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

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Abstract

Customs in a society are well-tested in diverse social situations. As a result, they are efficient, sustainable, and practical. Their conversion into a customary legal system, however, requires a thorough understanding of their social and cultural background. Otherwise, customary laws and their interpretation could become rigid, impractical, and sometimes, unreasonable. This article discusses the close relationship between customs and the customary law of the Kandyan region in Sri Lanka and the risks embedded in the interpretation of such laws in current social milieu. The article discusses a recent judgment of the Supreme Court of Sri Lanka on customary marriages and inheritance rights in Kandyan region which held that a *diga* (patrilocally) married woman forfeits her inheritance rights to her father's property. The article argues using 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 the Kandyan customary law is need to help avoid the inconsistencies. Anthropologists and sociologists could provide the socio-economic 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 *hermulgedera* (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 argue 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. The conversion of diga marriage to a binna marriage is only one of several options a diga-married woman has under Kandyan customary law to claim 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 the applicability of customary laws. Second, it discusses social and cultural context of customary laws in the Kandyan region that are 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 are daughters given away on diga; (b) what is the relevance of *daevadda* (dowry) in a diga marriage; (c) does a diga-married daughter lose all her succession rights to her father's intestate estate; and (d) if not, what rights does a diga-married daughter hold at her mulgedera. Third, the article reviews the Supreme Court's judgment in the context of anthropological literature on marriage and succession to ascertain whether the court's interpretation of the Kandyan customary law is compatible with customs and social practices in the Kandyan region.

From Customs to a Customary Legal System

Customs facilitate cooperative behaviour. Customary laws usually emerge from customs when a community acts as if they were legally bound to observe the 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. 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 the 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, so the locals can understand them. This characteristic makes a customary legal system effective and sustainable (Schooten and Werschuuren 2008).

Customary rules must be compatible with their original customs. Compatibility does not mean full compatibility, as there will always be some incongruence between a custom and its corresponding rule. A risk in converting a custom into a rule

is that the rule may fail to represent its original custom that has evolved in a particular social context. In such an instance, the rule could become too rigid thereby limiting its applicability and flexibility.

Variability and 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 rule or how it is being applied. In that case, they can appeal to a higher authority, such as the ruler of the area, to interpret and validate the custom or to prescribe a suitable procedure for its application. 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 the original customs. The court usually has a degree of discretion in deciding the reasonableness of a customary law. If the customary rule is not unreasonable and compatible with its original custom, the court is bound to recognise it as law (Orebech and Bossaelman 2005). The court's decision thus become a precedent that enriches the customary legal system.

Customary law reflects legal pluralism. Legal pluralism 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, several customary legal systems exist - 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 the laws of colonizers. Early Western colonizers found well-developed customary legal systems in countries that they subjugated and some of them were as comprehensive as Western legal systems. But such countries did not have Western-style central states to operate them. Anthropologists, travellers, and missionaries attempted to understand how such people had maintained social order without having European-style legal systems and central states (Merry 1988).

In 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 forming of colonial customary legal systems. On some occasions, in reformulating customs and social practices into customary legal systems, colonial administrators and judges had also created customary laws.

After conquering the Kandyan kingdom in 1815, the British found many customs and mutual obligations in the Kandyan

society which constituted the Sinhala law.² They 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 develop 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 that 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. They described and interpreted Kandyan customs, social practices, and rules to administrators, scholars, and judges. Such interpretations sometimes generated a class bias in favour of the Kandyan *radala* community although contributed to the shaping of a local customary legal system that fit into the colonial law in Sri Lanka. The British rulers superimposed their common law on local customary laws, allowing customary laws 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 Kandyan custom is that a person who has assisted another person over some time is 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 underemphasised during the British times (Obeyesekere 1967:49). The Kandyan Law Declaration and Amendment Ordinance of 1938, for example, removed the ethical aspect of 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, becomes entitled to succeed to any interest in the estate to which would not have become entitled had such assistance, support or benefit has not been rendered'.

When scholars, administrators, and judges abstracted customary legal principles from a complex system of customs and social practices in the Kandyan region, it was often difficult for them to contextualise varying complex meanings, values, and interpretations that were intertwined with sub-regional and village level customs and rules. As a result, some customary rules which were abstracted from 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, in a family. The clash between widows' rights and patrilineal succession rule has been resolved by giving widows life interest in their deceased spouses' *paraveni* land, which takes precedence over 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. Its function is to keep such land with a group of agnates in a village. But as Thambiah (1973) pointed out, the supremacy of patrilineal succession could have been copied from the Hindu law in India by British scholars, commentators, and administrators who had a good familiarity with the Hindu law and its application in Indian territories. In fact, 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 rigour and precision. They often wanted more clarity on 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 these goals. They understood the 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 has reduced the flexibility of customary laws, causing difficulties in their application in 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 the 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 laws operate regarding economic cooperation, kinship and marriage, inheritance, and succession rights. Village folklore describes how a gama has come into being, its geographical, administrative, and social boundaries, and what factors sustain it as a community. In most Kandyan villages, patrilineal descendants of the 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 a gama.

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, 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, that sons in a family own land individually and can dispose of their paraveni 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 and relatives would consider such an action unethical and improper. Nevertheless, there is no legal prohibition on selling a village *punguwa* to an outsider.

Daughters do not get permanent or absolute succession rights to their fathers' paraveni land. A binna-married daughter gets her *punguwa*, equal to her brother's *punguwa*. She holds the right to her paraveni share so long as she remains in her binna marriage. She cannot claim her share of family's paraveni land if she gives up her binna status. However, she can still hold her *punguwa* for her binna-children who will eventually inherit their mother's *punguwa* in their maternal grandfather's estate. A diga-married daughter, on the other hand, cannot claim a share in her family'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 have inheritance rights, equal to that of an unmarried daughter, to her father's intestate property.

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 husband have no rights of inheritance in the estate of their mother's parents" (1826:5).

When a childless son dies, his property *punguwa* reverts to his parents, enabling them and his siblings to enjoy it. This customary rule justifies 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 Dumbara 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 estate and other economic resources. By leaving her family, she avoids any disturbance to her family's paraveni land. She gets a dowry at most in the form of moveable property, such as a few pieces of jewellery 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 labour force in her husband's family. This arrangement is economically rational if the husband lives in the village where his land is located (Thambiah 1973). Sometimes, a diga-married daughter is likely to receive some of the parental acquired property outside her native village, and such lands are usually highlands.

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 surname. 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, as the binna husband does not inherit the paraveni land of the family. Two sayings among the Sinhalese summarize the social status 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 man from a landless family usually prefers to leave his village to join a family of means in another village which is looking for a man who could contribute to the economic activities of the family and help a daughter to beget children to inherit their grandparents' paraveni land (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 inherit the property of his deceased binna wife. If childless, her 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 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 matrilineal 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).

Niti Niganduwa (1880) and Armour (1860) discussed the importance of familial assistance, the situational character, and their 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.

Thambiah's analysis (1973) of his extensive anthropological field observations in Pata Dumbara of the Kandyan province are similar to the conclusions that 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 200 years.

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. Such concepts emphasise 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, and moving outside of her village and settling down at her husband's mulgedera. 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 referred to dowry to define and also to 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's patri-kin group. A dowry for a diga-married daughter usually comes from her 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 jewels (Thambiah 1973). If the value of the dowry is not equal to her share in her parent's estate, she is entitled to economic assistance from her parental family. For this purpose, some parents leave some of their acquired lands aside for their diga-married daughter(s). As a dowry is an 'advance' of her total inheritance share, she does not forfeit her succession rights in her father's estate (Thambiah 1973).

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 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 widower, 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 unduteous 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.

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 a key custom in Kandyan areas.

A person who has rendered assistance and support or any other benefit to a person who has subsequently died intestate shall not, because of such assistance, support, or benefit, become entitled to succeed to any interest in the estate of such deceased intestate to which he would not have become entitled had such assistance, support or benefit not been rendered (section 25).

Customs and Judicial Precedents

The final section of the article reviews the Supreme Court's decision mentioned at the beginning 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, contracted a diga marriage in 1957 under the General Marriage Ordinance, left her mulgedera, joined her husband's family in his village, and lived with him for about 15 years until his death in 1972. After his death, Doli Manika returned with her four children to her parents' mulgedera. At that time, Yahapath Hamy was alive. He died intestate in 1973. His wife, Ran Manika, who had life interest in his property, died in 1992. Doli Manika claimed a share of her father's intestate estate on the ground that upon returning to her mulgedera with her father's consent, she had re-activated her succession rights to her father's estate.

The District Court (DC) Kuliapitiya No: 11938P) held that Doli Manika's mere return to her mulgedera had not entitled her to regain the rights of a binna-married daughter. The Provincial High Court in Kurunegala⁵ 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. As a result, Doli Manika became entitled to a share of her father's intestate property. Several aggrieved relatives appealed to the Supreme Court against the High Court's judgement.

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 she had not converted her diga marriage to a binna marriage, which would have conferred on her 'any of the

rights a Binna daughter might have’.

According to the Kandyan customary law, a diga marriage is not a strategy to get rid of surplus daughters from a family (Heyley 1923). It is 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 diga-married daughter is usually given a dowry which does not include paraveni land. A dowry usually consists of jewellery, furniture, and cash or a piece of acquired land of the family in another village. 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). Where it is less or where she does not get any dowry, she is entitled to economic assistance from her father and brothers at the mulgedera.

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) or (b), Doli Manika could have returned to her mulgedera on widowhood, ill-treatment by her husband or economic hardship to receive care and support for her and her children. In addition, she was entitled to inherit a share of her family’s 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 does not inherit a share of paraveni land, as she had already received the value of her share or more as a dowry. In the case of Doli Manika, her father and other family members acknowledged her returning to the mulgedera as a diga-widow, engaged her in land operations, and looked after her children. Such arrangements, although informal, depict the principle of family socialism.

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 married on diga; instead, she temporarily left behind her succession rights with her family to avoid her husband, who is an outsider, getting any interest in her paraveni share, as such interest might have disturbed 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 of 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 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 about 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 staying at the mulgedera and receiving family assistance. The Kandyan custom is that a diga-married daughter can return to her mulgedera and live with her parents and siblings. Doli Manika was entitled to depend on her father for her and her children's subsistence, clothing, and housing. She participated in cultivating family land and shared benefits as a member of the mulgedera. The appropriate wording therefore is: when a diga-married daughter returns, not '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 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). Information about Doli Manika's mother's property and Doli Manika's right to inherit such property were important issues that the court should have examined in the judgment.

Doli Manika returned to her mulgedera as a widow. The return of a diga-married daughter to her mulgedera as a widow 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. She 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 subject in proportion to the value of the dowry that she had received. 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's return to her mulgedera after her husband's death did not indicate severance of her relationship with her diga-husband's family. His parents and her parents would have discussed about her resettlement at her father's mulgedera. Usually, an amicable agreement between the two families regarding the resettlement of Doli Manika and her children at her father's mulgedera would have facilitated her children's inheritance from their father's estate in his village.

Regarding (C) above, the judgement applied *Jayasinghe vs Kiribindu* (1979 (2) NLR 1973). In *Kiribindu*, the Supreme Court 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, according to the Supreme Court 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 a part of a 'binna settlement'. A diga-married man would 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 a temporary

worker of 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. In the case of Doli Manika, such a binna settlement was unlikely as she already had four children to maintain with her father's family support. In such a situation, a binna-husband would 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 the family 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 does not mean that she should have remarried under a binna settlement. But it means that her inheritance rights, as a single woman in her father's family, are similar to that of a binna-married sister.

Doli Manika could not have accommodated her four children in a 'binna-settlement' at her mulgedera. Two issues in this regard are: (a) would the children from her diga-marriage become entitled to their maternal grandfather's estate, if she subsequently contracted a binna marriage; (b) would her children become entitled to their diga-married father's estate in addition to their entitlement to their maternal grandparents' estate. Both questions would generate affirmative answers which defy Kandyan customs and Kandyan customary law.

Section 25 (2) of the Ordinance of 1938 states that

where after the commencement of the ordinance a woman leaves the house of her parents and goes out in diga with a man, but not contract with that man a marriage which is valid according to law, she shall not by reason only of such departure or going out forfeit or to have lost any right of succession to which she is or was otherwise entitled on the death of any person intestate.

The above section affirms that a daughter's succession rights are unaffected by (a) the departure from her home and (b) joining her husband's family. It is too arbitrary to state that the mere registration of marriage forfeits her succession rights. 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 the custom became a part of Kandyan customary law, marriage registration was the only critical requirement added.

Conclusion

Customs are efficient, practical, and well-tested over centuries by being applied to diverse social situations. Their conversion (not evolution) into customary laws could make them rigid, impractical, and sometimes unreasonable. The continuing use of the terms such as forfeiture, severance and 'binna settlement' in Sri Lankan jurisprudence highlights the

fundamental difference between a custom and a customary law. Customs and customary laws co-exist and need each other to be efficient, practical, and acceptable. As a result, if a court interprets a customary law in a rigid manner and adds more conditions, the gap between the custom 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 re-admitted 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 will generate irreconcilable gaps between customs and customary law. The outcome will be a weak and impractical customary law.

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, commentators on customs and the Kandyan customary law depended on local chiefs or assessors for interpretation of customs and customary laws. Court decisions over 200 years have also contributed to the interpretation of the Kandyan customary law. More than 90 years ago, the Kandyan Law Commission of 1927 had as its objectives (i) how to remove uncertainties in the interpretation of the law; (ii) how to bring back the spirit of customs and social practices to the Kandyan customary law which had been undermined by judicial interpretations; and (iii) to recommend changes in or additions to the customary laws enabling them to deal with modern conditions. Based on its recommendations, the government enacted several ordinances, such as the Kandyan Law (Declaration and Amendment) Ordinance, 39 of 1938, to settle many disputed questions (Cooray 2011). The commission's objectives are pertinent to today's need for customary legal reforms. The government can appoint an independent panel to review the Kandyan customary law and to recommend revisions. In such an effort, anthropologists and sociologists could play a critical role in finding and interpreting the customs, social practices, and social rules in the Kandyan region regarding marriage, succession, and inheritance. Such an engagement of social scientists can help understand customary laws in their social and cultural context, as anthropologists did in the 1950s and 1960s in the Kandyan region. 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 HCCA (Kurunegala): NWP/HCCA/KUR/88/2003/F

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