The Origins of the Laws of the Kandyans

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JULY - OCTOBER, 1956

the UNIVERSITY OF CEYLON REVIEW
VOL. XIV Nos. 3 & 4

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THE Island of Ceylon, amongst its many notable attractions, possesses the special attribute of being a legal museum.[1] The most fascinating of its living systems is the so-called Kandyan Law[2], which is known to be the remnant of the system of law formerly administered and observed amongst the Sinhalese people prior to the ascendency of European rulers in the Low Country.[3] Applied to-day to the Kandyan Sinhalese[4], it is a part of the heritage of the Ceylonese people as a whole, and it is most unfortunate that so little is known about its origins and development. Without its historical background no system of law can be properly appreciated, and the social history of the society in which it is applied must remain largely uncharted. The legal history of the Kandyans being largely unwritten or based upon misconceptions there exists a case for attempting a new approach, in an effort to make a small contribution, from the legal side, to the early history of the Sinhalese people.

Since no Sinhalese jurisprudential literature exists[5], other than the *Niti Nighanduwa*, which probably saw the light about 1825-30 at the earliest[6], the story of the origins and development of the Kandyan Law must be based upon the state of that system as discovered painfully and with much hesitation during the existence of the Court of the Judicial Commissioner at Kandy from 1815-33, supplemented by details derivable from earlier sources such as Knox and Ribeiro, and augmented by inferences which

*The author acknowledges with gratitude his obligations, of so many sorts, to Dr.H. W. Tambiah, but for whose kind encouragement and assistance his studies in Kandyan Law would always have been remote. To many of Dr.Tambiah's friends, too numerous to mention, he owes gratitude for their varied thoughtfulness for the needs of a foreign investigator of two systems of law in Ceylon.

1. Jennings, Sir Ivor and Tambiah, H. W., *The Dominion of Ceylon, the development of its Laws and Constitution*, London, 1952. Professor T. Nadaraja, *The Legal Systems of Ceylon*, (1952) 10 University of Ceylon Review, 31-46.

2. Jennings and Tambiah, *op. cit.*, 237 & seqq Nadaraja, *op. cit.*, 33.

3. Hayley, *cit. inf.*, 20-5 ; Jennings and Tambiah, *op. cit.*, 244-5.

4. Application is a matter of controversy, since the definition of a 'Kandyan' being at large the statutory rules on the subject may be said to be *illustratio obscuri obscuro* : see Hayley, 34-7; Jennings and Tambiah, 248. Perhaps it is true to say that the fundamental characteristic of a Kandyan is that he would have been a subject of the Kandyan king if the latter still ruled within the boundaries of 1815.

5. Or ever has existed so far as we know. None was known in Knox's day, the *Niti Nighanduwa* attempts to explain its absence, and the Agents of Government and the Judicial Commissioner at Kandy in their answers (1829-30) to the questions addressed to them by the Commissioners of Eastern Inquiry confirm the belief that no law-books existed.

6. The exact nature of Armour's association with the production of this book cannot be said yet to have been established. See Jennings, Sir Ivor, *Notes on Kandyan Law collected by Sir Archibald G. Lawrie*, LL.D., (1952) 10 University of Ceylon Review, 185-220 at 188.

may legitimately be drawn from the picture so established. Naturally this is far from being a satisfactory foundation for an essay in legal history, and the use of conjecture must necessarily be dangerously frequent. Nevertheless there are certain considerations which may enable carefully guarded conclusions to be arrived at, if we bear in mind the history of Ceylon's connection with India (the source of the Tesavalamai and the Kandyan Law alike), and take care not to fall into traps, which an as yet uncontrolled mass of comparative legal material seems to have prepared for the unwary.

It is not the intention of the present writer to advert to the rules of the current Kandyan Law except in passing. Peculiar judicial decisions and certain legislative enactments have distorted the picture which our sources give us, and a study of them belongs especially to the author of a new text-book on Kandyan Law, which the unfortunate obsolescence of the very valuable text-book by Dr. Hayley[7] renders with every passing year more obviously necessary.

The method which will be followed is to split the material into a number of arbitrary sections, according as the headings seem to pertain to a fundamental, a more malleable and finally a superficial stratum in the system. This classification is no doubt largely subjective, but *some* classification is necessary unless we are to be lost in a jungle of rules, in danger of missing the wood for the trees. Within each section the Kandyan rules will, where possible, be compared with Indian material on the same or closely related points. It will thus be possible to see to what extent Kandyan Law may be indebted to Indian laws, and we can proceed, very tentatively, to the next stage, which is to conjecture at what period or periods the Sinhalese acquired the rules in question, and whether it is possible to say, from this legal datum, what was the origin, geographically and racially, of the Sinhalese people. The usefulness of such a conjecture naturally depends upon its capacity to be homologated with conjectures derivable from other sources—but this is a task for the historian rather than the lawyer. The task which follows seemed to the writer to be well worth the attempt, if only because the cooperation of the inferences derivable from the Ceylonese material with inferences derivable from the much richer Indian material

7. *A treatise on the laws and customs of the Sinhalese including the portions still surviving under the name Kandyan Law*, by F. W. Hayley, Colombo, 1923. Despite the extremely high academic character of the book, and its weighty criticism of the trend of judicial decisions it is of interest to observe that it has not entirely displaced the more prosaic and much more antiquated Modder (*Principles of Kandyan Law*, 2nd edn., 1914). The legislation of 1938, not to speak of the progress of case-law, makes an entirely new text-book indispensably necessary.

produces a mutual illumination. Kandyan Law in fact provides a missing link in the story of Indian legal development, and if our slightly firmer conjectures about legal developments in India can throw some light upon the possible origins of the Kandyan system, the advantage will have been reciprocal.

If nothing more is established than a refutation of the commonly asserted connection between the Kandyan system and matriliny[8] (sometimes inaccurately called 'matriarchy'), the present writer will not be dissatisfied. Historically patrilineal, matrilineal and even bi-lineal peoples have been in close association in India and in Ceylon : nothing is easier than to impute 'influences' between them. And however true it may in fact be that matrilineal societies have adopted superficial elements formerly characteristic of patrilineal societies, we must take very great care before we attribute to an obviously patrilineal society, such as the Kandyans, a matrilineal origin merely because some of their customs seem consistent with a hypothetical former matrilineal 'set-up'. A fuller understanding of matriliny itself may help to clear up the misconceptions which Hayley, amongst others, would appear to have fostered.[9] We may proceed at once to the material itself, without further anticipating the conclusions.

A few prefatory remarks are, however, required in order to explain the Indian material used here. The oldest Indian sources are the Vedas (ca. 1500-800 B.C.) and the most recent are details of caste or tribal customs collected in the nineteenth and early twentieth centuries. In between these limits lie the *dharmaśāstra* texts (consisting of the *mūla*, or root, which is the collection of *sūtras* and *smrtis*, and of the commentatory body, partly in the form of straight-forward *vrtti* or *ṭikā* on the text chosen for the purpose and partly in the forms of digests of selected *smrti*-aphorisms, or commentaries nominally upon a single continuous *smrti*-treatise but in reality in the shape of legal digests) and other evidence of law in practice,

8. Hayley, *op. cit.*, 165, 167, 213, 411, 433, 436, 464-5. Jennings and Tambiah, 248. Nadaraja, *op. cit.*, 42 n. 46a, is more cautious, but apparently not exempt from the oft-repeated fallacy, though he puts Kandyan connection with (matrilineal) Marumakkattayam Law as not less remote than second-hand.

9. An excellent source on Marumakkattayam and Aliyasantana laws, as they were prior to legislative amendment, is the *Report of the Malabar Marriage Commission* ; see also *Travancore State Manual; Report of the Marumakkathayam Committee;* M. P. Joseph, *Marumakkathayam Law*, Wigram and Moore, *Malabar Law* ; P. R. Sundara Ayyar, *The Malabar and Aliyasanthana Law;* Mayne, *Hindu Law and Usage* (11th edn., 1950, repr. 1953) Appendix III ; N. R. Raghavachariar, *Hindu Law* (3rd edn., 1947) Ch. 17; and, for a more comprehensive modern survey, V. N. Subramanya Iyer, *Hindu Law including Marumakkathayam Law*, 1952. A specialised treatise on the old system is K. Krishnan, Pandalai, *Marumakkatayam Law*, Trivandrum, 1914.

such as inscriptions and collections or individual examples of legal documents. The age of the commentaries and digests (ca. 600 A.D.-1795 A.D.) is not in much dispute, and the dates of the inscriptions and extant legal documents are not disputed for practical purposes—we have inscriptions from the time of Asoka Maurya, but more substantially from about the fifth century A.D., and legal documents other than inscriptions are available from the 17th century. The practice of courts and tribunals prior to the British period is no longer a matter of much doubt. The law actually administered is, however, not perfectly clear for all periods nor for any period in relation to all castes and tribes. The vast monument of the *dharmaśāstra* is a splendid source for the orthodox Brahmanical sects and those who were at any particular time subject to judicial administration under such influence. It is one of India's chief heirlooms. But its historical development is still of matter largely of conjecture since the date of the *mūla*, viz the *smrtis* of Manu, Bṛhaspati, Nārada, Yājñavalkya and others and the *sūtras* of Gautama, Āpastamba and others, is far from being settled. Conjectures and cross-conjectures are many, and ingenious arguments erect a structure of *relative* priority or even absolute *termini ante quos* and *termini post quos*, which seem to be based upon insubstantial arguments. Probability is not however entirely unhelpful, and after the work of Bühler, Jolly, Kane[10], Varadachariar[11], Rangaswami Aiyengar[12], Naresh Chandra Sen-Gupta[13], and Mazzarella[14] a certain residuum of knowledge may be said to exist, which can safely be applied for our present purpose. The presence of a rule in a late source does not, of course, lead us to believe that it did not exist for a very long period before that time ; nor is the absence of a rule in the earliest texts an indication necessarily that the rule was not perfectly well known. For the method of construction of the *smrtis* did not require that every aspect of law should be dealt with, but only those aspects which might either be doubtful points of religious or moral law or be substantial difficulties in actual litigation. Topics which did not fall within these categories were thus omitted. Similarly in the course of their commentaries the jurists of the classical period, and of later periods which sought to imitate or to improve upon the great masters,

10. *History of Dharmaśāstra*, Poona, 4 vols. in 5, 1930-55; also *Hindu Customs and Modern Law*, Bombay, 1950.

11. *The Hindu Judicial System*, Lucknow, 1946.

12. *Rajadharma*, Adyar, 1941; Introduction to Varadarāja's *Vyavahāra-nirṇaya*, Adyar, 1942; Introductions to volumes of Lakshmīdhara's *Kṛtya-kalpataru*, Baroda, 1941- ; *Indian Cameralism*, Adyar, 1949; *Aspects of the Social and political system of Manusmṛti*, Lucknow, 1949; *Some aspects of the Hindu view of life according to Dharmaśāstra*, Baroda, 1952.

13. *Evolution of Ancient Indian Law*, London and Calcutta, 1953.

14. *Etnologia analitica dello antico diritto indiano*, 14 vols., 1913-38.

seldom adverted to matters which were perfectly well known to the populace unless they were necessary for the explanation of a passage in the text, and that only where a number of differing interpretations could be placed upon the text so as to render a choice inevitable. In this sense a knowledge of contemporary customary law is really essential for the understanding firstly of what the *smrti-kāras* themselves meant, and secondly for a comprehension of what the *vrtti-kāras* and *nibandha-kāras* wished them to be thought to mean. And this is where we are at our weakest : customary material from Ceylon can actually assist in bringing to life the picture presented by the written texts. We may proceed to consider, with the aid of this miscellaneous Indian material, the first group of topics in the Kandyan law.

Fundamental Institutions of Kandyan Law

(1) *Marriage.*

More than any other topic this subject serves to illustrate the nature of the relation between Kandyan and Indian laws. The Sinhalese do not appear to have believed that there was any magic in a marriage ceremony, and they were prepared to accept a connection as a marriage despite the absence of any ceremony[15] : but very strong views persisted as to the fitness and propriety of a connection between two persons, and unless the couple were so related as to be outside the prohibited degrees[16] and the exogamous unit[17], while within the endogamous unit of caste or sub-caste[18], and unless moreover the union were approved by close relations on both sides[19], there was every likelihood that the union might be denied the character of marriage and the issue, if any, be considered illegitimate. The *dharmaśāstra*, for its part, at least in medieval times, insisted upon a ceremony[20] ; nor could a child conceived before that time claim to be legitimate.[21] Whereas the Sinhalese circle of prohibited degrees was very small[22], that of the developed *dharmaśāstra* was exceedingly large[23]. The *dharmaśāstra* texts, so far as unambiguous statement goes, did not demand a very exact compliance with the requirement of sameness of caste, and regularly permitted *anuloma* marriages[24], that is to say unions in which the

15. Hayley, 174.
16. *Ibid.*, 155, 178-9.
17. *Ibid.*, 177.
18. *Ibid.*, 175-6.
19. *Ibid.*, 185 & seqq ; 201.
20. Kane, H. D., ii, 521.
21. *Ibid.*, iii, 647 : the definition of *aurasa*.
22. *Hayley*, 178-84.
23. Bars against *sapindas, sagotras, and sapravaras* ; see also *viruddha-sambandha*. Reference should be made to Kane, *H. D.*, ii. Pt. 1.
24. Kane, *H. D.*, iii, 596-9.

male was of the higher caste. As to exogamy, apart from prohibited degrees, no very great difference can be found, since the *dharmaśāstra* prohibited *sagotra* and *sapravara* marriages[25], but it must be observed that such restrictions applied only to the three higher castes, leaving untouched the Śūdras, who were the vast majority of the population.[26] On the other hand a consideration of the very greatest importance (which has often been neglected in this connection) persists in Sinhalese custom which is totally absent from the *dharmaśāstra*: the Sinhalese in common with Hindus south of the Vindhyas regarded marriage with the maternal uncle's daughter or, failing one, a paternal aunt's daughter as not merely proper and desirable but even obligatory.[27] It was, one might almost say, the key-stone of the social and economic arch of the South Indian settled agricultural communities. From remotely early times the *śāstra* regarded such a custom as curious and questionable : tolerable amongst those classes which practised it upon the bare ground of primaeval habituation.[28]

To the casual observer, whose sources on the nature of Hindu Law do not extend beyond the current text-books, it would appear from all the foregoing that Sinhalese custom and Kandyan Law could not have been derived from Hindu Law, and must have originated from some quite independent source. But the clue has already been given. We are to search for our parallels not merely in the *dharmaśāstra*, which contains an immense amount of customary material but is also the work of successive generations of reformers, but in the records of the practice of Indians, which in very many particulars differ widely from the rules laid down in the *śāstra*. In the case of the maternal uncle's daughter, where the utmost ingenuity could hardly enable the custom to be reconciled with Hindu jurisprudence, we have the whole story laid out for us in unimpeachable sources : in the majority of instances however we are not so fortunate, and have to search somewhat more carefully into rather more recondite material for the information we need.

Even in the time of Manu marriage was still an institution of great fluidity. The celebrated eight " forms " of marriage[29] was an attempt to regularise different methods of contracting a union, all of which were

25. See n. 23 above.
26. *Pravara* and *gotra* were virtually unknown to the *śūdras*. Mayne, *op. cit.*, 159.
27. Hayley, quoting Sawers, 155 ; Kane, *H. D.*, 458 & seqq.
28. See Sen-Gupta, *op. cit.*, 1-2, 97 ; Ganganath Jha, *Hindu Law in its Sources*, Allahabad, 1930-3, i, introd., 6 & seqq ; also the South Indian commentator Haradatta (ca. 1100 A.D.) on *Apastamba-dharma-sūtra*, II, 6, 15, 1.
29. Manu, III, 20-42, on which see Sen-Gupta, 83-94 and L. Sternbach, *Forms of marriage in Ancient India and their development*, (1951) Bharatiya Vidya, XII, 62 & seqq.

undoubtedly in use in ancient times, mostly among the pre-Āryan inhabitants of India. The Kandyans knew (and to some extent still know) marriage of the formal sort, in which the bride is given away by a relation together with a dowry, and another marriage of an informal kind in which the girl, or widow, as the case may be, gives herself to a man of her own choice, without any question of transfer of property. The first form roughly coincides with the Brahmā "form" of marriage described by Manu and other *smṛti*-writers[30], and the last is nothing other than the Gāndharva form, in which mutual attraction, once acknowledged by the parties, serves to establish the union without further requirement.[31] The *dharmaśāstra* does not go into details as to the circumstances in which a girl might form a Gandharva connection without scandalising all her relations, but this was unnecessary. In medieval times the scheme of Manu was spoiled by the superadded requirement that *every* union must be solemnised by a ceremony if it is to be a marriage.[32] The Kandyans have always practised a third type of marriage which is not represented, except incidentally and in ambiguous texts[33], in the *śāstra*. This is the so-called "marriage in *binna*". As we shall see, this is a peculiarly Indian institution notwithstanding its apparent absence from the *śāstra*. The subject may be placed in proper perspective if the sub-topics of "marriage in *diga*", "marriage in *binna*", polygyny, polyandry and the levirate are treated in order.

"Marriage in *diga*" is and was the normal Kandyan marriage, and in total default of evidence it is presumed that a marriage was in *diga* rather than in *binna*. No third "form" is admitted in our sources. The girl married in *diga* goes to her husband's house, adopts that house name, and becomes to all intents and purposes a member of her husband's patrilineal family[34]. It is misleading to refer to this type of marriage as "patrilocal", since in fact the couple might never reside with the bridegroom's father, yet it is helpful to this extent that children of a *diga* marriage normally "belong" to their father in the sense that they have a right to succeed to him

30. See above. The essentials of the Brāhma form are that the bridegroom is summoned and offered the daughter as a gift, she being a virgin and decked with valuable ornaments. The element of dowry is not absent, but inconspicuous.

31. For a recent elaborate discussion of the Gāndharva form see *Devivanai Achi* v. *Chidambaram Chettiar*, A.I.R. 1954 Madras 657. Sen-Gupta's suggestion that 'Gāndharva' is related to Gandhāra seems without foundation. The mythical beings known as Gandharvas were notoriously libidinous.

32. See note 20 above.

33. Such as Manu, ix, 127, 130, 135. In later *smṛti* times it was axiomatic that a daughter who had no brothers would be an "appointed daughter" even without any overt "appointment" by her father with the result that at least the first son would belong not to his real father but to the maternal grandfather. See Kane, *H. D.*, iii, 647, 657-9.

34. Hayley, 193.

on intestacy and to be represented in such a succession by their own issue by a *dīga* marriage.[35] It is not essential, though usual, for the *dīga*-married daughter to bring a dowry with her to her husband. This type of marriage is usual throughout India, and the dowry system is currently considered one of the great social evils of South India. Persons subject to the Tesavalamai in Ceylon are found making identical complaints with their remote kindred on the continent. As amongst the Kandyans of former times[36], Indians giving their daughters in marriage do not generally consult the bride's inclinations. The establishing of dynastic connections by means of marriage and the maintenance of family prestige by the same method are and were equally dear to the hearts of Indians and Sinhalese. In India another " form " of marriage was at one time very common, but is believed to have diminished in importance except among very low castes and semi-civilised tribes: it is the Āsura form, in which the bride is purchased for a bride-price[37]. There can be little doubt but that both the Brāhma and Āsura forms flourished side by side in South India for many centuries and even in Northern India. The relevance of this remark will appear presently.

" Marriage in *binna* " played in India a part complementary to that of the Brāhma and Āsura marriages, in both of which the bride went to the husband's family. In Kandyan Law the *binna*-married daughter stays in or near the property either of both her parents or of that parent who has set her up in this marriage[38]. The essence of the *binna* marriage is that the bride does not go to or become a member of her husband's household, but retains her full connection with her parents' or parent's household, so that in effect she and more especially her issue[39] continue the line of the parent who, but for this *binna* arrangement, might have been in danger of dying without lineal heir. The *binna*-married daughter is thus normally an heiress, and her husband vacates his position in his natural family to some

35. *Ibid.*, 403.

36. *Ibid.*, 186. Knox says, "Here is no wooing for a wife". Presumably he refers principally to the first marriage of a girl. Her freedom to choose her own mate in general is evidenced by him elsewhere.

37. The Asura form: see note 29 above. Since the fact of a marriage having been in this form may alter the line of descent of the wife's property the Court seems to have included against construing a customary present as *śulka* or bride-price. The following series of decisions is based as much upon customary law as upon the *dharmaśāsastra* and deserves attention: *Surayya* v. *Balakrishnayya*, A.I.R. 1941 Madras 618 ; *Velayutha Pandaram* v. *Suryamurthi Pillai*, A.I.R. 1942 Madras 219; *Vadakumpprata* v. *Kulathinkol*, A.I.R. 1950 Madras 351; *Gopi Tihadi* v. *Gokhei Panda*, A.I.R. 1954 Orissa 17 ; and *Venkata Reddy* v. *Kolandarareddigari S. Reddi*, A.I.R. 1955, Andhra, 31.

38. Hayley, 193, 194, 197.

39. *Ibid.*, 377-8.

extent[40], comes to live with and perhaps to assist the wife's parent or parents, but does not become an adopted son, having, in fact, a somewhat precarious tenure in his wife's family house[41]. This is almost exactly what happens in the *ghar-jamāī* or *ghar-jawāī* "adoption" of Northern and Western India[42] and the *illatom* "adoption" of Madras, or more particularly Andhra State[43]. Various steps might be taken to prevent the ancestral property from passing out of the family by reason of the absence of male lineal heirs, and of these the *illatom* method has attracted most respectable attention and is best known to the courts. The *dharmaśāstra* itself relented in the face of the demand that a daughter should be entitled to retain her father's property for her sons, and should stay at home married, but not a member of her husband's family[44], and the result was the hybrid institution known as the *putrikā-putra*, which many medieval jurists thought was the sole justification for the admission of the daughter as an heir to her father[45]. Many have seen the *putrikā* as a reflection of the wife of the *illatom*- "adoptee" : historically there is no doubt a connection, but the institutions are distinct. To call a *binna* marriage "matrilocal" may be misleading, since although the issue normally reside with their mother's parent this is by no means essential, their father normally resides there likewise, and of course the cases where the *binna*-settling parent is the bride's *mother* are the exceptions rather than the rule. The strict patrilineal rule whereby property passes from father to son without interruption is not strictly adhered to in Ceylon, for reasons which will appear in due course, but the general patrilineal plan is broken into by a *binna* marriage only so far as will enable the daughter so married to take the place of a son, a husband being brought in to provide issue for her parent in the second generation. There is absolutely no question of *binna* marriages being a relict of matriliny or "matriarchy". Even in those rare instances where property is kept in the female line by a succession of marriages in *binna*[46] what we are presented with is very different from matriliny. It is possible

40. *Ibid.*, 369, 407 : though his own rights are apparently secure his children's are prejudiced unless special care is taken to maintain the connection.

41. Hayley, 193-4: if the parents of the bride who set her up in *binna* orders him to go, he needs must.

42. Rattigan, Sir W., *Digest of Civil law for the Punjab*, 13th edn., 1953, 450-61, deals with the institution under the title *khana-damad*. See S. Roy, *Customs and Customary Law in British India*, 1911, 477.

43. Mayne, *op. cit.*, 280-1. Sorg, L, *Avis du Comite consultatif de jurisprudence indienne*, 1897, 233-40. *Venkateswarlu v. Chinna Raghavulu*, 1955. Andhra W. R. 39. The Malabar institution of the *sarvaswadanam* marriage (sometimes described as an adoption) is comparable : V. N. Subramanya Iyer, *op. cit.*, 429 ; Mayne, *op. cit.*, 119-20; *Velayudhan Pillai v. Nilakanthan*, A.I.R. 1955 N.U.C. 1101 (Trav. -Cochin).

44. See note 33 above.

45. Kane, iii, 713 & seqq. Sen-Gupta, 193 & seqq.

46. Hayley, 464-5.

that such a custom might have been started by or under the direct influence of Malabar women who came to Kandy in recent centuries prior to the British occupation, but the phenomenon (of great rarity in itself) fails to qualify as an example of matriliny by reason of the ease with which the succession of such marriages might be broken, the absence of any restraint upon any daughter marrying in *diga* if she thought fit, the right of male issue to inherit shares in the *pravēni* (ancestral) property, and to be represented in such a succession by their issue by *diga* marriages, whether male or female. This is conclusive. Matriliny does not admit marriage at all; recognises only blood connection through females; relegates the issue of males to their respective mother's houses, whilst retaining the fathers in their ancestral house; and makes no provision for interruption of the line by choice of individuals. Other characteristics of matriliny will be adverted to later. None of them are present in Kandyan Law.

Polygyny was admitted in the old Kandyan Law. Although the *dharmaśāstra* and certain customs seem to have restricted the husband's right to marry again during the subsistence of a prior marriage, by requiring that he settle a special fee upon the first wife or superseded wife[47] or that he should seek her consent except where she is suffering from specified defects[48], the fact remains that polygyny was regularly practised by many classes, both socially high and low, until it was totally prohibited in 1955.

Polyandry was a characteristic of the Kandyan Law of pre-British times, instances being much more common among brothers than between strangers[49]. In other words grounds exist for supposing that the institution was one of *fraternal* polyandry, capable of enlargement in special cases so as to admit others to the privilege[50]. This is most emphatically condemned by the *dharmaśāstra*[51], which has nevertheless retained traces of a time when the custom was much more common[52]. The chief trace is that of *niyoga*, known generally as the levirate. The texts can be made (as no doubt they were made) to support any custom whereby either during the lifetime of the husband or after his death his younger brother

47. Kane, ii, 550-554. The supersession-fee was called *ādhivedanika*. It appears to have been obsolete for centuries. See Kane, iii, 773.

48. See last note and Sorg, *op. cit.*, 187, 306 and 364.

49. Hayley, 170-2.

50. The permission of the wife's parents was required if a stranger were to be admitted at the husband's request: *ibid.*, 172.

51. Kane, ii, 555.

52. *Ibid.*, and in particular Manu IX, 162, 182.

or close agnate or even a stranger could be *authorised* to have intercourse with the wife, whose own opinion seems to have been neglected, nominally for the purpose of producing issue for the husband[53]. It would take up too much space to discuss the full implications of the persistence of this rule of the *dharmaśāstra* right down to modern times. Let it suffice that polyandry of the fraternal type certainly was known in ancient India in the North[54] ; that it survives in practice in the foot-hills of the Himalaya and in the Punjab and in many other parts of Northern India among under-developed communities[55], and that its common occurrence in the South, particularly but by no means exclusively along the West coast[56] is notorious. Instances of polyandry are equally common both where bride-prices are in vogue and where no question of transfer of property arises. There are some reasons for supposing that the famous Pāṇḍya dynasty of Madura—known to history as the "Five Pāṇḍyas"—was both polygynous and polyandrous[57]. The fact that both polygyny and polyandry are found together in South India and in Sinhalese custom (in both cases prior to or in disregard of statutory amendment) not merely indicates that the Kandyan institution of polyandry may have had an Indian source, but that it has nothing to do with matriliny. Some matrilineal communities practise polyandry, but that is because of the natural proclivities of the females, the absence of any proprietary hazard to call for restraint, and the total absence of the concept of marriage. Moreover in such societies the alleged polyandry (which ought to be called "promiscuity") is not fraternal rather than entirely unrestricted and is not found together with polygamy because the possibility of the latter is denied : the males are

53. For *niyoga* see Kane, ii, Ch. 13. I respectfully differ with the learned author with regard to the connection between *niyoga* and fraternal polyandry (p. 606). It is interesting to note in this connection that when the caste called Vagres of Gujerat codified their "laws" a few years ago, and settled the fines payable for adultery, they imposed a fine of Rs. 125/- on a father-in-law ; Rs. 100/- on the elder brother-in-Law ; but only Rs. 40/- on a younger brother-in-Law, who has thus a virtual privilege.

54. Kane, ii, 554-6 ; Sen-Gupta, 87 ; he refers (29) to the Bāhlīkas, a northern or north-western people, who from references in the Mahābhārata and elsewhere appear to have been polyandrous.

55. *The Khasa Family Law*, by L. D. Joshi, Allahabad, 1929. For other traces, particularly in the North-east, see Ehrenfels, Baron O. R., *Mother-right in India*, O.U.P., 1941 *sub* 'Polyandry'.

56. See note 9 above, and Nelson, J. H., *Madura country*, Madras, 1868, Pt. II, 35, 54, 82 ; *A view of the Hindu Law*, Madras, 1877, 144. Sorg endorses this, *Traite théorique et pratique*, Pondichery, 1897, 42.

57. Although certain eminent Indian historians are sceptical about the genuineness of the title 'Five Pāṇḍyas' it occurs so frequently in various sources of the 13th and 14th centuries that some definite meaning must be attributed to it. This is the only Indian royal family which adopted such a title. Evidently in imitation of the celebrated five Pāṇḍavas of legend, who were all half-brothers, the title probably explains why it has proved so impossibly difficult to link the known Pāṇḍyan kings and princes in a convincing family tree. The family doubtless endeavoured to keep the administration of its very extensive territories within the control of a fraternal group of no more than five—an object which could not have been achieved without the aid of polyandry, and which could by that method have been effectively achieved.

entitled to be as promiscuous as the females, but marriage is open to neither sex. Fraternal polyandry, however disgusting to the *dharmaśāstra*, is perfectly consistent with patriliny. But it is a non-Āryan custom, which must have been a profound shock to the Āryans when they first settled in India. No Āryan community could have allowed itself to have been modified (not to say contaminated) by such a custom[57a]; whereas those that practised it might well adopt a great many Āryan characteristics, such as speech, religious beliefs and innumerable superficial habits and prejudices not too inconsistent with this fundamental and ancient institution.

(2) *Legitimacy.*

Legitimacy and marriage are inter-dependent concepts in Indian legal history. The crystalisation of the *dharmaśāstra's* requirements for the validity of a marriage was no doubt governed by the desire to standardise, as far as possible, the minimum requirements for legitimacy. India being from remote ages an amalgam of races we may expect to find not only varying methods of determining where legitimacy was required and where it was not—in other words "degrees" of legitimacy—but also varying notions of the way to obtain legitimacy. The Kandyan Law shared with Indian laws the characteristics of the prominence of family or caste concern in determining such matters and the total want of the very useful institution known as legitimation in Christian societies. The Kandyan Law denied legitimacy to a child born of a union which was incestuous[58], between a man of a low caste and a woman of a high caste[59], and between parties whose parents or close relations opposed the match[60]. Illegitimate children had rights of succession[61], unless they were the fruit of incest, to acquired property of their fathers; they might inherit all their mothers' property[62]; even the *pravēni* property of their fathers might come to them in default of all other relations[63] and they were in any event entitled to be maintained out of it in case of need[64]. In India illegitimate children were permitted in

57*a*. It must in fairness be added that, whatever the tone of Manu, whose *smṛti* has doubtless undergone (as Sen-Gupta shows) some re-editing or even re-compilation in the early centuries B.C., in the time when the Mahābhārata was compiled the Sanskrit-knowing public were quite accustomed to polygamy, *niyoga* and various sorts of vicarious parentage (at least, as *probable* in ancient high society), and were by no means outraged at the idea of polyandry—though it required some justification.

58. Hayley, 201.

59. *Ibid.*

60. *Ibid.*

61. *Ibid.*, 931.

62. *Ibid.*, 462.

63. *Ibid.*, 392.

64. *Ibid.*, 391 n. (v).

every case to be maintained at the expense even of the ancestral estate[65]; there seems no reason to doubt but that they were entitled to inherit their mothers' property in competition with her legitimate children (though this has been denied)[66]; in the case of Śūdras (which term would include all the pre-Āryan communities) the illegitimate child could inherit *half* a legitimate son's share, and in default of such son succeed to the whole estate[67]. There is not the smallest doubt but that the requirement laid down in the *śāstra* that in order to qualify for such rights the illegitimate son must be a *dāsi-putra*, i.e. the son of a kept concubine, reflected South Indian habits: for certain inscriptions make it clear to us that some communities at least either married rarely or valued their concubines and their-issue by concubines very highly, placing them below, but not far below, their legitimate issue[68]. The *dharmaśāstra*, in giving the father very wide discretion in allotting property to the *dāsi-putra*, no doubt followed the custom very closely, for indefeasible rights in ancestral property as sharers belonged properly only to legitimate issue, and the grant of discretion to the father in his lifetime admitted both the customary regard for "obedient" illegitimate sons[69] and the subservient status of even legitimate sons so long as their father lived[70].

(3) *Divorce.*

Since the *dharmaśāstra* of medieval times has followed the texts of Manu which apparently deny the validity of divorce[71], it is generally believed that the Hindu Law, as such, knew no such thing as divorce until it was introduced by statute. This is a distorted view. A careful perusal of

65. Modern decisions refuse maintenance to illegitimate daughters: this is an error. On the rights of the illegitimate son to maintenance for life out of joint family property (of which the nucleus is 'ancestral' in most cases) see *Vellaiyappa Chetty* v. *Natarajan*, (1931) 58 I.A. 402 *Harisingji Chandrasingji* v. *Ajitsingji*, A.I.R. 1949 Bombay 391. Kane, iii, 601 and 602.

66. Derrett, *Inheritance by, from and through illegitimates at Hindu law*, (1955) 57 Bombay, L.R (Journal) 1-22, 24-39 ; *More about illegitimacy at Hindu law*, *ibid.*, 89-98.

67. See first reference in the last note.

68. See inscriptions published in *Epigraphia Carnatica*, ix Channapatna 73 (A.D. 1318) ; v. Belur 219 (ca. A.D. 1141) ; i, 59 (A.D. 1297).

69. It is to be remarked that the *Yājñavalkya-smṛti* particularly reserves discretion to the father as to his illegitimate son's share, while his commentator Vijñāneśvara (Colebrooke's Mitakshara I, xii, 3) allows maintenance to the illegitimate sons of twice-born men only if they are 'docile'. cf. Manu, IX, 179.

70. This is a controversial matter. The Mitākharā insisted upon the sons' right to partition ancestral property at their pleasure, but this rule was not widely followed in pre-British times, and one may compare the situation in the former French possessions : Sorg, *Avis*, 70. The Dāyabhāga law, applied chiefly in Bengal and Assam never countenanced any right of the sons in their father's or grandfather's property.

71. Manu, IX, 46, 101.

Manu himself and of Nārada[72] and the legal portions of Kauṭilya[73] reveals that the wildest liberty prevailed in classical times[74], and that the *dharmaśāstra* was shouldering a heavy task in attempting to reform society. Successful in bringing the public to believe that ceremonies were necessary to constitute a valid marriage, it has not yet succeeded in persuading Hindus that divorce is immoral. The Act of 1955 retains customary divorces[75], which since the remotest times have been extremely common among all but the highest castes.

Divorce and re-marriage of widows and divorced wives are topics that run together. The *dharmaśāstra* denies both possibilities[76]. The Kandyan Law, whilst imposing certain penalties upon the widow who remarries[77], retains the ancient principle of freedom of choice of partner, and divorce even without grounds was regularly admitted[78]. The *diga*-married wife was not quite so free as her husband[79], but with this exception, which was later doubted[80], both parties were entirely free to separate. Joint acquisitions during coverture were equally divided[81], the wife could take away her dowry and the property settled on her husband, if any, by her parents as a marriage portion[82]. Her rights to be maintained after divorce and her right to objects given to her by her husband depended upon which spouse was responsible for the breaking of the marriage[83]. If she were pregnant at the time of the divorce she could claim maintenance for herself and her child subject to certain rules[84]. Custody of the children

72. Kane, ii, 619 & seqq., but cf. Sen-Gupta, 136-7.

73. Kauṭilya's *Arthaśāstra* is not frequently referred to as a legal source, but since its date is generally believed to be established as early as the third century B.C. its details are of unique archaeological value. Kauṭilya was referred to on the subject of nullity of marriage in *A. v. B.*, (1952), 54 Bombay L.R. 725.

74. Sen-Gupta, 86, admits this with reference to marriage—why he should not accept the same point with reference to divorce is not clear.

75. Hindu Marriage Act, 1955, sec. 29(2).

76. Kane, ii, 608 & seqq.

77. As in Hindu law (whether by custom or under the Hindu Widows' Remarriage Act), she forfeits her husband's estate upon her remarriage: Hayley, 350. cf. *Rama Appa Patil v. Sakhu*, A.I.R. 1954 Bombay, 315.

78. Hayley, 195-6.

79. According to Sawers, who seems to have been unwarrantably doubted. The ancient Hindu law allowed the wife to repudiate her husband for impotence or loss of caste or if he absented himself for a very long period. The husband could supercede a wife for a larger variety of causes, but there is a dispute as to whether he could repudiate her, whether for persistent unchastity or for other reasons. See note 72 above. The traditional Hindu view is that a wife's freedom was or ought to be much less than the husband's, but the texts in detail seem to have aimed at a more humane doctrine.

80. Hayley, 195.

81. *Ibid.*, 287.

82. *Ibid.*

83. *Ibid.*, 287-9.

84. *Ibid.*

and alimony were carefully accounted for. The classical jurisprudence of India knows nothing of these rules, but there is ample evidence that such rules existed and perhaps still exist by custom, particularly in the South[85]. A strong similarity exists between the customary laws of South India among the non-Brahman castes which are not strongly influenced by Āryan habits and the matrimonial régimes of Kandyan Law and Burmese Buddhist Law[86].

(4) *Adoption.*

At first sight the Kandyan Law of Adoption and that of the text-book Hindu Law are so unlike that a historical connection might be denied outright. Once again appearance is misleading. Just as in the realm of marriage the *dharmaśāstra* attempted with some success to purify and refashion the customary law, so in the realm of adoption the classical jurists took the raw material of the customary law—a Protean mass—and created out of it an institution which would be satisfying to the religious as well as sentimental and acquisitive instincts of the docile public. In the Kandyan Law a childless man can adopt[87], but so also can a man having children (it would seem)[88]; a woman can adopt to herself[89]; daughters as well as sons can be adopted[90]; adoption may take place even after the adoptee has attained puberty; and the adoptee acquires no rights of succession to

85. A custom among the Kammas of Andhra: *P. Purandhamayya v. P. Navaratna Sikhamani*, A.I.R. 1949, Madras 825. The position among the Kallans and Kunnuvans of the Madura District as described in Nelson, Madura country, 34-5, 50-1, is strikingly similar to that described in our Kandyan sources.

86. The essential features which the three systems have in common are that the estates of the spouses are separate, yet there is a community of acquisitions created by the marriage. Rules appear to exist for the resolution of this community upon a divorce. The *dharmaśāstra* once knew such a community, under the maxim *dampatyor madhyagam dhanam* ("goods are common to the wedded pair") and Āpastamba distinctly says that no division takes place between husband and wife; they are joint as to religious ceremonies and spiritual rewards *and with respect to the acquisition of property* (II, 6, 16-19: 2 Sacred Books of the East, 136-7) and his point is repeated (II, 11, 29, 3: *ibid.*, 170). Haradatta, commenting upon these passages in medieval times, when the maxim quoted above had been practically confined to spiritual matters, seems entirely to accept the literal interpretation. On Tamil customs we have the evidence of the Tesavalamai (see Tambiah, H. W., *The laws and customs of the Tamils of Jaffna*, 1950, 175-211). See also Mootham, O. H., *Burmese Buddhist Law*, O.U.P., 1939, Ch. 3. Like the developed *dharmaśāstra* however Kandyan law would seem never to have given the surviving spouse a fractional share in acquired property, being more interested in the distinction between acquired and ancestral property, and between immovable and movable property. This characteristic draws Kandyan law nearer to Hindu law than to Burmese Buddhist law.

87. Hayley, 166.

88. *Ibid.*, 208.

89. *Ibid.*

90. *Ibid.*, 204, 476.

the relations of the adopter[91]. In all these respects the *dharmaśāstra* differs[92]. But the difference is significant only so far as it proves what ingenuity was successively employed by the classical jurists to refashion the institution, and that story need not be told here. At customary law, however, it is clear that although the motive to adopt seldom existed unless the adopting parent were childless a man who had children already was not debarred from adoption in the South[93]; and a woman could adopt not merely as her husband's agent (as the Hindu Law would have it[94]) but in order to provide herself with an heir[95]: such a custom is recognised by the famous Mithila school of Hindu jurisprudence[96], but is denied to-day in the greater part of India. It appears in the former French possessions[97] and the Portuguese possessions[98]—while from South India it went over, of course, to Jaffna, where it appears in the Tesavalamai[99]. The adoption of girls is admitted to be a possibility in the leading Sanskrit text on the subject[100]; certainly happened in ancient India[101] (for was not Sītā herself an adopted daughter ?); and is instanced in South Indian practice[102]. Adoption of daughters by temple dancing-girls[103] might be supposed a special custom not relevant for our purpose, but it is not impossible to see in their practice a survival of one which was once more widespread but which had as time went on less and less utility in India. Rules regarding the age within which children might be adopted have been the subject of controversy in India[103a], and it may be taken for granted that customary law did not set such fine

91. *Ibid.*, 476.

92. The adopter must be childless: Kane, iii, 667; a wife or a widow may adopt only as representatives of their husbands: *ibid.* 668 & seqq. (except in *kritrima* form); sons only may be adopted: *ibid.* 674-5 (where evidence is given that in ancient times daughters might be adopted); adoption must take place before the boy reaches maturity, or is married, according to various views: *ibid.*, 679-681; the *dattaka* (the only adopted son allowed according to medieval texts) is in every relevant respect the true son of the adopter for purposes of succession. Moreover, an only son or an eldest son could not be adopted prior to the British period.

93. This is to be inferred from the Tesavalamai.

94. The *Dattaka-mīmāṃsā*, the leading treatise on the subject, is emphatic about this.

95. This is the rule adopted in the French possessions: Sorg, *Avis*, 144.

96. Mayne, 278 & seqq.

97. See note 95 above and *C. S. Nataraja Pillai* v. *C. S. Subbaraya Chettiar*, (1949) 77, I.A. 33, s.c. (1950) 1 M.L.J. 172.

98. No hindrance to a female's adopting is to be found in the Code for Non-Christians in the New Conquests of 1853, art. 84; the Code of 1880 (which in general applied the Portuguese law), art. 26; the Code for Diu, art. 26; or the Code for Damão, Pt. II, art. 19 (which does not apply to the Bania caste, who by art. 59 of Pt. I are forbidden to adopt).

99. Pt. II, sec. 1.

100. *Dattaka-mīmāṃsā*, 112-6.

101. Instances, mostly from the Mahābhārata are quoted in the *Dattaka-mīmāṃsā*, and mentioned by Kane, iii, 675. To those the instance of Sakuntalā should be added.

102. Nelson, *Prospectus of the scientific study of the Hindu law*, Madras, 1881, 142. Apparently adoption of daughters is legal in Kumaon customary law to this day.

103. Mayne, 67-8.

103*a*. Kane, iii, 679-81

limits as some of our medieval texts insist upon. And our final point relates to the rights which the adoptee takes in the family of his adoption. This is closely related to the question of his rights in his natural family. The *dharmaśāstra* forces upon him a complete transfer, equating him for most purposes to a natural-born son[104]. But pre-existing custom probably did not permit this in all but the most exceptional cases, and even adoptions under the classical law which are not in the *dattaka* form give only very circumscribed rights of succession in the new family and retain for the adoptee a great part of his original status in the old family[105]. Instances of such a position in modern customary law are forthcoming from the North as well as the South of India[106].

It may further be shown that the *dharmaśāstra* requires that the adoptee should not be the son of a woman whom the adoptive father could not have married in her maiden state[107]. This refinement is openly rejected in the greater part of India[108], and in Madras customary breaches are so regular that proof of a custom in derogation of the textual law is no longer insisted upon[109].

Points of likeness between the Kandyan Law and Hindu Law are not wanting. The very existence of adoption itself is something worthy of comment in both systems, since it is or was so rare in contiguous cultures. The adoptive parent has a right to succession[110]. The child must be of the same caste[111]. The adoptive parent cannot give or sell the adopted child[112]. Upon a competition between the adoptee and a legitimate child the adoptee's share is liable to be depressed[113]. The Hindu Law says to a quarter of an *aurasa's* share, except in the case of Śūdras, whose adopted sons may share equally with after-born *aurasas*[114]. Despite a certain

104. *Ibid.*, 689-98.

105. The *kritrima* adoption is one in point. See A.I.R. 1955 Patna 487.

106. Adoptions at Punjab customary law (see Rattigan, *op. cit.*), the *illatom* adoption (see note 43 above) and the various Malabar adoptions detailed in V. N. Subramanya Iyer. Art. 26 of the Goa Code of 1880 contemplated the adoptee's retaining a status in his natural family if the latter were devoid of heirs. The *dharmaśāstra* form known as *dvyāmushyāyana* seems to be an adaptation of a customary form in which the boy belonged to both families.

107. Kane, iii. 682-3.

108. *Ibid.*

109. *K. S. Gopalachariar* v. *D. Krishnamachariar*, A.I.R. 1955, Madras, 539.

110. This naturally follows at Hindu law where the boy is adopted in the *dattaka* form. In Kandyan law see Hayley, 481, where the adoptive parent's rights are not stated categorically.

111. Hayley, 203 ; Kane, iii, 675.

112. Hayley, 137 ; Kane, iii, 666.

113. Kane, iii, 698.

114. See the discussion in *Laxman Gadiji Mali* v. *Mt. Bayabai*, A.I.R. 1955, Nagpur 241.

vagueness, the proportion of a *quarter* did find expression at Kandy from the lips of persons who knew nothing of the Hindu Law[115], and this could hardly be a coincidence. That in practice the fraction was vague even in India is ensured by the doctrine that in the *dharmaśāstra* proportions such as a "half" or a "quarter" are to be interpreted in an equitable manner and not precisely[116].

In this connection it is worthy of notice that the characteristic Kandyan emphasis in certain cases upon the feature of "assistance and support", which is vouched for to some extent even in the classical Hindu law of succession[117], is not without parallels in the law of adoption. Amongst the "substitute sons" who might inherit property there appears the *self-given* son, who is carefully distinguished from the waif: this son is defined as he who, having been orphaned or abandoned by his parents, attaches himself to a man saying "I shall become your son"[118]. Moreover we are told of the "made son" (*kritrima*), whom the adopter takes up because of his maturity and virtue and "endowment with filial qualities"[119]. In both instances it is clear that customary law acknowledged that different degrees of adoption might depend upon the capacity and willingness of the adoptee to act as a faithful son to the adopter, and while the true position was being established to the satisfaction of both parties the fact of adoption might be left in doubt[120]. As a result the *dattaka* son was evolved in India, the act of giving and taking of the child[121] putting at rest any doubts as to his complete transfer from one family to another, and in Ceylon the Sinhalese admitted, upon adequate proof of the adopter's intention[122], the formal

115. Hayley, 477-8. Perhaps Hayley's notion of an 'equitable adjustment' is rather a method of evading the difficulty than a genuine solution.

116. This is evident from the Mitākshara interpretation of the mother's share at a partition between her sons, when she has *strīdhana* from her husband's family: the *Yājñavalkya-smṛti* awards her a half; the commentator thinks that means that she deserves the difference between the amount of her *strīdhana* and the size of a full share.

117. It is a commonplace among commentators that the distinctions between heirs of apparently similar class often found in the *smṛtis*, or the conflicts between the various orders of devolution, can be attributed to a regard for the relative *guṇas* ('qualities') of the claimants. Dutifulness was unquestionably among the qualities. In the Mahābhārata we find a verse to the effect that the son who takes thought for the necessities of his parents deserves preference over the others (story of Yayāti in the Ādiparva), and it is a fixed rule of the *śāstra* that a father may distribute his own property among his sons strictly in accordance with their dutifulness towards himself. Even a slave who saves his master's life can take a son's share: Kane, ii, 185.

118. Manu, IX, 177; Yājñavalkya, II, 131.

119. Manu, IX, 169.

120. This seems to lie behind the difficulties which developed in Kandyan law under the British administration: Hayley, 203-8.

121. Kane, iii, 687; Mayne, 237-8.

122. A matter of some difficulty: see note 120 above.

adoption of a child with more or less fixed rights of succession and on the other hand the special rights of an informally adopted person who by his assistance and support rendered to the *propositus*[123] was elevated into a position rather better than that of a mere creditor of the estate. That such expedients existed in Indian customary law there need be no substantial doubt.

(5) *Minority and Guardianship.*

We now approach a sub-topic which demonstrates the gap between our knowledge of Indian customary law and the Kandyan Law. Certainly the *dharmaśāstra* and the latter have but a few obvious points of similarity. In Kandyan Law capacity was not reached, as under the *dharmaśāstra*, all at once. The classical jurisprudence made a woman *vyavahāra-prāptā* at 12, and a boy reached the same stage at 16[124]. The Sinhalese are said to treat 16 as the age of majority for both sexes, but limited capacity to perform legal acts could exist before that time, and for long after it a person could take advantage of a limited majority, and could resile from certain acts[125]. There is no plain evidence of such customs in India[126].

Guardianship for marriage is fairly well known in Indian law, but this is a specialised aspect of guardianship and need not be accompanied with any other sort of guardianship right. The law of guardianship of infants, and the order in which guardians may be preferred lie in darkness even in the *dharmaśāstra*, probably because the topic was not likely to be the subject of litigation, so long as the patrilineal joint family looked with equal affection and efficiency upon the infant's needs. When however the joint family property came to be split up, and the infant's rights necessarily crystalised in respect of defined objects, the ancient law designated either the elders of the village or maternal relations as the proper guardians of the minor's property[127]. The motive is perfectly plain: if the property remained with agnates, especially the separating brothers or cousins, it would be extremely difficult for the infant heir to assert his

123. Hayley, 486 & seqq.

124. This is stated categorically in Soma-deva's *Nīti-vākyāmṛta*. Curiously the Indian courts have assumed that 16 is the age for both sexes. There is a controversy whether the end or the beginning of the 16th year is relevant for boys: Kane, iii, 573-4.

125. Hayley, 209-10.

126. Nevertheless, the acts of a person suffering from *bālya*, (?) 'immaturity' (possibly also 'senility') were liable to be set aside; and we have in the customs of South India the rule that full majority is not reached until 25: Sorg, *Anis*, 33-4; cf. 216.

127. Kane's edition of the *Kātyāyana-smṛti*, Bombay, 1933, v. 845 (p. 297) and note thereto with references.

separate rights and prevent deliberate or accidental embezzlements of his property[128]. Perhaps this is the reason why maternal relations, whose interest in preserving their charge's property-rights are bound to be very high and whose capacity to watch the activities of the agnates who were formerly co-owners must be as great as their affection for their charge, are uniformly preferred as guardians in Kandyan law[129]. The ultimate guardianship of the King is recognised in both systems[130].

The Kandyan rules that the guardian is personally liable for the maintenance of the minor, but may enjoy the usufruct of the minor's property, without power of alienating the minor's lands[131], and that the guardianship of itself gives the guardian a preferential right of succession over relatives of similar relationship, cannot be found paralleled in Indian customary law[132]; but this appears to the present writer to be due to the fact that upon this subject little or no material on customary law exists. There is nothing inconsistent with such rules in the *dharmaśāstra*, except the last, which has no counterpart[133].

(6) *Succession.*

Testamentary and Intestate : The law of testamentary succession, which played such a large rôle in the litigation of the early British period can be believed either to be based upon a tradition of death-bed donations or upon some fairly recent innovation, in fact an imitation of an institution brought to Ceylon from Europe in the 16th century. It is almost impossible to be certain which view is correct. What is clear, however, is that in 1815 testation was commonly believed to have been a more or less recent development in Kandyan Law[134], while at the same time the institution was thoroughly well established. In India testation as such seems to have been

128. The commentary of Medhātithi on Manu VIII. 27 is very clear on this (edn. Jha, vol. 2, Calcutta, 1939 ; trans., Calcutta 1924, 38) and even more outspoken is that of Nandana (Jha, *Hindu law in its sources*, vol. 2, Allahabad, 1933, 524).

129. Hayley, 214.

130. Kane, iii, 574 ; Hayley, 216.

131. Hayley, 216.

132. Hayley, 482-5 ; the only guardian (other than adoptive parent) permitted to succeed according to the *dharmaśāstra* is the *guru*. At customary law in the Punjab prostitutes may be succeeded by their brothel-keeper, but this exception proves the rule.

133. With the extraordinary qualification given in the preceding note. As regards the guardian's right of usufruct, the *dharmaśāstra* actually tells us (Baudhāyana II, 3, 36) that the king cannot deprive his ward of the profits, but this is in general a hard rule and there is nothing corresponding to it when private guardians of a minor's property are mentioned. In a joint family the natural rule (Baudhāyana II, 38, 41) was to charge those who had the right to control the property with the duty to support minors, nothing being said as to the limit to their own right of enjoyment.

134. Hayley, 318-9.

unknown until the 1760's, even in South India[135]. And the interval between the gradual familiarisation of wills in India and the coming of the British into control of the Kandyan Provinces was far too short for any possibility of influence from that quarter having produced the result we know of. The present writer is disinclined to feel that Portuguese or Dutch influence can have had anything to do with it, and the solution seems to be that, given the principle that the owner can dispose of his property in general freely *inter vivos*, and given that the community was willing to allow this subject to the valid disinherison of unworthy or disqualified natural heirs[136], a custom of making donations *mortis causa* and deathbed partitions of property amongst conflicting issue by several marriages, wives, former wives and concubines developed into such a pitch of organisation that when written documents came into more general use the arrival of the concept of testament merely put the finishing touches to a steady development which was ready to receive it. Even in India, where, on account of different developments, testamentary disposition was regarded at first with distaste or abhorrence[137], the law when it did emerge into the light of day depended partly upon the pre-existing law relative to the father's well-known powers of disposing of family property *inter vivos*[138], particularly upon his retirement from worldly concerns[139], and partly upon the law relating to gifts *inter vivos*[140]. It may well be doubted whether anything more than a power of distribution upon the death-bed (while in sound mind) had existed in ancient India, whether North or South[141], and the developments amongst the Sinhalese must be attributed to local evolution under the influence of local conditions. These must have been much more concentrated and homogenous than those prevailing in India, where the *dharmaśāstra* acted as an academic step-mother to all legal development.

Intestate succession in Kandyan Law has proved of very great difficulty both to practitioners and academic writers, but since Ordinance No. 39 of 1938 (as amended by Ordinance No. 25 of 1944) the general character of the system has been changed, and the former problems have largely

135. Mayne, 873 & seqq; Kane, iii, 816-8; Sorg, *Traite*, 356 & seqq.

136. On disqualifications see Hayley, 322-3, and more fully *Niti-nighandawa* passim.

137. See Mayne and Kane, reff. in note 135 above.

138. Kane, iii, 567 & seqq; Mayne, 547-8. The text of the *Mitākshara* (trans. Colebrooke; various edns.), particularly Chapter 1, is very enlightening on this subject.

139. Kane, ii, 917-48.

140. See the valuable discussions in the cases on the old law of testamentary disposition (as administered in the British courts): *Tagore* v. *Tagore*, (1872) L.A. Sup. Vol. 47; *Gadadhur Mullick* v. *Off. Trustee of Bengal*, (1940) 67 I.A. 129.

141. The Pandits, in reply to questions put to them by the early British courts found it impossible to conceive of a testament as anything other than a gift *inter vivos*, and subjected it to the limitations appertaining to the latter.

ceased to be of practical importance. To the historian however the old difficulties remain open, and an attempt must be made to describe the old system, so far as we can ascertain its character from the discrepant and fragmentary details given in our sources. All workers in this field must feel grateful to Dr. Hayley for his remarkable success in sorting out the involved mass of customary material which is all we have to guide us. At the outset it must be clearly understood that the Kandyan system of intestate succession is an example neither of pure patriliny, matriliny nor what we might call "bi-liny". Descent is traced through both sexes, yet in some situations maternal kindred are preferred to paternal kindred : at other stages, again, we find equal division between both sides of the house. Succession to males and succession to females differs, as in Hindu law, and the course of descent depends largely upon the nature of the property, its source and time of acquisition. Broadly speaking, these are typical Indian features[142]. Can Kandyan succession-law be linked up with an Indian customary law ? The present writer believes that it can, and, with the use of a little imagination, which the poverty of our sources forces upon us, it is not difficult to reconstruct the picture of pre-Āryan customary laws in this connection.

Pure patriliny existed in Northern India for centuries among the descendants of the Āryan conquerors : no one could succeed to property on a death or retirement unless he were connected with the *propositus* exclusively through males ; and the nearest male kindred excluded all more remote. Pure matriliny is known to have existed at the latest in the 12th century along the Western Coast (Malabar), among certain castes who have certain characteristics in common. Amongst these the fishing communities were prominent, and it is no coincidence that a matrilineal community, the Mukkuvas, continued that law until comparatively recent times in Ceylon[143]. Matrilineal communities probably existed in Madras

142. Succession to males and succession to females are so utterly distinctly conceived that when Sarvadhikari wrote his Lectures on Succession he never for a moment thought of a female *proposita*. The latest practitioner's authority on Marriage and Stridhana (succession to females) is the work of that name by Sir Gurudas Banerjee, now in its 5th edition. The difficulties and complexities of the Kandyan laws of succession are amply matched in Indian law : one of the most eminent Hindu jurists of the pre-British times described succession to a childless woman as "unfathomable". The *nature* of the property is considered of the greatest importance in *stridhana*, and to a lesser extent (movable-immovable, ancestral-self-acquired) in partition of the estate of males. Source and time of acquisition are considered in those same connections. Similar considerations are not wanting in Burmese Buddhist law and in some European systems, but they do not exist, and have not existed at least for many centuries, in the Common law and Islamic systems.

143. Jennings and Tambiah, *op. cit.*, 276-80. Hayley was mistaken in supposing either that the Mukkuvas could have influenced the Kandyans to any degree worthy of mention, or that Mukkuva custom could throw any light on the origin of Kandyan institutions. The Mukkuvas are evidently Malayāli immigrants, forming part of the Tamil-'Malabar' element in Coastal Ceylon.

and elsewhere in early times, but our details about them are too scanty to be of any value ; it is known however that matrilineal communities exist still in the North-East of India[144]. These two types of succession-law may be regarded as the extremes, and it is the view of the present writer that, just as patriliny was slowly modified to accommodate the habits of non-Āryan or sub-Āryan communities in Central India and eventually in the Deccan, so matriliny as we know it is not a pure self-begotten institution, but a specialisation of a patrilineally biassed type of bi-liny which must have been the characteristic succession-law of pre-Āryan India. We have a great many fragmentary traces of it, with which the Kandyan evidence fits perfectly.

Succession cannot be considered apart from marriage, divorce and maintenance. These institutions are in different ways interdependent. It seems almost certain that before the Āryan invasions of India, and for many centuries afterwards, the settled agricultural communities practised certain customs which were quite foreign to the Āryans. Amongst them was the scheme whereby, assuming (as the pre-Āryans did) that there was nothing so valuable as ancestral land, that property was kept within a small group consisting of two or at the most three patrilineal families or clans by a system of intermarriage which avoided incest but prevented as far as possible alienation either by death or *inter vivos* outside the small endogamous group. The community was predominantly patrilineal, instead of strictly so, as were the Āryans. Amongst blood kindred males had a qualified preference to females, in that females married out of the family took their dowry as their advancement in satisfaction (except in special cases) of their claim to a share in the father's property. But in the absence of sons, daughters could succeed, and sons' daughters were as competent to succeed as sons' sons. When women inherited they took an absolute estate[145], and a limited estate for women was unheard-of. The widow had a complex position. Her rights stood upon four feet : her dowry remained her own[146], and gifts made to her by her husband[147], with special reservations in relation to ancestral land[148] ; in the acquisitions made

144. See Ehrenfels, *op. cit.*

145. This is no longer disputed as regards South India before about 1350. Kane, iii, 708 & seqq ; Sen-Gupta, 183-190. Even to-day daughters take an absolute estate in Bombay, and other States applying the Bombay 'school' of Hindu law.

146. The *smṛtis* are full of injunctions to husband (except in an emergency), sons and brothers-in-law not to touch the wife's *strīdhana*.

147. *Bhartṛdatta* : for kinds of *strīdhana* see Kane, iii, 770 & seqq.

148. On the distinction between *saudāyika* and *non-saudāyika strīdhana* (which includes all kinds of property) see *ibid.*, 783-5. Kātyāyana's emphasis that *saudāyika* includes immovables is significant. The Maithila work *Vivādaratnākara* typically points out that *immovable* property derived from the husband cannot be disposed of freely : Jha, *Hindu law in its sources*, vol. 2, 530-1.

during the marriage she was probably entitled to a half share[149] ; she had a right to be maintained out of the deceased husband's estate until her own remarriage[150], and it is possible that she took an absolute estate in his moveable and even undivided immoveable property if he died without issue[151]. As regards his immoveable property and chattels (such as slaves) connected therewith it would appear that she could inherit an absolute estate in it only if there were no issue, or only daughters married out of the family, *and* the husband died separate from all his agnates[152]. For the scheme that has been referred to was based upon the prevalence of joint cultivation and enjoyment of ancestral estates by sons and male issue to the fourth generation inclusively[153], and so long as the estate was joint the widow never had more than a right to maintenance out of it. It is possible that in such circumstances some communities allowed the widow to inherit the deceased husband's share for a limited estate that is to say, she could maintain herself and her husband's dependents out of it, but could not dispose of the *corpus* except for necessity[154]. Great care was taken to preserve the financial independence of women, though they were the inferior sex, while at the same time preventing the possibility of ancestral property passing through them into the hands of another family, either by death or remarriage, which was a very real fear[155].

The marriage *out* (*diga*) and the marriage *in* (*binna*) were both in use and practised side by side—both were required to produce the desired effect. The nexus between mother's and father's family was very close, being the result of continuously repeated bonds. The evils of the dowry system were largely diminished by careful attention to the elaborate rules

149. Evidence of the Tesavalamai and the maxim *dampatyor madhyagam dhanam*, and other traces of ancient rules referred to in note 86 above.

150. This is still the law everywhere in India : Mayne, 825.

151. The text of Yājñavalkya about the widow's right to inherit does not confine itself merely to movables, and customs proved recently allow the widow an absolute estate in immovables as well as movables : Kane, *Hindu Customs and Modern Law*, 106-7 ; cf. Roy, *Customs and Customary Law in British India*, 468 & seqq., and see Rattigan, *op. cit.*, on the point. In the Punjab a limited estate is normal, but the fact that the widow is not always excluded by joint collaterals of the deceased is significant.

152. This is the celebrated Mitākshara solution of the age-old conflict of texts. See Colebrooke's trans., Ch. 2, sec. 1.

153. Compare the references to "three generations" in D'Oyly on Kandyan succession. The third degree - fourth generation according to the Hindu method of calculating nearness of kindred. On the four-generation rule see *Moro Visvanath* v. *Ganesh*, (1873) 10 Bombay H.C.R., 444 and *Dashrathrao* v. *Ramchandrarao*, (1952) Bombay, 31.

154. For the general rules of the "Woman's estate" and their *smṛti* background see Kane, iii, 708 & seqq.

155. Since in ancient times remarriage of widows was certainly countenanced : see Kane, ii, 608 & seqq.

of marriage and succession, which were directed to the same end. While morals permitted, without penalising, romantic associations, financial considerations and prestige enforced highly objective betrothal contracts : sharp contrasts in social behaviour were heightened by a keen sense of the rights both of blood kindred and of relations by marriage, and the competition of such duties could not fail to produce a complex succession-law. The Āryan system on the other hand admitted the dowry-system with reluctance[156] ; denied females any right of inheritance, and when it relented[157], subjected them to a limited estate, so that the estate would always revert to the next agnate heirs[158]. Very few females were ever permitted to succeed, and relations by marriage were treated as strangers, with whom one would always be on the very formalest of terms. They had no rights of maintenance or succession. The Āryan system was not so caste-conscious, and, as has been said before, did not object to unions in which many castes might be drawn upon for brides. Āryans learnt to be interested in ancestral property from their predecessors in India, but the *dharmaśāstra*, even in the hands of Southern jurists, never quite developed the almost hysterical respect for ancestral land which characterises the pre-Āryan. The powers of the father were, naturally, at their optimum, and remain so to this day in Bengal[159]. It is in the South that the brilliant composite doctrine propounded first in the *Mitākṣarā* (ca. 1125 A.D.) came to reconcile Āryan ideas with Southern practice[160], gave greater respect to blood kindred than to spiritually-potent agnatic heirs, admitted females on a large scale, and laid down a doctrine of restriction upon the powers of the father[161] which has provided generations of advocates with a substantial income. Yet, even in the modern South, the vigour of the ancient system, though it flourishes in marriage and adoption and divorce, must be admitted to have succumbed very largely—so far as the books and the courts are concerned—to the supremacy of the Āryan *dharmaśāstra*. Our enquiry, of course, relates to a millenium and a half prior even to the *Mitākṣarā*.

156. It is to be observed that although the *śāstra* inveighed against those who "sold" their daughters, no attacks are made upon those who virtually sold their sons—this is probably because the most approved form of marriage, the Brāhma form, involved the gift of a maiden well-adorned—and her adornment was only in an indirect sense an addition to the wealth of the family. In later times the girl's ornaments have become her *strīdhana*, and the dowry is a direct payment to the bridegroom or his family. In a Travancore case recently it was held that the bridegroom's father held the money in trust for his son and could be compelled to transfer it to him. This situation is not directly faced in our *dharmaśāstra* literature, obviously because dowries were always envisaged as perquisites of the husband.

157. See Sen-Gupta 192 & seqq. together with 183 & seqq.

158. For the modern law on this subject see Mayne, 733 & seqq.

159. Dāyabhāga system, so called from the chief work of Jīmūtavāhana, a Bengali jurist of the end of the 11th and commencement of the 12th century. Colebrooke's trans. should be referred to.

160. Derrett, *A new light on the Mitakṣara as a legal authority*, 30 Journal of Indian History, 35-55.

161. Mitākṣharā I, i, 27-29.

The pre-Āryan inhabitants of the Peninsula, whilst watchful that ancestral property should not pass to strangers in blood and at the same time determined to be just to families connected by marriage, from whom their own future descendants would in part come, must have allowed property to descend first to descendants, then, ascending, to parents (probably, in one system, to both parents jointly and in another system to the mother first—a scheme which did not fail to appeal even to the Āryans in due course), then to collaterals of the full-blood, then to those of the half-blood, then to grandparents in equal shares (excepting ancestral property emanating from a particular side of the house, which would return thither) and then to uncles and aunts and their issue. A preference for the maternal uncles and aunts over the paternal[161a], though perhaps not universal, is perfectly intelligible in view of the fact that the property must thus go either to the *propositus*' brother's widow[161b] or to some relation whose daughter would eventually marry into the *propositus*' agnatic stem once again : if the property could not pass to an agnatic collateral—who would have the first claim on property which would have been his or hers if the *propositus* had not been born and survived—the natural heirs are those who had supplied the *propositus* with his wife and his dowry, or if he had neither, would be supplying either a wife or a husband to his agnates. It is of interest to note that whereas in the pure agnatic family the paternal uncles and their issue are allies, in the system we are describing they tend to be rivals. The South Indian kinship system cannot be used as an entirely safe guide in succession-matters. A father's brother's son does not count as a brother—though he may be called "brother"—so as to share with real brothers in the succession. To-day the South Indians are very particular to distinguish between an elder brother and a younger brother, while they are not particularly keen to distinguish between ancestral property and the acquisitions made by joint brothers ; yet there is evidence that at one time

161*a*. In inscriptions (see n. 162 below) we find the mother's brother and the sister's son high in the order of succession. Haradatta (on Gautama dh. sū. II, 5, 18) counts the father-in-law as a close relation for the purpose of 'pollution on death'.

161*b*. It is not without significance that although the *dharmaśāstra* in general contemplates only the *propositus*' widow and no other widow as an heir (in that capacity : i.e. a mother, or father's mother claims as such whether in coverture or not), one particular school (that of the Māyūkya, applied in Western India) actually puts widows of agnates in the order of succession, while the customs of the Punjab frequently admit such widows, but in their respective husbands' steads.

both these differences were much more important in succession law[162]. It is open to question whether in the old Kandyan law the former distinction (which is preserved in the Sinhalese language, and is conspicuously absent from Indo-Āryan languages besides Sinhalese) did not found a rule even in succession-law.

The disputes in Kandyan law regarding distribution *per capita* between children or alternatively between the beds (wrongly called *per stirpes*)[163], and regarding the exact enitlement of the surviving spouse[164] are reflected in Indian legal history. Precisely similar points are constantly discussed in our texts[165]. Distribution between the beds was the original pre-Āryan rule and many Āryan communities found no difficulty in adopting it[166]. It is still very much alive in India[167]. The sometimes absolute and sometimes limited estate for the widow in all parts of her husband's property is the relict of a pre-Āryan scheme somewhat modified by Āryan notions

162. Elder brother distinguished from younger brother in succession : inscriptions published in Epigr. Carn. iii, Tirum.-Narsipur 21 (ca. 1222) ; E.C. vi, Chikmagalur 105 (1343) ; E.C. ix, Nelamangala 12 (ca. 1330) ; and Epigr. Indica v, 28 (1178). In recent centuries the characteristic trend has been for all self-acquired property to be treated as joint family property if the acquirers are still joint in status. This trend has been considerably arrested during the British period. Yet the *smṛti* texts of all periods make great play with rules for distinguishing "partible" from "impartible" property, and a reasonable inference is that the sub-Āryan communities maintained — in the widow's interest— that the distinction between ancestral and self-acquired property was of vital importance. Medieval South Indians, we can be sure, were not so particular because the widow's rights of succession had been substantially modified.

163. The method of distribution between the beds, which is as old as Gautama, survives to-day — see below. The phrase *per stirpes* is correctly used to describe a method of distribution by representation of predeceased links, as for example where the three grandsons of P by a predeceased son A share between them a half of the estate of P in competition with the single grandson of P by another predeceased son B. For the dispute in Kandyan law see Hayley, 354, 393 & seqq. 401 ; see also 379, 393-7, 399, 455 ; also *Report of the Kandyan Law Commission*, 1935, 25 ; Ralph Pieris, *Title to Land in Kandyan Law* (Sir Paul Pieris Felicitation Volume), 14-16. It is very difficult to accept Hayley's opinion on the truth of this controversy, since so many details point to the *patnī-bhāga* method (see below) as fundamentally traditional. See Hayley, 418, 420, 421, 500.

164. Hayley, 348 & seqq ; 447.

165. The *patnī-bhāga* rule ceased to be controversial early, but other problems such as the shares to be taken by sons of various seniorities and castes, and the notorious crux of the widow's right were lively debated even as late as the Mitākṣarā and the 16th century work in the Mitākṣarā tradition, Pratāpa-rudra's *Sarasvatī-vilāsa* (text and trans. of Dāyabhāga portion ed. Foulkes, London, 1881).

166. *Patnī-bhāga*, "division according to wives", is recommended in Gautama, Bṛhaspati and Vyāsa (see Kane, iii, 607) and in Vṛddha-Hārīta (quoted in the *Dharmakośa*, W.ii, 1938, at p. 1988). What Kane might well have mentioned, and indeed is conclusive, is the fact that the whole of the *śāstric* law relating to Reunion (of joint heirs who have separated) is based upon the assumption that partition is according to the beds.

167. In Madras a custom among Chetties was upheld along these lines : see 43 Madras 254 = A.I.R. 1925 P.C. 49 and 48 I.A. 539. See also *Sanskrit Documents*, ed. Sen and Misra, Allahabad, 1951, 44. In Punjab customary law the institution is called *Chundavand* : see Rattigan *op. cit.*, 240-81, 437-49 ; also All Pakistan Legal Decisions 1956 P.C. 37.

of a late period[168]. Representation of collaterals by their issue does not appear in the *dharmaśāstra*, probably because the scheme originally worked out upon a strict patrilineal basis did not contemplate other than a mere serial selection of the nearest heir or heirs, and the "spiritual benefit theory"[169] would have done nothing to encourage representation, which seems to have existed in South Indian customary law[170]. Succession by children of associated marriages, especially in competition with children by separate marriages is exactly as would be expected of a polyandrous society, in which distribution according to beds would be the natural method. The law of succession to females in Kandyan law has strong similarity with the developed, rather than the primitive *dharmaśāstra* rules relating to descent of *strīdhana*[171], and that development itself must be attributed to the growing predominance in some parts of India of the surviving traces of pre-Āryan female independence and the necessity for keeping dowry and the acquired property of the females out of the hands of the husband's collaterals. The law gives a further indication of the delicate terms upon which families related by marriage stood towards each other. The Indian law relating to *strīdhana*, except in communities heavily influenced by Āryan ideas, shows a very strong influence by the pre-Āryan social set-ups[172].

168. Assuming, upon the basis of greater probability, that the pre-Āryan scheme would have restricted her inheritance to either (*a*) all his property but without the power of partition and alienation of the undivided interest in joint immovable property, or (*b*) property other than immovable property held subject to a joint tenure. Since it was only in late medieval times that the Mitākshārā resolution of the difficulty was achieved it is reasonable to suppose that previous Āryan influence tended to subject her to limitations as to enjoyment or alienation beyond the limitations which the pre-Āryan system had contemplated. Whereas the Āryans had learnt to allow the widow to succeed, some sub-Āryan communities must have accepted that even as to acquired lands her estate could not endure beyond her life. But this complex topic requires deeper investigation.

169. Expounded at length in Sarvadhikari's Lectures on the *Principles of the Hindu Law of Inheritance*, 2nd edn., 1922, also in Gharpure, J.R., *Sāpiṇḍya*, Bombay, 1943.

170. To judge from the phrasing in E.C. iii Tirum.-Narsipur 21, but this is not conclusive. The Tesavaḷamai is far from clear, but this would seem to be the implication from I, 14, "If a man has a child . . . deceased father." In Punjab customary law representation of brothers and uncles is normal : Rattigan, 439.

171. No question of ancestral lands being in the *propositi's* hands could arise in the earliest law relating to *strīdhana*, but the question certainly arose in South Indian customary law in the early middle ages—witness the Tesavaḷamai. See Sen-Gupta, 128-9.

172. Had this not been the case it would have been impossible to account for the fact that, once the Āryans or sub-Āryan races had been brought to accept that a woman could own property, the *śāstra* did not proceed to abandon the categories of *strīdhana* which had gradually accumulated, to assimilate the whole to a type, and give one line of succession for the whole : the jealous care with which different lines of descent were prescribed for different sorts of property points to persistent pre-Āryan influence, however modified in details.

(7) *Maintenance.*

The Kandyan law gives the greatest importance to maintenance, and in this it shows a similarity to Indian customs. The *dharmaśāstra* did not inculcate a very wide distribution of this right[173], and in modern Indian law it is generally restricted to close relations. Rights attach to property as well as to persons, and those who cannot show a right against either are excluded[174]. The Kandyan system was more liberal, and it is possible that this was the position in India amongst pre-Āryan communities[175].

(8) *Debts.*

The characteristic and peculiar features of the Kandyan laws relating to debt are all to be found in Indian customary law and most of them are reflected in the *dharmaśāstra.*

Execution sales are absent in both systems[176]. The King's disinclination to assume priority for debts to himself (if the evidence is of any value for early times) was commented upon in Kandyan Law[177], and is consistent with Indian theory[178], though we cannot speak for Indian practice. The part played by self-help is great in Kandyan Law[179], and the whole institution of *dharnā* (as it is known in India) or *velekme* (as it is known in Ceylon) may be said to be common to both systems[180]. The part played by supersition and the special dread of indebtedness (coupled with an indifference to paying debts!) is identical in Indian customary practice

173. Kane, iii, 803-5.

174. Mayne, Ch. 18.

175. The mitākharā on Yājñavalkya III, 239 (Kane, iv, 34) and the apparently southern Indian work, the *Sukranīti* (Madras, 1882 and trans. Sarkar, Allahabad, 1914), at III, 249-50, a rule that some relations by marriage are entitled to be maintained.

176. Hayley, 513 ; Sen-Gupta, 236 ; Varadachariar *op. cit.*, 207 & seqq. Since confiscation of all property as a punishment was known, this coincidence is quite extraordinary. Kane, iii, 441, relies on a text advocating execution (quoted ca. 1200-1500)—its source may be regarded as spurious, even if later jurists unhesitatingly accepted it.

177. Hayley, 520.

178. The King's responsibility for giving justice to others, bearing spiritually the burden of unpunished wrongs remaining within his kingdom, points to a duty of securing that suitors are paid their debts even if he fails to collect those owed to him. Yet, there is an obvious difference in the Indian and the Kandyan positions. In the Kandyan kingdom taxes were a part of 'services', and cash collections were subordinate to a scheme of service in kind. In India most services were sooner or later commuted into cash payments, or shares of crops, and unless taxes were paid regularly the whole machinery of government, including the judicial function, would suffer. Hence it was natural that a notion should exist that the king should assume priority for debts owed to himself, and this we find expressed once in Kauṭilya : yet Kātyāyana expressly says that the King must give priority to a Brahman. See Kane, iii, 441, n. 740.

179. Hayley, 514, & seqq. Cf. Varadachariar, 196-7.

180. Hayley, 516 & seqq. Varadachariar, 202 & seqq ; Nelson, *Indian usage and Judge-made Law in Madras*, 109 ; *Prospectus*, 55-6, 165, 167. Kane, iii, 438 & seqq. discusses the *dharmaśāstra* sanction for such practices.

(up to the nineteenth century) and in Kandyan Law : Hayley was mistaken in believing that he had detected significant differences[181]. Selling of children, [and (?) wives] and other blood relations in satisfaction of debts[182]; the absolute liability of male issue for the debts of their ancestor, with exemption as to interest[183]; and finally servitude for the discharge of indebtedness[184]—all these are common to Indian and Sinhalese law. It is important to notice that the *dharmaśāstra* seems to have attempted to mininise certain practices which were evidently usual, but which conflicted with the fundamental theories upon which the jurists built up the classical system[185]. The Indian rule of *dāmduppat* will be referred to below.

(9) *Revocability of alienations.*

At first sight it would appear that the extraordinary and characteristic rule of the Kandyan Law (not yet defunct) that gifts and even sales, with certain exceptions, may be revoked by the alienor during his lifetime, notwithstanding that the land may have passed to a third or fourth party in the meanwhile, upon his tendering the purchase price in the case of sales[186], has no counterpart in Indian law. If this were so it would give rise to interesting speculations. But although we have, as yet, no material from other sources to prove the habit of such revocations in Indian customary law, certain chapters in the *dharmaśāstra* and certain well-known practices of a kind which might be labelled as residual lead us to believe that in very early times this custom was in great vogue. Its basis, everyone agrees, is the desire to keep the ancestral land in the family, and simultaneously to accommodate persons who are temporarily embarrassed for want of funds to pay fines or tenure-services. Mortgages and revocable sales are admitted to be divided by a very fine line[187], and the actual intention of the alienor has to be established by very careful enquiry apart from the terms of the document, if any. Revocation and its kindred institution,

181. Hayley, 518 ; material given in 1714 by Fr. Bouchet and quoted by Nelson, *Prospectus*, 167, disposes of the notion.

182. While Vasiṣṭha says that a father has the right to sell his son and Kauṭilya says that non-Āryans may do it, Yājñavalkya says it is sinful and Kātyāyana forbids it. The nature of the parent's "ownership" over his or her child was a subject of controversy. The picture is not complete from the *dharmaśāstra* ; south Indian inscriptions must be consulted and these prove a great many of these sales. See Nilakanta Sastri, K. A., *The Cōḷas*, 2nd edn., Madras, 1955, 555. For Kandyan law see Hayley, 137 and 139.

183. Kane, iii, 442 & seqq ; Hayley, 495, 505.

184. Kane, iii, 416-7, 440 ; Hayley, 139.

185. The texts do not explain in detail what superstitious sanctions the creditor may apply to the debtor ; what we know is derived from late sources.

186. Hayley, 300 and n. (s), 302, 408, 507, 508 ; Pieris, *op. cit.*, 9-11.

187. Pieris, *ubi cit.*

automatic *reduction* of gifts[188], belongs partly to the law of succession, being related to the concept of quasi-vested rights in close relations, such as issue, and partly to the law of contract. The *dharmaśāstra* gives only negative evidence on the subject of reduction of gifts, which we find under the heading of "partibility": it would appear that certain gifts were thought by some (? the unreformed pre-Āryans) to be revocable or partible at the instance of heirs of the donor[189]. As for the wider question of reclaiming of gifts by the donor, and annulling of sales, the *dharmaśāstra* has some interesting details to give under several heads. Firstly we are told that there are a large number of alienations which should not be made at all[190]: it is curious to note that the system does not refer to them as "ungiveables", as we might expect, but "ungivens", i.e. things which though they appear to be given are really not alienated at all, for the alienation is voidable. Part, but by no means all of this chapter is concerned with the activities of those whose title to give is defective, by reason of want of consent, etc. It might be worthwhile to investigate the possibility that part of the Kandyan law of revocation by heirs[191] stems from a similar source. But, as to the rest, the chapter concerns itself with the impropriety of an individual with full competence to do so making certain alienations. Again we have a chapter on the wickedness of revoking certain gifts[192]. This is a curious chapter, at least to a European reader who is accustomed to supposing that if he offers to reclaim something he has given he will be met with abuse and the law will afford him little if any remedy. The chapter assumes that people were used to imagining that they had a kind of latent right in an object (particularly land) even after they had parted with it. This is typically pre-Āryan: the Āryans had a background of movement and conquest—quiet hereditary enjoyment was something they learnt in India and other countries in which they settled. It will be observed that both the Hindu and the Kandyan Laws are agreed that gifts to pious uses are irrevocable[193].

It follows both from the assumed Indian customary and the Kandyan Law that an alienor could deprive himself and his heirs of a right to revoke by binding himself and them by an imprecation not to use the right of

188. Hayley, 334, 499.

189. Yājñavalkya II, 123(*a*); Mitākṣarā, I, vi, 13-15.

190. *Dattānapakarma*: see Kane, iii, 471 & seqq. for a brief treatment.

191. Hayley, 302, 304. It seems clear that the scope for *revocation* as opposed to *redemption* by heirs was very limited in 1815, certainly not extending beyond cases of voluntary conveyances, and perhaps doubtfully even so far. Pieris, *op. cit.*, 10-11.

192. See Kane, *cit. sup.*, also ii, 886 & seqq. Nārada, *Dattāpradānika*, 9-10, is among the most significant passages for comparative purposes.

193. Hayley, 306; Kane, iii, 472.

revocation. A so-called "renunciation clause" in a document would serve this purpose[194]. Hayley unfortunately seems to have become confused about this. There cannot be any doubt but that the statements which seemed to him to be mere verbiage were actually renunciation clauses[195]. In Indian practice we are unable to find many examples of this usage, yet it is perfectly consistent with what we know from multitudes of inscriptions relating to gifts to pious uses that such clauses should be used in transfers between private individuals. The charter or *śāsana*, by which the property was conveyed to the temple or to Brahmans, etc., in very many instances coupled with the donor not merely his coparceners, whom one would expect to signify their consent, but even close relations by marriage, whom we have reason to believe would be maternal collaterals and thus remoter heirs. Statements that the consent of relations, heirs and neighbours have been taken before making the alienation are common[196], and grants almost invariably end with an imprecation on any who should attempt to resume the grant. It is generally supposed that the imprecations—sometimes very fearful[197]—are aimed at the conquering king or the embezzler or trespasser : no doubt these were not far from the draftsman's mind, but the possibility that they referred especially to the donor himself and his kindred is not remote. The very form of the most commonly used imprecation in the Deccan is very suggestive :— "He who takes land whether *given by himself* or by another is born a worm in ordure for sixty thousand years[198]." That the emphasis is on *gifts* and the most suspected resumer is the donor *himself* is quite apparent.

The *dharmaśāstra*, in addition to declaring the voidability of alienations by persons without adequate authority, gives us a chapter on annulling *purchases* in certain circumstances[199]. Here we see the work of the

194. Hayley, 303, 304, 329 ; see note 196 below.

195. Hayley, 303-4. The imprecation, present in Indian as well as Kandyan documents, is conclusive.

196. The mass of inscriptional evidence is very large. One of the earliest specimens of this kind of clause is E.C. iv Chamrajnagar 63 (ca. 750) ; the formula referred to in the text appears in E.C. v Channarayapatna 242 (1252) ; E.C. iv Hunsur 26 (1345), *ibid.*, Nagamangala 106 (? 1425), Chamrajnagar 185, 187, 189 (1482-7), Gundlupet 4 (1535), Heggadadevankote 119 (1670). But clauses of a less formal character with identical object are found in the intervening centuries in great numbers, e.g. Mysore Arch. Rep. for 1910-1, para. 95 ; E.C. iv Seringapatam 160 ; E.C. iv Hunsur 3 (1167) ; E.C. v Arsikere 16 (1196). In E.C. vi Chikmagalur 83 (1196) we find a widow joining with her father-in-law in granting land for the memorial to her husband. The Tesavaḷamai confirms that land could not be alienated without the consent of *dāyādas*.

197. The specialists in framing imprecations were the Āndhras : see Butterworth, A. & Chetty, V. V., *Inscriptions in the Nellore District*, 3 vols., Madras, 1905.

198. sva-dattam para-dattam vā yo hareta vasundharām
shashṭi-varsha-sahasrāṇi vishṭāyām jāyate krimih.
This text has Purāṇa authority, and is cited not hundreds but thousands of times.

199. Kane, iii, 489-91.

reformer. We are not told, as we might expect, that sales can be revoked by the purchaser only for defects in the article purchased undisclosed by the seller and not visible to the purchaser upon a reasonable inspection, but, quite apart from any circumstances of fault in the object purchased, we are told that the purchaser can return it and regain his price if he does so within a short specified time[200].

INSTITUTIONS OF KANDYAN LAW CLOSE TO COMMON SENTIMENT YET MORE CAPABLE OF CHANGE WITH TIME AND INFLUENCES AB EXTRA

(1) *Caste.*

It must remain for long an open question whether caste, an institution of Kandyan Law as prominently as of Peninsular Indian custom, came to Ceylon with the earliest Sinhalese invaders, or developed there under the influence of subsequent repeated Tamil invasions, the accession of new groups of inhabitants within Sinhalese districts or the domination of Ceylon at various periods by Tamilian rulers and their entourages. The present writer is forced to proceed for the present upon surmise and probability, and the most probable solution would appear to be that the original Sinhalese knew caste as an occupational division of the population in vigour in their own homeland. The society from which they sprang probably held together in tight bonds of mutual occupational dependence, each caste being rigidly self-contained, and no caste being capable of existing satisfactorily without the remainder. The division of the population into the four Brahmanical classes described by Manu and others may well have been known to them, and the arrival of Brahmans in Ceylon cannot have been delayed much after the coming of Buddhism to the Island, if as late as that. The fact that caste in the two-fold sense of the fourfold division and the rigid occupational stratification was known in Ceylon from extremely early times is evident from the historical texts. Subsequently no doubt other communities came to be represented in Ceylon besides the original Sinhalese, and may have adopted the Sinhalese tongue. We find on the other hand that most Tamilian and Muslim communities kept their identity and did not mix freely with the Sinhalese, mixed marriages occurring only in the highest levels of society between Sinhalese and Tamils and Malayālis. Much of this is conjecture : what is certain is that caste played an immensely important part in the Kandyan social structure in 1815,

200. Two trends may be identified, both apparently improving upon a customary position: according to one the period cannot in any case exceed three days ; according to the other the period is related to a reasonable time for trial or inspection and varies with the object purchased—a female slave could be returned after one month ! See Kane, iii, 489-90.

and because the British soon forgot their original intention, particularly after 1819, to give every support to caste rules, the general tendency has been to diminish their importance. Caste affected marriage[201], could not be lost merely by marriage with a slave[202], might even affect the stability of illicit relations between the sexes[203], affected succession to property[204], could, if subjected to imputations by a slanderer, give rise to a right to damages[205], and finally influenced the type of punishment that might be awarded for an offence[206]. All these characteristics existed in common in the Indian as well as in the Kandyan laws.

(2) *Slavery.*

The Kandyan Law relating to slavery is on all fours with the Indian law, so far as the latter may be ascertained from the *dharmaśāstra*, records of customs and inscriptions[207]. The nature of slavery itself, and the means of liberation ; the methods of becoming a slave, and the status of children of slaves ; the rights of slaves to own property, and their passing as part of the estate of their deceased owner : all these find comparable rules in both systems[208]. The *dharmaśāstra* takes a different view of the effect of liaisons with slaves[209], but this would appear to be a reforming rather than a customary principle.

(3) *The status of women.*

Much has been written about this controversial subject in India, and it is possible to argue both that the Āryans brought with them a lower and that they brought a higher notion of the status of women when they

201. Hayley, 175-6 ; Kane, ii, 447 & seqq.

202. Hayley, 135, but cf. loss of freedom on account of intercourse with slave, *ibid.*, 140—cf. Kane, iii, 485.

203. Hayley, 176 ; the twice-born Hindu was subjected to spiritual penalties if he had relations with women of the Śūdra caste ; Yājñavalkya III, 241 ; see Kane, iv, 34.

204. Hayley, 495 ; Pieris, *op. cit.*, 16 ; Kane, iii, 597-9.

205. Hayley, 115 ; Kane, iii, 511-2.

206. Hayley, 124, 125, 129 ; Kane, iii, 389, 395, 397.

207. Hayley, 118, 134-144 ; Kane, ii, 180-9 ; iii, 484-5. A paper by Colebrooke on slaves both in law and practice, quoted by Harrington, *Analysis of the laws and regulations . . in Bengal* (London, 1817), iii, 743, bears a most interesting similarity to the Report on Slavery in the Kandyan Provinces found in the Proceedings of the Board of Commissioners, 25th August, 1829.

208. Hayley was doubtful as to the slave's powers to own and dispose of property (p. 144), but it is clear that although the Indian slave had defective ownership, he was by no means devoid of it. Kātyāyana, v. 725 and Kauṭilya (S. Sastri's trans. 207) make this quite clear. And when people sold themselves and their issue into slavery it was in reality a mortgage of their labour.

209. Hayley, 140 should be compared with the verse of Kātyāyana cited above (Kane, iii, 485) Kauṭilya cited in Kane, ii, 184, and Nārada *ibid.*, 185. Whereas both systems agree that a male associating with a female slave is himself thereby enslaved (even if temporarily), the Indian system preserves fundamental rules about caste, which, though not entirely absent in Kandyan evidences, greatly modify the rule.

came into contact with Indian pre-Āryans. Perhaps the truth is too complex to be arrived at upon such straightforward lines. It is clear, however, that the South Indian woman of historical times was, if not man's equal, at least as well protected financially as her male relatives. This is where she differed from her Āryan sisters. There is ground for thinking that the South Indian woman had a great deal of independence in secular as well as religious matters[210]. She was, nevertheless, in the position of a protected person, who, at least in most communities, could if she wished to do so shelter behind her brothers or her husband[211]. There is no reason to believe that she generally enjoyed any preferential right of management or enjoyment of property, and where a widow managed property for her children her prominence was one of necessity rather than choice. The position in the Kandyan society seems to have been the same[212].

(4) *The throne.*

It is known that many of the later Kandyan kings were foreigners and therefore their practice must be utilised for our purpose with much caution. Nevertheless they must, on the whole, have abided by local customs, or they would not have been tolerated so long. There appears to be hardly any feature of the Sinhalese king which would distinguish him from his Indian counterparts. Election[213], succession[214], nomination of heir-apparent[215], subjection to law[216], absence of legislative power[217], owner-

210. Grants by women to charity are very numerous in South India. The prominence of Queens and even the wives and widows of Governors in political and even military affairs in the Deccan and further south in medieval times is quite remarkable. See Mahalingam, T. V., *South Indian Polity*, sub. nom. 'women'; also Derrett, *The Hoysaḷas*, 97,100. There is no reason to believe that women were more retiring and less trusted among the sub-Āryan communities of pre-Āryan background during the previous thousand years or so.

211. This is the characteristic Indian position: it seems not less true of the Kandyan woman: Hayley, 64, 186, 215, 511.

212. Knox remarks both on their freedom of movement and converse with all classes and also upon their acceptance of an inferior position to their husbands.

213. Hayley, 41-2; election was the residuary method recognised in India, and outstanding instances occurred during the reign of the Chālukya dynasty in the Deccan.

214. Hayley, 41-2; strict father-son succession was not regarded as normal in India, where whatever prominence was given to the eldest son the throne was thought of as the property of a joint family, and collateral rather than lineal succession was frequent—a situation which led to frequent succession-wars. The problem was at least as old as the Mahābhārata.

215. Hayley, *ibid.* The approved practice of Indian kings was to associate their most competent sons with them while they were yet in full control of affairs. The Yuvarāja, duly consecrated, would then be in the best position to defeat rivals.

216. Rangaswami Aiyangar makes much of this in his *Rajadharma*. See also Sen-Gupta. Hayley, *cit. sup.*

217. The Kandyan scene splendidly demonstrates this fact (Hayley, 56), one which might well be disputed on Indian evidence. Indian theory definitely denies legislative power to the king, except to the extent of limited orders. See Derrett, *The criteria for distinguishing between legal and religious commands in the dharmaśāstra*, A.I.R. 1953 Journal 52 & seqq.

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ship of all land[218], exaction of services[219] ; source of honours and appointments, ownership of minerals and treasure trove[220], entitlement to fines[221], source of justice[222] : all these characteristics have their Indian parallels. The right to take property by escheat and to forfeit tenures for default of services are rights enjoyed by the Indian monarch[223]. All this is not to suggest that customary divergences did not exist, or that Ceylon had no peculiarities. It would be strange if she had not. The peculiar isolation of the Sinhalese made it almost inevitable that some special customs should emerge there. Yet in so many small matters the Kandyan king resembled his Indian rivals : When he made a grant he used to sign the document with a special mark[224]—signature was not usual except for kings—and would notify the effect to local officials by special announcement[225]. The king's willingness to patronise more than one religion is a feature which is characteristically Indian[226].

218. A controversial matter in Indian history but not in Kandyan law : Hayley, 223, 227, 251. The most distinguished Indian historians deny that the king had such a right, but their sources are biassed and their reasoning inadequate. Great jurists, such as Srī-Krishna Tarkālaṅkāra and Jagannātha Tarka-pañchānana believed in the king's ultimate ownership and based upon it a great part of his jurisdiction. Dr. A. L. Basham takes the better view: *The Wonder that was India*, London, 1954, 109-110.

219. Hayley, 226 ; the feature of *rājakāṇiya* bulks very large in all accounts of the Kandyan system—see for example Pieris, *op. cit.* In India, particularly in the South, we have ample evidence of the sort of services which were exacted, and most of them seem to correspond closely with those evidenced in Ceylon ; but by medieval times these had all been commuted, so far as we can tell, to cash payments. For surviving revenue rolls, and the items there appearing see Derrett, *The Hoysaḷas*, Ch. 7. In passing one may note that South Indian kings took heriots (marāle) just as did the Kandyan king, and that services were evaded by fraudulent dedications to a god in similar ways in both countries.

220. Hayley, 283-4 ; Kane, iii, 175.

221. Unless assigned : Hayley, 127 ; Kane, iii, 393, 407. *Daṇḍa*, like *dāya* (in this context escheat) was a regular perquisite of the ruler.

222. Hayley, 58 ; Sen-Gupta, Introd. & Concl. ; Kane, iii, Ch. 11.

223. Kane, iii, 763. It is to be remarked that in practice estates escheated to the king much earlier than the *śāstra* would allow. In most kingdoms the property (unless held jointly with co-heirs) passed to the king if no male issue survived within 4 generations inclusively. Evidence for ancient times is found in the drama *Śākuntalam* by Kālidāsa, while in South India numerous inscriptions make it appear that it was as a favour that the king allowed the widow to inherit. The Portuguese at Goa long availed themselves of the ancient custom.
See Sarasvatī-vilāsa (Foulkes), sec. 613.

224. Pieris, 7 ; in Southern India kings alone signed grants, and the *dharmaśāstra*, in requiring names to be written, probably did not, as Kane suggests (iii, 308-14) contemplate actual signatures. But the king's seal (*ibid.*, 314) conferred a unique authenticity.

225. Pieris, 8 ; this is reminiscent of ancient Indian *śāsanas* of the Maurya and Gupta periods. No doubt such announcements were made in later ages, but the fact is not recorded directly or indirectly in the majority of medieval records that survive.

226. And puzzling to Europeans. For examples see Derrett, *The Hoysaḷas*. Ch. 7.

(5) *Tort, crime and punishment.*

The amorphous character of tort in Kandyan Law[227] faithfully represents the vague character of that chapter in the *dharmaśāstra*[228], and this can hardly be a coincidence. The great similarity between contractual and delictual indebtedness[229], the feature of self-help[230], the thin division between tort and crime, the special function of the king in repressing crime[231] but his indifference to tortious wrongs[232], the feature of compensation[233], of restitution *plus* fine *plus* damages[234], the objections to sorcery[235], liquor[236] and gambling[237], the gradation of crimes and the gradation and types of punishment[238]—in all these contexts *dharmaśāstra* parallels are very generally forthcoming. All the details do not tally—for example, taking animal life was not invariably an offence in India[239]—but the characteristic features are almost identical. In particular we must notice the notion that fellow-villagers are collectively responsible for wrongs done in their territory[240], and that the king must compensate the uncompensated wronged party[241]

227. Hayley, 524.

228. Kane, iii, 259, 511 & seqq. For Sen-Gupta's view of the development of criminal jurisdiction see his work at pp. 286 & seqq. The king had a comparatively small scope of action on his own motion, cognizable offences being a very small minority : Kane, iii, 251.

229. Hayley, 529 ; no distinction is made in the *dharmaśāstra* works on Vyavahara (procedure).

230. See note 180 above, also Kane, iii, 408.

231. Kane, iii, 242 & seqq. ; it is very remarkable that the ancient texts look to the king as primarily a "remover of thorns", though whether he does this in a civil or a criminal action is immaterial.

232. Except in the few matters in which he may act *suo motu* (see note 230 above) the king cannot take steps without a complaint or suit being filed.

233. Hayley, 524; this is not so strong in the *dharmaśāstra* where the jurisprudence of fines seems to have outgrown the desire to compensate the injured party : Kane, iii, Ch. 24. Yet the difference is small ; cf. *ibid.*, 494.

234. Hayley, 118. 523, 528 ; Kane, iii, 481, 522.

235. Hayley, 116 ; Jennings, Notes on Kandyan Law, 209 ; Kane, iii, 406 ; Gune, V. T., *The Judicial System of the Marathas*, Poona, 1953, 260.

236. This, like the following, has two sides : we have evidence both that liquor-drinking was disapproved and that it was regulated—in both countries. *Surāpāna* is rather a sin than a crime according to the *dharmaśāstra* : see Kane, iv, 20 & seqq., but it was nevertheless punished as a crime at some periods—see Gune, *op. cit.*, 260. Hayley, 120.

237. Hayley, 121 ; Kane, iii, 538 & seqq.

238. Both the regular gradations, for which see Hayley, 68, 107, 108, 124-5, 128, 129, 131, and the lack of regard for precedent and consistency are to be observed in both. The law as gathered in Kane, Sen-Gupta, Varadachariar and Jha may be supplemented with inscriptional details collected in Mahalingam and Nilakantha Sastri. It is most interesting that both in Ceylon and in India the abettor was not guilty of murder : Hayley, 105 ; Kane, iii, 529. Sexual intercourse and even rape between a woman of high caste and a man of lower caste evoked legal violence in both countries.

239. Medātithi tells us that a king might make a valid order that meat should not be killed on certain days. In Kandyan law taking animal life seems to have been a moral rather than a legal offence, to judge from the evidence given by Knox and the rules referred to by Hayley at p. 241. A marked difference is that according to Knox prostitution was an offence in the Kandyan country ; this is un-Indian in development.

240. Hayley, 263 ; Kane, iii, 166-8.

241. The Indian view on this subject was in full vigour even in the last part of the 18th century, when Warren Hastings was memorialised by a robbed person.

are markedly Indian concepts. On the other hand it appears from our sources that retribution played a large part in the Kandyan law of crime, whereas in the *dharmaśāstra* the only basis to punishment is its value as a deterrent[242]. But then we know that the *dharmaśāstra* was a work of art, based upon continuous juristic research, whereas such activity was practically unknown in Ceylon. For all we know the untutored Indian judge saw nothing in punishment but retribution, and the savagery of some punishments for crimes against the State, and the mildness of punishments for crimes against low-caste people or against those who were in no position to complain tend to suggest that that may indeed have been the case.

(6) *Hospitality.*

From crime we turn to its opposite. The fundamental character of a society is susceptible of change even when unusually protected from outside influences as were the Kandyans. It cannot be certain that the Kandyans as Knox knew them in the 17th century were temperamentally representative of their earliest ancestors in the Island. Nevertheless, the characteristics which he describes do not seem strange to the Indologist. A certain naïveté and simplicity, combined with a strong sense of personal honour, is not characteristic of all classes of modern India ; it does not consort well with the atmosphere associated with the educated Brahmanical communities. But its counterparts were in all probability to be found easily in medieval Peninsular India, if not all over the sub-continent. These things are very intangible and vague, but Knox's account rings true to the student of ancient and medieval India. In particular the custom of " Kandyan hospitality " (*navātan kirē*) would not surprise one familiar with South Indian customary law[243] : an absence of sexual jealousy and a high regard for the host's responsibility for his guest seem to have characterised some communities there as much as other now rare unsophisticated peoples. It is perfectly clear, however, that such customs though evidence in ancient India from sources collected by Kane are incompatible with Aryan attitudes to life, and no traditionally Aryan or sub-Aryan community of modern India could understand the extremes of hospitality referred to in the custom mentioned. Yet, for all this, the claims of hospitality in India and Ceylon are still quite remarkable in their strength : perhaps nowhere in the world can they be rivalled except among the Bedouin of the desert : and that India and Ceylon are more or less alike in this intimate respect cannot be a coincidence.

242. Hayley, 525. The Mahābhārata and all works on Daṇḍa (criminal law) emphasise that the king's jurisdiction exists to deter malefactors.

243. Details given by Nelson in his *Madura Country*.

(7) *Suicides.*

In passing from hospitality to suicide we are performing no strange feat. The Sinhalese and the Indians of ancient, not to speak of modern times, were precisely alike in two respects : they had a very strong sense of personal dignity and self-respect and were very sensitive to what a European would call trivial abuse[244], and at the same time they had a strong superstitious belief in the power of shedding blood. The strongest magic of all was suicide ; next best was the murder of one's own mother or child. Instances of the latter are wanting in Ceylon but they are part and parcel of the same picture. A person who has been injured or insulted and cannot obtain satisfaction by other means will threaten to commit suicide[245], and shame alone may drive the injured party to commit suicide even if there is some prospect that his honour might eventually be vindicated. An incident of this character happened in the Low Country during the present writer's sojourn there. The act has a two-fold effect in the mind of the doer : firstly that grave misfortune will fall upon the party responsible; the whole village will be polluted ; the responsible party will be loaded with an unseen curse and the king will be under an obligation to find out the cause of the suicide and punish the offending party[246]. In the last result he may be obliged to fine the whole village[247]. But there is yet another side to it. The South Indian instances of such conduct reveal a belief in vigour that an element of challenge was involved in such acts. A woman who killed her own child at the door of her enemy would expect, and the rest of the villagers would expect, that the enemy would have to kill one of his own children if his honour was to remain intact[248]. Suicide was a challenge to the indicated party to follow suit : hence it was received with terror rather than pity, which would be the European reaction, and hence its value as a weapon of attack. It has been quite rightly identified as an institution of a pre-legal period in human development, and it is of course pre-Aryan, finding no place in the *dharmaśāstra*, though by no means unknown in Northern Indian history[249].

244. Knox's evidence would suggest the reverse, but the criminal law seems to make a reconciliation of the two view-points necessary. It is very striking how the institution known as *vākpārushya* (abuse) figures in the *dharmaśāstra* ; and to this day verbal assault is as much resented in India as blows, if not more so.

245. Hayley, 112.

246. *Ibid.*

247. *Ibid.*, 264. Cf. for Indian practice see Gune, 259, 261.

248. Nelson, *Madura Country*, Pt. II, 52-3.

249. Nelson, *Prospectus*, 165. Cf. Mahalingam, 187.

(8) *Contracts and deeds.*

No doubt Hayley and others are right in saying that the Kandyans had few needs such as would require contractual engagements[250]. Caste relationships and service-tenures would determine, in addition to the rights of blood kindred and relations by marriage, all a man's duties. Nevertheless pledge was known, and a great variety of mortgages were in use among them[251]. Loans of money and grain, and rates of interest thereon seem to have been known upon a basis familiar in India[252]. The extremely high rates of interest[253], the peculiar attitude to the term of loans[254], the liability of heirs and issue in particular[255], the rules relating to redemption, and the peculiar rule that interest must not exceed the principal[256] are to be found in India likewise. In India also consideration was not necessary to support a contract, and acceptance was not required to make a gift complete[257]. As in India, deeds were formerly in very little use and oral transfers were valid. As time went on the advisability of having written instruments came to be widely recognised. They were resorted to much earlier in India than in Ceylon[258], but the reason for their adoption must have been the same, and the form and general tenor of the documents was similar in India and in Ceylon. For example, the "witnesses", who did not necessarily witness the execution of the document, performed the same function[259]. The Kandyan *atikārama*, which appears now as a douceur,

250. At p. 512.

251. Hayley, 503 & seqq.

252. Hayley, 503.

253. Kane, iii, 418. Inscriptional evidence supports the view that very high rates were usual, both on money and grain.

254. According to one system the loan had no term, and interest never increased however long the period : but the mortgagee had the usufruct during the period. A useful little work on Indian pledges and mortgages is Das, M. L., *The Hindu Law of Bailment*, Khalispur, 1946. Texts are conveniently collected and analysed in Jha, *Hindu Law in its Sources*, vol. 1, 132 & seqq. See also conditional sales: Kane, iii, 493 & seqq.

255. Hayley, 505 ; Jha, *cit. sup* ; Kane, iii, 443 & seqq.

256. *Dāmdupat* : Kane, iii, 423 & seqq., also Ranade, R. K., *Damdupat in Hindu Law*, (1952) 54 Bombay L. R. (Journal) 49-57. Hayley, 503.

257. Hayley, 301, 306 ; Kane, iii, 442 : an instance of voluntary promises which are enforceable. As for acceptance, Jīmūtavāhana, in the Dāyabhāga, contends that the intention to give suffices for transfer of title. This view had many supporters though it was later condemned : see *Svatva-rahasya* and *Svatva-vicāra*, two anonymous works on Property which will be published shortly. Kane, iii, 475.

258. The comparatively recent ubiquity of deeds is plain from what Sawers says. In India they were recommended for general use from later *smṛti* times. On the development of the use of documents see Sen-Gupta.

259. Hayley, 291-3. In India the witness' function was to know or to approve, so that he could bear testimony about the transaction afterwards. This is plain from the form and terms of very many South Indian inscriptions.

now as earnest money and now as pledge, reappears if one carefully scrutinises *dharmaśāstra* texts[260], though it must have been rather a customary practice than a matter of legal obligation. Similarly the function of tokens (*kaṭa sākkiya*) was well recognised in Indian law[261]. Certain differences were inevitable. Contracts for assistance and support were more common in Ceylon than in India, where the joint family system remained in full vigour, and was even fostered by legal developments. In Kandyan Law a wife might be surety for her husband, an impossibility according to the *dharmaśāstra*[262], which affected to regard the husband and wife as one in matters secular as well as spiritual[263]. It is curious how the Kandyan sale-deed differed little from a gift-deed, and one is reminded of the strange *dharmaśāstra* maxim that land must never be sold, and if it is sold the sale should be conducted as if it were a gift[264]. Behind this rule lies a mystery for future solution : perhaps pre-Aryan customs hold the key.

INSTITUTIONS OF A MORE PERIPHERAL CHARACTER

(1) *Administration of justice.*

While it is probably true to say that fundamental concepts of right can hardly have changed in two millenia, so that we may find evidence of value in for example the attitude towards adverse possession and laches which indicates a community of attitude between the customs of India and the law of the Kandyans[265], there is no sound reason for assuming that the machinery of justice, with the hierarchy of courts and system of appeals, represents what the original Sinhalese knew and practised at the time of their coming to Ceylon. We are not in a position, therefore, to draw any conclusion from the very obvious similarities between the Kandyan arrangements for complaint, arrest, summoning the court, trial, sentence and execution and those which prevailed in India before the British came there as law-givers[266]. The combination of civil, criminal and social sanctions which are demonstrated in both systems is very marked and distinguishes both from other societies.

260. Earnest : Kane, iii, 491 ; pledge : *ibid.*, 434-5 ; douceur : *ibid.*, 473 ; cf. ii, 887. Hayley, 502, 504.

261. Hayley, 293, 501 ; Pieris, 5, 8, 13. Without this explanation the characteristic Hindu institution of the *dakshiṇā* would be quite incomprehensible : Kane, ii, 855, 1188-9.

262. Hayley, 510 ; Yāñjavalkya II, 52 : Jha, *op. cit.*, vol. 2, 625.

263. The famous *ardha-śarīra* theory, which is invoked even in modern case-law.

264. Kane, iii, 496-7.

265. Hayley, 99, 100, 101. The topic is very vexed in the *dharmaśāstra*, causing the greatest difficulty to medieval digest-writers such as Jīmūtavāhana and Vāchaspati Miśra : Kane, iii, 408.

266. Particulars given in Hayley may be compared with those in Gune, *cit. sup.*, and Varadachariar

(2) *Oaths and Ordeals.*

Particularly in the course of the administration of justice, and also in private transactions, these superstitious aids to justice were in great vogue. They were in use in India in litigation up till the British period[267], and indeed may still be resorted to in special cases if both parties agree to be bound by the oath of one of them[268]. All the features of the Kandyan ordeals are present in Indian law and custom, and find their place in the *dharmaśāstra* from very remote antiquity[269].

(3) *Government organisation.*

The Kandyan government was feudal in character, and officials held their offices at pleasure. It seems that the hereditary principle which became such a feature of Indian administration did not develop so strongly in Ceylon, probably on account of the small size of the Island and the very small and rare temptation to a Sinhalese king to extend his realm by conquest. The system and even the names of the officials have a thoroughly Indian complexion[270], but once again no conclusive inference is to be drawn from this.

(4) *Land tenures.*

The same objection applies to utilisation of evidence on land tenures : the system may have been modified a number of times. There is ample evidence of ancient tenures in the *dharmaśāstra*[271] and on tenures in practice in the 18th and subsequent centuries in records compiled for the use of the East India Company and its successor[272]. A comparison might be useful, but hardly for our present purposes. The special characteristics of cultivation in the Kandyan Provinces may have produced an effect which would limit the scope of similarity between practice there and in India.

267. Gune, 90 & seqq ; Nelson, *Hindu Law in Madras in* 1714, Madras Journal of Lit. & Science for 1880, 10 ; an example in 13th century Mysore : E. C. iii, Mandya 79, also E. C. viii, Sorab 387 (1241); Kane, iii, Ch. 14 ; Sen-Gupta, 63 & seqq.; Mahalingam, 187, 223, 233.

268. "Decisory oaths".

269. A comparison will of course show that the popularity of the "hot oil" ordeal is the result of a selection from a rich range of choice. The "hot iron" method seems to have been an Āryan ordeal. For Kandyan ordeals see Hayley, 86-92 (but did *both* parties really take the ordeal, or was that method usual ?); Pieris, 8, 20-22 ; Jennings, *Notes on Kandyan Law*, 200-5.

270. The names given by D'Oyly may be composed with those appearing in the Appendix to Kane, vol. 3, at p. 975 & seqq.

271. It is of interest that there is no trace of pre-emption in Kandyan law, although this was a feature of ancient Indian law : Kane, iii, 496. On various tenures see *ibid.*, ii, 865-9 ; iii, 495 ; Mahalingam, *sub.* 'Taxation' and 'Taxes'. Very instructive is the material concerning various classes of tenants found in the manuals of Malabar Law (cited above). See also Nārada's rule about those who build upon the land of others : Kane, iii, 480-1. On asweddumizing see Hayley, 240 ; Pieris, 4 ; Kauṭilya (S. Sastri's trans., 128).

272. As for example the work on Mirāsi Right edited by Brown, C. P., Madras, 1852.

(5) *Buddhist Law.*

A different objection applies to our utilising material on the law relating to priests and the *saṅgha*. It is evident that the Buddhists carried with them from India to Ceylon a law relating to the conduct of monks, the administration of monasteries, doctrine and so on. There can be no doubt but that so far as the civil law of India impinged upon affairs within the *saṅgha* Buddhists in Ceylon are indebted to India for the rules to be applied. As regards the position of a Buddhist priest and his qualification to own property[273] and to succeed to property[274] strong similarities exist between the Kandyan rules and the rules of Hindu law relative to those who abandon the world and become *sannyāsis*[275]. Moreover, when a particular *sannyāsi* becomes head of a *maṭha*, or Hindu temporality of a collegiate description[276], problems arise of a very similar character to those which have arisen in Ceylon, and very similar answers have been given. Particularly in connection with succession to the office of *maṭhādipati*, a problem which has vexed Ceylon courts, Indian customs support one rather than the other of the traditional systems in use in the Kandyan Provinces[277]. But all this is to little purpose since it is admitted by everyone that Buddhism came to Ceylon long after the Sinhalese came there, and the Buddhist authorities must have maintained a very close and intellectual contact with India throughout the greater part of Ceylon's history.

Conclusion.

We have surveyed a good part of the Kandyan Law, so far as it may be known from the published sources. Where the institutions are such as might legitimately be believed to have remained little if at all modified by the passage of the centuries, particularly in a highly conservative and remote community such as the Sinhalese were for at least a millenium, during which time the orthodox Hindus would never mix socially with them[278], the natural inferences to be drawn from the similarity between Kandyan Law and Indian laws and customs point in a certain direction.

273. Hayley, 563-5 ; Kane, ii, Ch. 28.

274. Hayley, *ubi. cit.* ; Kane, *ubi. cit.* and iii, 764-5.

275. It will be remembered that the notion of *bhikshu* is derived from the general character of the Hindu ascetic.

276. Kane, ii. 948 & seqq.

277. The problem is set out in Hayley, 545-557. For modern Indian parallels see *Sital Das* v. *Sant Ram*, A.I.R. 1954 S.C. 606 and *Prithi Nath* v. *Birkha Nath*, A.I.R. 1956 S.C. 192, and generally Mayne, 940.

278. The Sinhalese were *mlecchas* (see Haradatta on Gautama dh. sū. I, 9, 17) and so unfit for contact of any kind. Their interference with South Indian politics in the 13th century is not likely to have made them individually more welcome amongst the orthodox.

We cannot altogether neglect certain well-known historical facts, although our eventual conclusion must be laid at the feet of historians for their consideration. It is generally believed that Vijaya brought the first Sinhalese to Ceylon about the time of the Buddha ; the Sinhalese language, despite its far from negligible Dravidian element, has been identified as an Indo-Āryan language. Both facts must be taken with some qualification, but they cannot be ignored. The upper limit for the invasion is quite unknown except to legend ; and the language has developed in isolation and only a small fraction of the present Sinhalese may be even in part descended from Indo-Āryan speakers : the survival of the Dravidian Brāhūī in the North-West of India warns us of the need for care. Yet these facts, none the less, fit the pattern of the legal data.

It seems that the Sinhalese were a people of predominantly non-Āryan descent, with a way of life substantially identifiable as akin to that common in modern South India. Āryan ideas do not seem to have passed them by, indeed that can hardly have been the case since the Indo-Āryan language must have been spoken first by persons lineally connected with the invaders. The strange ability of those invaders to adopt alien ways in certain matters is becoming ever more clear[279], and though they treated the aboriginals as subject peoples they did not for a long period disdain to mix very freely with them. The Āryan strain in the Sinhalese may thus have been what the present writer chooses to call sub-Āryan. They might have known of Brahmans and Brahmanism, and had already made some attempt to reconcile native custom with Āryan traditions. But this process had not gone far. The customs which they followed were well-known in Manu's day and in Kauṭilya's time, but they were a people on the very fringe of the orthodox world. In all probability they were averse to accommodating themselves to a completely orthodox set-up, though this is pure conjecture, and their reasons for migrating from India can only be guessed at. The alacrity with which they added Buddhism to their Hindu-like cults seems to suggest that they were temperamentally averse to Brahman-worship, and they may well have been an unorthodox or heretical sect when they embarked, together with their retainers and followers, for the happy Island, where a very primitive people would be forced to make room for them. They were not highly literate, and it may be that their migration was as much due to economic pressure as to theological differences. We have yet to find out. But it can be accepted, so far as

279. The Āryans gradually accepted many features even of so intimate and well-conserved a ritual as the marriage ceremony from pre-Āryan sources.

we have gone, that the ancestors of the Sinhalese were part of that great amalgam of peoples which grew up during the period B.C. 1500-500, and which continued in varying measures to grow throughout the Peninsula and the East, out of the fusion of pre-Āryan with Āryan, an amalgam which has made the Indian civilisation what it is.

The antipathy of the Sinhalese to the Tamils, their closest neighbours, does not rest merely upon the millenium of conquests and invasions and political alliances and intrigues : there is no doubt but that the racial affiliations of most of the Tamils differ from those of the original Sinhalese—the proportions of pre-Āryan races in the mixture are different, just as the proportion of Āryan is demonstrably different. Yet, of course the Sinhalese were not Āryans. From whence, then comes the notion that their descendants are ? This presents no difficulty. The Buddhists referred to any respectable member of the *saṅgha* as an Ārya, and that usage must have been common throughout the former Buddhist world. Moreover the Dravidians were accustomed to refer to non-Dravidians as Āryans. Thus the Kannaḍa-speaking peoples of the Deccan and Mysore referred to the Marāṭhās as Āryans, though of course the proportion of Āryan blood was hardly any higher amongst the Marāṭhās than amongst the Kannaḍigas: the difference lay in the language. Therefore one may tentatively conclude that, subject to the findings of ethnologists, linguists and historians, the original home of the Sinhalese is to be sought in the Peninsula, not necessarily South of the Vindhyas, either towards the East or the West coast. The regions north of the mouth of the Narbada river, or even further eastwards could have been their provenance, though there is little evidence to show that they did not come even from Sindh. The balance of probability seems however to be in favour of some region in the modern Madhya Bharat or even Rajasthan, for these regions to-day preserve the character of border-lands between the sub-Āryan and the Dravidian peoples, for even the Mahārāshtrians preserve very substantial traces of their Dravidian ancestry. Could the Sinhalese have come from Orissa ? There is no very cogent proof that they did not. In modern Orissa the border between Dravidian and Āryan is patent, and Orissans feel that though their language separates them from their Dravidian Telugu neighbours their customs are more akin to those of the latter than to those of their Bengali neighbours on the other side. A series of queens is known to have ruled in Orissa, and to this day widows marry their deceased husband's brothers. But such indications are slim enough. Even the efforts of ethnologists may have to be used with caution, so far have peoples migrated.

ARYA

Before Kandyan Law slips imperceptibly into history much may still be learnt about the Kandyans' traditional way of life, their notions of honour, justice, virtue and so on, their ambitions and criteria, which would help beyond all measure to fill out the data set down in the crabbed technical formulae in the early 19th century sources, and the result would be not merely to preserve a more lively picture of a community which probably has no counterpart in the India of to-day—a service which would be as valuable to Indologists as to lovers of Ceylon—but also to make deductions about the origins of that people more substantial and more reliable. Naturally this material is now to be sought only in remote and rarely-visited regions of the Kandyan Provinces, and it is for the anthropologist and sociologist to complete the work which he has already begun and which he alone is now competent to carry through.

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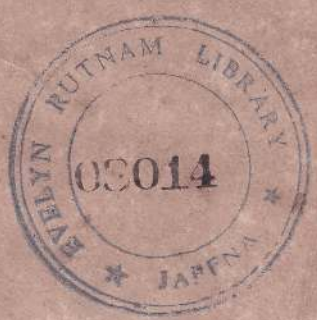

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THE CEYLON UNIVERSITY PRESS