters inherit their parents' estate regardless of whether they are *diga* or *binna*-married (Sawers 1826; Niti Niganduwa 1880; D'Oyly 1929; Obeyesekere 1967). Thus, family solidarity

takes precedence over the matrimonial arrangements of the children.

***Diga* and *Binna* Marriages**

Of the two types of marriage – *diga* and *binna* – in Kandyan areas, *diga* marriage is preferred to *binna* marriage. Rich, privileged women, and poor, underprivileged men resort to *binna* marriage (Leach 1961). Leach found in Pul Eliya, a village in the North Central Province⁴, that 60 per cent of marriages were *diga* marriages and 40 per cent were *binna* marriages. Tambiah (1958) found that in lower Dumbura villages in the Kandyan district, 80 per cent of marriages were *diga*, and 20 per cent were *binna*.

In a *diga* marriage, a daughter is exported to another village as a bride. She leaves her *mulgedera* to ease the pressure on her family's estate and other economic resources. By leaving her family, she avoids any threat to her family's *paraveni* land. She gets a dowry at most in the form of moveable property, such as a few pieces of jewelry or a sum of money when she moves to her husband's *mulgedera* (or to a new residence in her husband's village). Her children take her husband's family name and hold succession rights to his property. Also, she adds two more hands to her husband's family to cultivate its land and do household chores, strengthening the labor force of her husband's family. This arrangement is rational when the new couple lives in the village where the husband's parents live (Thambiah 1973).

In a *binna* marriage, parents import a bridegroom from another village for their daughter. A *binna*-married daughter "raises up heirs to the proprietor by an artificial relationship" (Hayley 1923:372). She shares equal succession rights with her brothers and unmarried sisters. Her children take her father's family name. The import of a husband for a daughter from outside to the *mulgedera* does not affect the patrilineal ownership of the *paraveni* land of the family. The *binna* husband does not inherit the *paraveni* land of the family. Two sayings among the Sinhalese summarize the social statuses of the two marriage types: *diga yanawa* (go on *diga* to husband's village) and *binna bahinawa* (comes from outside and settles down at wife's *mulgedera*). The phrase *binna bahinawa* has a derogative meaning of low social status – a landless man usually prefers to leave his village to join a family of means in another village which is looking for a man who can contribute to the family's economic activities and beget children to inherit the property of his wife's parents (Thambiah 1973).

A *binna*-husband holds a subservient role at his father-in-law's *mulgedera*. Early British writers sometimes exaggerated his vulnerability. According to Modder, "A *binna* widower has no rights to or interest in his wife's property, whether ancestral or acquired, after her death" (1914:345). Nevertheless, Thambiah (1958) observed in several villages in Pata Dumbara that, although a *binna*-widower does not inherit his wife's property, he has a life interest in her property, even if he were to re-marry after her death. His children from the *binna* marriage inherit the property of his deceased wife, including the *paravani* share in her father's estate. If childless, her *paravani* property reverts to her brothers and unmarried sisters (Leach 1961).

Marriage and Inheritance

Pieris (1956), having reviewed early British documents in the Kandyan region, especially the records of the Board of Commissioners for the Kandyan Province (from 1816 to 1833) and contemporary judicial decisions, identified several principles that were applicable to the succession rights of a *diga*-married daughter to her parent's estate.

A *diga*-married daughter was entitled to inherit (i) if there was no male issue, (ii) by returning to the *mulgedera* in her father's lifetime, (iii) by returning to the *mulgedera* and contracting a second marriage in *binna* [i.e., a matrilocal marriage], (iv) by keeping a close connection with her father's house, independently of her status of destitution, [and] (v) if she was the only child of her mother, she shared with the children of her father by another wife (1956:14).

Thambiah's analysis (1973) of his extensive anthropological field observations in Pata Dumbara of the Kandyan province is similar to the conclusions of Pieris'. Thambiah found that a *diga*-married daughter could inherit her father's estate by (a) returning to her *mulgedera*, (b) keeping close and regular contact with her parents, (c) contracting a *binna* marriage after her husband's death or divorce, and (d) assisting parents and unmarried siblings when they suffer from economic or health problems. The broad congruence between Pieris' and Thambiah's findings demonstrates that the above inheritance customs have remained the same over a period of at least 150 years.

Niti Niganduwa (1880) and Armour (1860) discussed the importance of familial assistance, its situational character, and its implications for succession and inheritance. They maintained that a returning *diga*-married daughter to her *mulgedera* can recover her rights by contracting a *binna* marriage or dedicating her life to assist her parents and unmarried siblings. Such familial services are intertwined with her rights in her parent's estate.

In addition to inheritance rights, a *diga*-married daughter also has the right to receive 'assistance' from her father and brothers in circumstances such as divorce, widowhood, and destitution, regardless of whether she had received a dowry or not. Kandyan customs dictate that her father and brothers are bound to provide residence, subsistence, medical care, and other facilities for her and her children until her death and until her children reach adulthood (Leach (1961), Obeyesekere (1967), and Yalman (1967). The concept of assistance is a good piece of "evidence of great flexibility" of the Kandyan customary law (Goody and Tambiah 1973:131).

Commentators, writers, and judges, in interpreting the Kandyan customary law, have introduced concepts such as 'forfeiture' and 'severance' to Kandyan customary law from English common law. Such concepts emphasize that a *diga*-married daughter does not have succession rights to her father's estate, as she has already forfeited such rights by severing her relationship with her *mulgedera*, leaving her village, and settling down at her husband's *mulgedera* in his village.

The formal ceremony of taking the bride to the bridegroom's *mulgedera* or bringing a husband from outside for a daughter will not make a marriage a *diga* or a *binna* marriage. The significance and validity of *diga* or *binna* marriage depend on the declared intentions of the couple and their parents to abide by inheritance and succession rules of the type of marriage they seek to establish (Hayley 1923; Obeyesekere 1967; Yalman 1961). Moreover, a customary marriage was recognized as valid not because the couple had followed customary procedures and rituals, but because they had obtained their parents' consent for the union.

Diga Marriage and Dowry

Dowry plays a role in *diga* marriages. In the 19th century, judges often referred to dowry arrangements to define and ascertain succession rights of a daughter to her father's intestate estate (Obeyesekere 1967). A *diga*-married daughter was entitled to a dowry as an advance of her inheritance from her parents (Hayley 1923; Leach

1961). A dowry is a mechanism to allocate a portion of family property to a *diga*-married daughter while ensuring the ownership of *paraveni* land would not leave the village patri-kin group. A dowry usually comes from the mother's acquired property. This practice restricts the rights of the children of a *diga*-married daughter on her father's property (Obeyesekere 1967). A dowry sometimes functioned as a mechanism to buy off potential claims of a *diga*-married daughter on her parents' property (Bulten et al. 2018).

A *diga*-married daughter should ideally get as her dowry the equal value of her share in her parents' property – land and movables such as money and jewelry. The value of a dowry in some Kandyan villages 'equals or exceeds' the value of the daughter's *paraveni* share in the family estate (Thambiah and Goody 1973:130). If the value of the dowry is not equal to her share in her parent's estate, she is entitled to receive economic assistance from her parental family. For this purpose, some parents leave their acquired lands aside for their *diga*-married daughter(s).

In Pul Eliya, the average value of a son's inherited land is more than double that of his *diga*-married sister's dowry. A son, on average, inherited 0.375 acres of paddy land and 0.721 acres of highland, whereas a daughter, on average, received as her dowry the value of 0.181 acres of paddy land and 0.395 acres of highland. The average value of the dowry of a *diga*-married daughter was 48 per cent of the value of her brother's paddy land share and 55 per cent of his highland share. Thus, a *diga*-married daughter got only about 50 per cent of her share of the family's property as dowry, and the remaining 50 per cent was practically never given (Thambiah 1973; Leach 1961). As a result, a *diga*-married daughter does not forfeit her inheritance rights over her family's estate. Even if a *diga*-married daughter got the full value of her share in her family estate as a dowry, she can still return to her father's *mulgedera* as a widow, a divorcee, or a destitute woman. In such a situation, family assistance to her and her children is not determined based on whether she has received a dowry or not.

Family Assistance and Succession

Sons and daughters do not automatically inherit shares of the property of their father. They become entitled to his estate only if he recognizes them as heirs presumptive. Such recognition involves situational factors such as residential propinquity, their patterns and frequency of visiting the *mulgedera*, and the assistance provided to the *mulgedera* (Sawers 1826). In

his last will, the landowner may allocate a reasonable portion of his estate to a *diga*-married daughter who has regularly assisted him and the family. At the same time, he may leave no property to other family members if they have ignored their responsibilities towards the family and its welfare (Thambiah 1958, 1963; Goody and Thambiah 1973; Obeyesekere 1967). The key issue in succession is not always the type of marriage children have contracted, but how much assistance the children as family members have provided to their *mulgedera*. "Support and assistance afforded to an aged or sick person was valuable for the transfer of property, even to the exclusion of undutious heirs-in-law" (Pieris 1956:9).

A landholder can bequeath a share to an outsider who has assisted him and acted as a family member over a period of time. In an intestate estate, such an assistant can get a share of family property for rendering family assistance only if all siblings agree to the arrangement. Therefore, parents sometimes record such special benefits in a last will to avoid family feuds. As discussed earlier, Section 25 of the Kandyan Law Declaration and Amendment Ordinance No 39 of 1938 excludes a non-heir who has assisted the family from any interest in the estate. It is an example where the formal law curtails the application of a benevolent custom in the Kandyan areas.

Customs, Customary Law, and Judicial Precedents

The final section of the article reviews the Supreme Court's decision mentioned at the beginning of the paper in the light of the above discussion. To summarize the facts of the case: Yahapath Hamy, a Kandyan man, owned *paraveni* land in his village, Halmillawewa. One of his daughters, Doli Manika, after contracting a *diga* marriage in 1957, left her *mulgedera* and joined her husband in his village. Doli Manika lived with her husband until his death in 1972. Soon after her husband's death, she and their four children returned to her parents' *mulgedera*. At that time, Yahapath Hamy was alive. He died intestate in 1973. His wife, Ran Manika, who had a life interest in his property, died in 1992. Doli Manika claimed a *punguwa* of her father's intestate estate on the grounds that upon returning to her *mulgedera* with her father's consent after her husband's death, and enjoying the property of her parents, she had re-activated her succession rights to her father's intestate property. Some of her relatives disputed this claim at the District Court.

The District Court⁵ held that Doli Manika's mere return to her *mulgedera* did not entitle her to the rights of a *binna*-married daughter. The Provincial High Court in Kurunegala⁶, on appeal, held that Yahapath Hamy had re-admitted Doli Manika to his *mulgedera* by allowing her to live there and use the family's property for her and her children's subsistence and welfare. Thus, Doli Manika came under the "paternal power" of her father, which, in turn, made her "an heir to his property." There were only three active claimants for the property, and Doli Manika was one of them. The high court concluded that Doli Manika should inherit an undivided one-third of the land that was sought to be partitioned. Aggrieved relatives of the judgment appealed to the Supreme Court against the High Court's judgment.

The Supreme Court opined that the decisive factor in the appeal was whether Doli Manika's father re-admitted her as a *binna* daughter to his family. The court accepted the submission of the defendant-appellants that Doli Manika was not entitled to a share of her father's intestate estate because she "had not adduced any evidence as to how her forfeited right to succession was revived and re-admitted to the household upon return to the *mulgedera* in 1972." Moreover, the court held that since Doli Manika had not converted her *diga* marriage to a *binna* marriage, she was not entitled to "any of the rights a Binna daughter might have."

The above judgment can be examined in the light of the customs of the Kandyan region. A *diga* marriage is not a strategy to get rid of surplus daughters from a family (Heyley 1923); but a mechanism to keep *paraveni* land within the family by avoiding the transfer of such land to outsiders through marriages (Thambiah 1958; Obeyesekere 1967). A practical approach to achieve this custom is to give a *diga*-married daughter a dowry which does not include the family's *paraveni* land. Instead, it consists of jewelry, furniture, cash, or a piece of acquired land in another village. In well-to-do families, the value of a dowry could be more than the value of a *paraveni* share. When the value of a dowry is less than the value of a *paraveni* share or when no dowry is given, a *diga*-married woman is entitled by custom to receive care and support from her father and brothers.

The Supreme Court's judgment does not say whether or not Doli Manika received a dowry from her parents. Three possibilities in this regard were: (a) she did not receive a dowry; (b) she received a dowry, but its value was less than the value of her *paraveni* share; and (c) she received a dowry which equalled or exceeded the value of her *paraveni* share. In the cases of (a) and (b), Doli

Manika had not only the right to return to her *mulgedera*, but also to receive care and support for her and her children from her father's family and inherit a share of her father's intestate estate, based on the proportion of the share she had already received as her dowry. In the case of (c), she retained the right to return to her *mulgedera* and get the support and care from her parents and brothers. But she did not inherit a share of *paraveni* land, as she had already received the value of her share or more as her dowry.

In the case of Doli Manika, her father and other family members acknowledged and consented to her returning to the *mulgedera* as a widow and engaging in land operations. Such arrangements depict the principle of family socialism in customary Kandyan law. The recognition and treatment Doli Manika had received at her *mulgedera* upon her return were sufficient evidence for her regaining membership at her *mulgedera*, which, in turn, revived her succession rights.

In the above circumstances, the term the court used – forfeit – is inappropriate. Forfeit means to lose or deprive of property or a right or a privilege (The New Oxford Dictionary of English. 2001). The term 'forfeit' also contains an element of punitive action. Doli Manika did not forfeit her inheritance rights when she married on *diga*; instead, she left behind her succession rights with her family to avoid her husband, who was an outsider, from getting any interest in her *paraveni* share at her *mulgedera*, as such an interest can disturb the patrilineal principle of succession.

The Supreme Court considered several legal issues in the appeal:

- A. Did the Provincial High Court err in law by concluding that Yahapath Hamy had re-admitted Doli Manika as a *binna*-married daughter by allowing her to possess the land comprising the *mulgedera* before his death? Could Yahapath Hamy, in law, re-admit his *diga*-married daughter as a *binna*-married daughter during the subsistence of her *diga* marriage in contravention of Section 9(1) of the Kandyan Law Declaration and Amendment Ordinance No.39 of 1938?
- B. Did the Provincial High Court err in law by concluding that Yahapath Hamy could, in law, grant rights in the immovable property to Doli Manika in contravention of Section 2 of the Prevention of Frauds Ordinance No 7 of 1840?
- C. Did the Provincial High Court err in law by misapplying the burden of proof required in

proving that Doli Manika had regained *binna* rights?

Regarding (A) and (B) above, the assumption that a *diga*-married daughter could be 're-admitted' to her *mulgedera* gives the impression that her father or brothers had the discretion to refuse her return and living at her *mulgedera* and receiving family assistance. The Kandyan custom is that a *diga*-married daughter has the right to return to her *mulgedera* and live there with her parents and siblings. Thus, Doli Manika was entitled to depend on her father and brothers for her and her children's subsistence, clothing, housing, and welfare. Moreover, Doli Manika cultivated family land with her father's consent and shared benefits as a member of the *mulgedera*. The appropriate wording in this context therefore is: 'when a *diga*-married daughter returns', not 'when readmitted' to her *mulgedera*.

A *diga*-married daughter could return to her *mulgedera* not only because she has the right to return, but also because she retains her succession rights to her mother's property. According to Niti Nighanduwa (1994) and Armour (1861), a daughter's rights to her mother's property are governed by different rules from those regulating succession to her father's property. A *diga*-married daughter is "not excluded from her mother's property, either paraveni or acquired. An unmarried sister, a *binna*-married sister, a *diga*-married sister, and a brother are all entitled to equal portions of their mother's property' (Thambiah 1958:23). Doli Manika's mother's property and Doli Manika's right to inherit such property should have been examined in the judgment.

Doli Manika returned to her *mulgedera* as a widow. The return of a *diga*-married daughter to her *mulgedera* indicated that she was no longer a *diga*-married woman. According to section 9 (1) of the Kandyan Law Declaration and Amendment Ordinance of 1938, Doli Manika ceased to be a *diga*-married woman after her husband's death. In the case of *Jayasinghe vs Kiribindu and Others* 1997 (2) SLR 1, Justice Wadugodapitiya, in his dissenting judgement, held that in terms of 9(1) of the Kandyan Law Declaration and Amendment Ordinance of 1939, a *diga*-marriage is dissolved upon the death of the *diga*-husband. Doli Manika, thus, re-assumed the status of a single woman in her father's family upon her husband's death. The new status justified her return to her father's *mulgedera*. Broadly, as an unmarried woman in the family, she also became entitled to inherit a share of her father's estate in proportion to the value of the dowry that she had received.

Doli Manika's return to her *mulgedera* after her husband's death did not indicate severance of her relationship with her *diga*-husband's family. An amicable agreement between the two families regarding the resettlement of Doli Manika and her children at her *mulgedera* could also have ensured her children's inheritance from their father's estate in his village.

Regarding (C) above, the judgment applied in *Jayasinghe vs. Kiribindu* (1979 (2) NLR 1973) held that unless Kiribindu is re-admitted into her father's family by a *binna* settlement, she cannot re-acquire the rights of a *binna*-married daughter. The key ingredients of the *binna* settlement in Kiribindu are (i) return to *mulgedera* with her father's consent and, if her father is not alive, with her brothers' consent, (ii) settling at the *mulgedera* as a *binna*-married couple with her husband, and (iii) if widowed or divorced, contracting a *binna*-marriage.

Regarding (ii) above, it is impossible to expect a *diga*-married husband to become a *binna*-married husband with the same wife as part of her 'binna settlement'. A *diga*-married man would certainly disagree with such a conversion of marital status, as it would undoubtedly lower his social status, impacting on his relationship with his wife and her family. Under a *binna* settlement, she would hold succession rights to her father's estate, and her husband would become only an assistant to her family. He must be ready with a walking stick, a torch, and a *talipot* to leave the *mulgedera* of his wife at any time on the orders of his wife, father-in-law, and brothers-in-law.

Regarding (iii), if a daughter returns to her *mulgedera* and marries a man in *binna*, an outsider joins the *mulgedera* as her husband. Usually, an outsider is brought in as a husband for a daughter when the family needs more men to cultivate the family's land and raise children to continue the patrilineal line. It was unlikely that Doli Manika wanted a *binna* settlement, as she and the four children had already been receiving care and support from her father's family. In such a situation, the arrival of a new *binna*-husband could be more of a burden than an asset to the family. On the other hand, the family might not need another man to work on its land.

In the above context, Doli Manika's claim that "upon coming back to her *Mulgedara* she acquired the rights of a woman under the *Binna* marriage" (Supreme Court 2021:11) needs elaboration. It means that her inheritance rights, being a single woman, are like those of a *binna*-married sister who lives at *mulgedera*. The Kandyan custom is that a *diga*-marriage does not impact the succession rights of a daughter who

returned to her *mulgedera* (Thambiah 1958; Obeyesekere 1967). When such customs became a part of Kandyan customary law, formal marriage registration was only an extra requirement added.

Conclusion

Customs are efficient, practical, and well-tested over centuries by being applied to diverse social situations. Their conversion into customary laws can make them rigid, impractical, and sometimes unreasonable. The continuing use of terms such as 'forfeiture', 'severance', and '*binna* settlement' in Sri Lanka's jurisprudence highlights the fundamental difference between customs and customary law. Customs and customary laws co-exist and need each other to become efficient, practical, and acceptable. As a result, if a court interprets a customary law in a rigid manner or adds more conditions or deviates from its original scope, the gap between the customs and its corresponding customary law might become too wide, making the latter inflexible and unreasonable. In Doli Manika, the conditions imposed by the court that she should have adduced evidence to prove that she was in fact readmitted to her *mulgedera* and that her succession rights were revived are unreasonable. Kandyan customs explain the circumstances in which a *diga*-married daughter could return to her *mulgedera* and her rights. Kandyan customs do not require that Doli Manika should have converted her *diga* marriage to a *binna* marriage to enjoy her succession rights to her father's estate. By insisting on such extra requirements, courts generate irreconcilable gaps between customs and customary law. The outcome will be a weak and impractical customary legal system.

In the absence of a codified law of Kandyan customary law, one way to arrest the widening gap between customs and Kandyan customary law is to prepare an Interpretation Guide for key Kandyan customary rules. In the early British period, judges, scholars, and commentators on customs and Kandyan customary law depended mainly on local chiefs or assessors to interpret them. Ordinary people were not consulted in ascertaining the original customs or customary laws.

More than 90 years ago, the Kandyan Law Commission of 1927 had as its objectives (i) removing uncertainties in the interpretation of Kandyan customary laws; (ii) bringing back the spirit of customs and social practices to the Kandyan customary law which had been undermined by judicial interpretations; and (iii) recommending changes in or additions to the customary laws enabling them to deal with modern

socioeconomic conditions. Based on the recommendations of the Commission, the government enacted several ordinances such as the Kandyan Law (Declaration and Amendment) Ordinance, 39 of 1938 to settle disputed questions (Cooray 2011).

The Kandyan Law Commission's objectives are pertinent to today's need for Kandyan customary legal reforms. The government may appoint an independent panel comprising legal practitioners, administrators, representatives of the public, and customary law experts to review Kandyan customary law and recommend revisions. In such an effort, anthropologists and sociologists can play a critical role in finding and interpreting customs, social practices, and social rules and prohibitions in the Kandyan region on marriage, succession, and inheritance. Such an engagement of social scientists helps understand customary laws in their social and cultural context. Such an approach will help ensure the flexibility and applicability of Kandyan customary law and its compatibility with original customs.

Footnotes

¹ Pieris (1956), Thambiah (1958, 1965), Leach (1961), Obeyesekere (1967), Yalman (1967), Goody and Thambiah (1973), and Robinson (1976). The author conducted several village studies in the 1970s in Kandyan and North-Central Provinces on class relations and social change. Living long periods in villages helped to gather firsthand knowledge of how villagers apply customs and social practices to diverse social situations such as marriage and succession. Such knowledge, in turn, helped check the veracity of the findings of the anthropological studies conducted in the 1950s and 1960s on inheritance, succession, and marriage in Kandyan areas.

² Kandyan customary law. Roman-Dutch law was the prominent legal system in the maritime provinces of Sri Lanka under the Dutch at that time. It did not supersede the Sinhala law.

³ North Central Province was a part of the Kandyan kingdom.

⁴ Traditionally a part of the Kandyan Kingdom.

⁵ Case number 11938P, Kuliyaipitiya District Court

⁶ HCCA (Kurunegala): NWP/HCCA/KUR/88/2003/F

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