SINHALA LAWS and CUSTOMS

by

H. W. TAMBIAH

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From Vijaya

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SINHALA LAWS AND CUSTOMS

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by

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FOREWORD

I have much pleasure in recommending Dr. Tambiah's new treatise, SINHALA LAWS AND CUSTOMS as a study which should be of great value not only to the legal profession and students of the Law, but also to those interested in the origins and history of the Sinhala people. Dr. Tambiah's book is not only interesting but informative. Some of the opinions he expresses being partly theoretical and thus provocative, they should serve to encourage further research into this subject. And I feel sure that Dr. Tambiah himself will be best pleased if such further researches reveal the validity of opinions or conclusions different from those which he now accepts. From the lawyer's point of view, the book fulfils the important purpose of providing a complete and up-to-date substitute for Dr. Hayley's LAWS AND CUSTOMS OF THE SINHALESE.

H. N. G. Fernando
Chief Justice

Other works by the author

Landlord and Tenant in Ceylon

Laws and Customs of the Tamils of Jaffna

Laws and Customs of the Tamils of Ceylon

Law of Insolvency in Ceylon (joint)
with E. R. S. R. Coomaraswamy

The British Commonwealth: The Development of its Laws and Constitution - Vol. 7—

The Dominion of Ceylon (joint) with Sir Ivor Jennings (British Commonwealth Series)

PREFACE

This work was commenced after my researches on the customary laws of the Tamils of Ceylon were completed. The study of the customary laws of Ceylon is not complete without the examination of the customary laws of the Sinhalese. Hence an attempt is made to present these Sinhala laws and customs.

After reading the thought-provoking article by Prof. J. D. M. Derrett of the University of London on the "Origins of Kandyan Law", it was fascinating to do further work on Kandyan law, which is the true Sinhalese customary law. The study of Sinhalese customary law is most rewarding in view of the fact that it is fuller than the law of *Thesawalamai* and is a remnant of one of the old customary laws which prevailed in India and in Ceylon before the writers of the *Dharmasastras* started their work on the Hindu system of jurisprudence. The customary laws of a place truly reflect the genius of the people to whom they apply. Customary laws develop imperceptibly and therefore contain the true reflection of the aims and aspirations of a people.

In the Sinhala customary law, one finds a mature system of family law and inheritance. It contains far reaching equitable principles. It is from this mass of customary laws that the writers on Hindu law had derived their inspiration. As Mayne remarks, the fundamentals of *Dharmasastras* are based on the mass of equitable customary laws which existed both in India and Ceylon. These customary laws reflect the civilization and glory of the Dravidians who had been living in Mohenjodaro and Harrappa when the Aryans, as nomads, came over to India to the Gangetic plains in a comparatively primitive state.

As Prof. Derrett remarks the study of Kandyan law is most useful to a student of Hindu law since it is a missing link between the customary laws which existed earlier and the Hindu law proper. Further a study of Hindu law is not complete without the study of the customary laws of India and Ceylon. It may be said without fear of contradiction that the Sinhala laws and customs are perhaps the most complete collection of pure customary laws which has survived to us in modern times.

By the study of these customary laws and the co-relation of the principles evolved one finds a uniformity. Thus the principles of Kandyan law are very similar to those of the *Thesawalamai* and the Tamil customary laws. These customary laws are not the same as the *Dharmasastras*. A mere study of Kandyan law without its background would give the student the impression that it is "a wilderness of single instances". But if it is studied in its proper

setting the concept of the Sinhala family and the intricate rules of intestate succession become intelligible.

This book is written from the point of view of the social anthropologist, sociologist, the student of jurisprudence and the lawyer. Many books, such as *Sinhalese Laws and Customs* by F. A. Hayley and *Kandyan Laws and Customs* by Modder which are treatises on Kandyan law, are now out-of-date. Precedents and legislation have in many matters altered the Kandyan law. Further, these writers have not delved into the great mass of material on Kandyan law found in the Ceylon Government Archives. The decisions of the Board of Commissioners and the Judicial Commissioners running into several volumes and the decisions of the Agents found in their diaries are the earliest sources of Kandyan law. These sources have not been tapped by Modder. Hayley merely refers to a few decisions of the Board of Commissioners. In this work, no pains have been spared to collate all relevant materials found in manuscripts and the original sources. The case law is dealt with from a critical angle and the author's views have been freely expressed. Wherever law reform is necessary it has been indicated.

The Historical Introduction consists of the origins of the Sinhala race, a topic which became necessary in view of the research done to establish the roots of Kandyan law. The Sinhalese customary law during the Portuguese, Dutch and British regimes, the sources of Kandyan law and the applicability of the Kandyan law, have all been dealt with in detail.

In dealing with the sources of Kandyan law, the relative merits of the institutional writers are discussed. The important enactments dealing with Kandyan law, are cited. In the chapter dealing with the genesis of Kandyan law the method followed is the one that was adopted by Dr. Derrett in his article on the " Origins of the Kandyan Law". Various important topics of Kandyan law have been discussed and compared with similar institutions of the *Dharmasastras*. A comparative study shows to what extent the *Dharmasastras* have derived benefit from the customary laws of India and Ceylon. It also establishes that the principles of *Dharmasastras* based on religion are quite different from the principles set out by the secular systems of the Sinhalese and the Tamils.

In the chapter entitled "Applicability of Kandyan Law", it has been established that the Kandyan law is a personal law. Originally it was a territorial law but case decisions made it a personal law. It also deals with the vexed question as to who are the subjects governed by Kandyan law.

The rest of the book is divided into The Law of Persons, The Law of Property, The Law of Obligations and The Law of Crimes, following the traditional methods adopted by writers on law.

Under the Law of Persons, slavery which is a very interesting and obsolete institution is discussed. Although this topic is of very little value to the lawyer, it provides valuable information to the sociologist, the anthropologist and the student of history. Minority and legitimacy and the effects of contracts by minors are also discussed.

It is shown that the principles governing adoption are similar both in Kandyan law and in the *Thesawalamai* and the rights pertaining to it are secular, unlike the principles governing the same topic in the *Dharmasastras*.

The effect of The Kandyan Law Declaration and Amendment Ordinance is discussed. In this context the Adoption Ordinance which applies generally to all who choose to act under it and not merely to the Kandyans has been omitted since it will be a topic on general law and not special law.

Chapter X deals with marriage under Kandyan law. The important distinctions between *binna* and *diga*-marriages have been fully discussed and certain tentative theories have been advanced regarding the nature of such marriages. The statutory provisions governing marriage have been fully discussed. In dealing with guardianship, the Indian customary law and the Kandyan law have been compared and one finds great resemblances between these two systems.

The Law of Property consists of ownership, possession and feudal tenures. The Roman-Dutch concept of ownership and possession is quite different from the Kandyan counterparts. A student of comparative law finds this distinction interesting. The feudal tenures under the Kandyan period is of great interest to students of political science, history and jurisprudence. It was very similar to the tenures that existed in the Chola and the Pandyan empires in India and indeed some of the names of the tenures are Tamil in origin. It may well be that after the Chola occupation, the tenures that were introduced were continued in the Kandyan period. The Chola tenures themselves were perhaps based on tenures that existed under the Mauryan period. The development of the *rajakariya* system, the statutory changes and the principles found in the Services Tenures Ordinance are all discussed.

The Law of Succession is the most important branch of Kandyan law. It has been shown that testamentary succession, as known in modern times, was unknown to the Kandyans who had other institutions to serve the same purpose, such as donations for succour and assistance. The modern testament in Ceylon is adopted from the Roman-Dutch Law and the principles of English law. Some of the important provisions governing this topic are statutory. Intestate succession is a most rewarding field in the whole of the study of

Kandyan law. Its fundamental principles, kinship, etc., are first discussed in order to pave the way for the understanding of this intricate subject. In Kandyan law, a distinction is made between succession to males and succession to females and a further distinction exists between the law governing intestate succession to movables and immovables. Each branch has been dealt with exhaustively in view of the importance of this topic to the lawyer as well as to a student of history and social anthropology.

Chapter XXXI deals with Contracts in Kandyan law. These contracts were very similar to those found in the *Thesawalamai* and other customary laws and reflect the state of the society. Although these contracts are obsolete today, it is of value to students of anthropology and social history who wish to study Sinhalese rural society as it existed then.

Chapter XXXII deals with Donations under Kandyan Law. In this chapter donations for succour and assistance and revocability of such deeds both before and after the Kandyan Law Declaration and Amendment Ordinance came into force are discussed.

The last chapter deals with Criminal Law.

Due to the heavy work I had on the Bench I regret I was unable to publish this work earlier. It is my duty to thank a number of my friends who went through the manuscript as well as the typescript and verified the authorities cited. In particular, my thanks are due to Mr. Ranjit Amerasinghe, Lecturer at the Ceylon University, Mr. Walter Thalgodapitiya, Mr. R. M. Goonasekera, Principal of the Law College, Mr. B. T. B. Pulle, B.Sc., and Mr. H. M. Z. Farouque, LL.B. who went through the proofs and checked up the authorities cited. My thanks are also due to my Private Secretary, Mr. M. C. M. Iqbal, who kindly consented to type the whole of the manuscript and verified all the authorities. He is also responsible for the preparation of the Index which was done under my direction. I thank my Lord the Chief Justice, Hon'ble H. N. G. Fernando, O.B.E., M.A. (Oxon.), LL.B. who in spite of his arduous duties, found the time to go through this work and give a foreword.

I must also thank my wife Leelawathy Tambiah for the encouragement she gave to write not only this work but also my other works, and for her great devotion.

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THE LAW OF PERSONS

THE LAW OF PROPERTY

LIST OF ABBREVIATIONS

Acc. Saka	Saka year equivalent to
A.C.J.	Acting Chief Justice
A.C.R.	Appeal Court Reports
A.G.A.	Assistant Government Agent
A.I.C.	Ancient Inscriptions of Ceylon
App.	Appendix
Armour	Armour's *Kandyan Law*
Ariyapala	*Society in Medieval Ceylon* (1956)
Aust. or Aust. Rep. ...	Austin Reports of Cases
Bd. Mns. D.	Minutes of Board of Commissioners decisions (23/4 means no. of vol. in Ceylon Archives)
Bal. or Bal. Rep. ...	Balasingham Reports
Bal. Notes or B.N.C. ...	Balasingham's Notes of Cases
B.C.	Board of Commissioners
Bertolacci	Bertolacci's *Ceylon* (1817)
Berwick	Voet's translation by Berwick
B. & S.	Bevan and Siebel Reports
B.J.C.	Board of Judicial Commissioners
Br. or Br. Rep. ...	Brown Reports
Burge	*Commentaries on Colonial and Foreign Laws* by William Burge (4 Vols.)
C.A.	Ceylon Archives
Cap.	Chapter
Cey. Law Rec. ...	Ceylon Law Recorder
Ceyl. Misc. ...	Ceylon Miscellany
C.G.A.	Ceylon Government Archives
C.J.	Chief Justice
C.J.S.G.	Ceylon Journal of Science Section G (Archaeology, Ethnology, etc.)
C.L.R.	Ceylon Law Reports
C.O.	Records of the Colonial Office
Codrington ...	*A Short History of Ceylon* by H. W. Codrington; *Land Tenures in Ceylon* by Codrington
C.P.G.	Central Province Gazetteer
Cur.L.R.	Current Law Reports
C.R.	Court of Request
C.W.R.	Ceylon Weekly Reports
Davy	Davy's *Account of the Interior of Ceylon* (1821)
DB	Divisional Bench of the Supreme Court

Mayne	...	*Hindu Law and Usage* by Mayne
Mhv. or Mv.	...	*Mahavamsa*
Modder	...	*Kandyan Law* by Modder
Morg.	...	Morgan's *A Digest of the Decisions of the Supreme Court of Ceylon* 1833–1842
MS.	...	Manuscript
N.	...	Note
N.C.P.	...	North Central Province of Ceylon
Neville	...	Neville's *Account of Ceylon*
Niti	...	*Niti Nighanduwa*
N.L.R.	...	New Law Reports
Nos.	...	Numbers
P.A.	...	Perera's *Armour on Grammar of Kandyan Law*
para.	...	paragraph
Parker	...	Parker's *Ancient Ceylon*
PC.	...	Privy Council
P.C.	...	Police Court
Philalethes	...	Philalethes's *History of Ceylon* (1817)
Pridham	...	Pridham's *History of Ceylon* (1849)
Puram.	...	Puranooru (Tamil Sangam Literature)
Q.	...	Queyroz's *Conquista* (1916)
Raghavan	...	*The Karawas of Ceylon* by Raghavan
Ralph Pieris	...	*Sinhalese Social Organization* by Ralph Pieris
Ram. Rep.	...	Ramanathan Reports
R.A.S.	...	Royal Asiatic Society
R.A.S. (CB)	...	Royal Asiatic Society (Ceylon Branch)
Rev.	...	Revenue
Ribeiro	...	*Fatalidade Historicam* (Lisbon, 1836) trs. by Pieris, Colombo, 1948
Robert Knox	...	*An Historical Relation of the Island o Ceylon* by Robert Knox
S.	...	Sawers's *Digest*
Sab. Report	...	Sabaragamuwa Report
Sawers's *Digest*	...	Sawers' *Digest* in Hayley's Appendix
S.C.C.	...	Supreme Court Circular
S.C.R.	...	Supreme Court Recorder
S.D.T.	...	Statement on Different Tenures
S. C. Mins	...	Supreme Court Minutes
Sec.	...	Section
Seligman	...	*The Veddas* (1911) by Seligman
Sess. Pps.	...	Sessional Papers
Sol. or Solomon	...	Solomon Reports

Sorg's *Avis*	*Introduction a l' Etude du Droit Hindou Traite Theorique et Pratique du Droit Hindou* 1817, *Avis du Comite de Jurisprudence Indienne* 1896.
SBE ...	Sacred Books of the East
Stra. H.L.	*Hindu Law* by Sir Thomas Strange 1830 4th Edition 1864.
Tamb.	Tambiah Reports
Times	Ceylon Times Law Reports
Udapalata L.M. Saka ...	Udapalata Lekammitiya
Van. Rep.	Vander Straaten Reports
Vol.	Volume
Wendt or Wendt Rep. ...	Wendt Reports

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HISTORICAL INTRODUCTION

CHAPTER I

THE ORIGINS OF THE SINHALESE RACE

Early Settlements

CEYLON, with its multi-racial, multi-linguistic and multi-cultural inhabitants, has a complicated legal system which cannot be comprehended in its proper perspective except in the light of its history. Accordingly, an inquiry into the origins of Sinhalese laws is not complete without a discussion of the successive waves of settlers who migrated to this Island for many centuries from the neighbouring sub-continent.

It is not within the scope of this work to deal exhaustively with the history of Ceylon or to enter into controversies; it is sufficient to focus attention on the chief landmarks in the annals of Lankā in order to appreciate the origins and the subsequent development of the laws and customs of the Sinhalese. Hence, emphasis is only laid on those phases of Ceylon's history which have a bearing on the origins of the Sinhalese laws. The views here expressed are so documented as to enable students of research to assess them critically and to pursue any further line of inquiry.

One of the points on which scholars are not agreed is whether the Sinhalese are Aryans or Dravidians. It must be remembered at the outset that no race or language is pure. The concept of the alleged Aryan superiority, described as a dangerous myth,[1] has clouded the vision of many scholars by making them think on narrow lines and thus impeding true research. The researches of historians, supplemented by a critical examination of the customary laws of the Sinhalese and Tamils, show that these two groups, if they do not have the same ethnic origins, were at least, fused together at certain levels.

The theory that the Sinhalese and Tamils belong to two different ethnic groups becomes untenable when one examines the history and the cultural patterns of these two major communities of Lankā. An examination of some of the basic concepts of Kandyan law, the remnants of true Sinhalese customary law, shows that they are not different from those of Indian customary law. Recent researches have shown that the roots of Kandyan law are to be found in the Indian customary law and not in the Aryan law or the *Dharmasastras*, quite contrary to popular belief.[2] An examination of the origins of the Sinhalese customary laws also makes it

1. *Man's Most Dangerous Myth* by M. F. Ashley Montague (Columbia University Press) pp. 7 and 8

2. *The Origins of the Laws of the Kandyans* by J. D. M. Derrett, University of Ceylon Review, Vol. XIV, Nos. 3 and 4, p. 105 et seq.

abundantly clear that the Sinhalese people are no more pure Aryans than the Tamils are pure Dravidians.

The Dravidian myth as regards the origins of the Tamil people, is also found in a school of thought prevailing in South India known as the *Thani Thamil* School. Some Tamil scholars are of the opinion that Tamil culture should be equated with ancient Dravidian culture and, therefore, all Aryan traces in Tamil culture should be eschewed. This school, however, takes a Utopian view of the language and culture of the Tamils. Not only did the blood of the Aryans and Dravidians mingle freely, but also their languages, religious beliefs and cultural patterns. The people of India are an amalgam of the various racial groups who settled in the sub-continent at different stages of her varied history. Although this blend may show a stronger mixture of Dravidian culture amongst the people south of the Vindhiya mountains than among those north of it, it is erroneous to conclude that the South Indians are pure Dravidians.

A great controversy exists as to who were the early settlers of Ceylon; one significant truth, however, cannot fail to catch the eye of any historian, and that is, no pure Dravidian or Aryan ever set his foot on the soil of Sri Lanka. The word 'Aryan' was used, in ancient times, to denote a person who had any pretence to respectability. Hence, the occurrence of the word Arya in ancient chronicles does not necessarily mean that people of pure Aryan origin were the early settlers of Ceylon. It is necessary, therefore, to undertake a brief survey of the main settlements in India in order to trace the origins of the first Sinhalese settlers who came from India.

The Negroids: The earliest people to come to India are believed to have been the Negrites or Negroid race, who arrived in the eolithic stage of their culture from Africa along the coastal border of Arabia and Iran; they settled in the western and the southern parts of India, having already spread over Northern India. Thereafter, this wave of immigration extended to Malaya and the Indonesian group of islands. Most of these tribes were either absorbed by the later immigrants or were annihilated. But a few of them having distinct Negroid traces, still survived in South India, speaking dialects of Tamil. These tribes can be found amongst the Mongoloid Nagas in Assam and the people living in the Andaman Islands. The Negroids hardly left any imprint on the culture of India or Ceylon, although they gave their sun-kissed complexion to the inhabitants of these countries.

The Austroloids: After the advent of the Negroids, there came to India from the West, probably from Palestine, the medium-sized, long-handed, snub-nosed, dark-skinned people, who are described by anthropologists as Proto-Austroloids. Some of these

racial groups migrated to distant lands such as Australia and established settlements. Their descendants are still to be found in the Australian continent. Those who remained on Indian and Ceylonese soil, developed their respective cultures and languages. These Austroloids, more commonly known as the Austric people, spread outside India in two main streams. The first stream consisted of the Nagas of India and Ceylon, the Kol or Munda people of central India, the Khasis of Assam, the Mona of Burma and Siam, the Khmers of Cambodia, the Chams of Cochin-China, and some other allied tribes in Burma, Vietnam and Nacobia. The second stream of this race, called the Austronesians, spread to Indonesia and the Malayan Peninsula. The Austronesians are to be found among the Melanesians, the Micronesians and the Polynesians.

Vedic literature refers to the Austrics of India as the *nisa das*, and in the early Christian era they were also known as the Kallas and Bhillas. They were a dark-skinned people, speaking dialects allied to the various dialects in India, known as Santali, Mundari, Kurku, Gadaba, etc. This wave of settlement spread throughout India and many characteristic features of this group can still be found amongst the *parayars* and *pallars* and other lower classes of India and Ceylon. The Adi-Dravidas of India are perhaps a mixture of the Austric and the Negroid people.

The Mongoloids: The next stream of immigration that flowed through the north-eastern gap of the Indian frontier seeking new lands were the Mongoloid people. They had yellow or yellow-brown skin, and certain other physical features such as narrow or slant eyes, high cheek-bones, flat noses and scantiness of hair on the face. The Aryans who came later, called them Kirates. Modern anthropological researches show that the existence of this race can be traced as far as the Mohenjo-Daro period. They settled along the banks of the Brahmaputra river and its eastern tributaries; they founded extensive settlements in Assam, Bhutan, Nepal, East and North Bengal, North Bihar, and the regions to the south of the Himalayas in North India up to the regions which correspond to modern Kashmir. Some of them came south and established settlements in Orissa and central India. Today, the distinctive features of their civilizations are chiefly found in the North and the North-East of India.

The Dravidians: The next group, a linguistic one that came to India at a later period, are known as the Dravidians. They were mainly a people of Mediterranean origin, but had mingled with other racial elements like the Armenoids. These different racial elements were united by a common speech—the Dravidian language. They probably entered India before 3500 B.C., and groups of them had settled in Mesopotamia, Persia, Iraq and Iran before they

established themselves in India. The Bahuis of Baluchistan who still speak a dialect akin to Tamil, are believed to be the remnants of the Dravidians who settled there. The Dravidians were a highly civilized people who brought what may be termed the 'city civilization of India', as opposed to the 'village culture' which was the creation of the Austric people. The Dravidians first established themselves in the Punjab and Sind and built great city cultures such as the Harappa and Mohenjo-Daro civilizations. The monumental work of Fr. Heras has focussed attention on the archaeological finds of Mohenjo-Daro.

The Czechoslovak scholar, B. Hronzy, has offered a new theory on the origins of the people who built up centres of culture at Mohenjo-Daro and Harappa. He calls the builders of the Punjab and Sind culture 'proto-Indians'.[1] This scholar is of the view that those who built this culture were a branch of the Indo-European people known as the Hittites of the Asia Minor, with admixture of non-Indo-European elements like the Caspian Hurrites.[2] According to Hronzy, these proto-Indian people brought with them a religion, a culture and a language allied with those of the Hittites; they also brought with them the hieroglyphic writings from Asia Minor and built up civilizations in Punjab and Sind. Hronzy surmises that these people also had a large trade with a neighbour, but somewhere between 2000 and 1500 B.C. the Dravidian-speaking people from the north-west of India swooped down on this civilized group and destroyed their culture and their towns.[3] The archaeological finds of Mohenjo-Daro and Harappa show that a civilized people who lived in beautiful cities were suddenly decimated by invaders, and it is from this evidence that Hronzy arrives at this conclusion. These Dravidian 'barbarians' of unknown provenance absorbed the remnants of the civilization of the Proto-Indians and were in possession of India between 1500 and 1200 B.C. They spread southwards and occupied South India and Ceylon.

Between the years 1500 and 1200 B.C., another semi-nomadic racial group emerged; namely, the Vedic Aryans. They established themselves in that part of India which is often described as Ariyawartha'.[4] Their progress south of the Vindhya mountains was stemmed by the power confederacy of the Dravida kings.

The Dravidian people spread themselves, their language and culture throughout the whole of central India south of the Vindhya mountains, and Ceylon. Place-names all over India and Ceylon indicate their wide sphere of influence.

1. *Historie de l'Asie Anterieure, de l'Inde,* et de la Crete, Paris, 1947; English Translation, Prague, 1953
2. ibid.
3. ibid.
4. R. A. S. (C. B.) New Series 1959, Vol. VI, p. 80. (C. W. Nicholas is of the view that place-names in the Mannar District have always remained Tamil.)

An alternative theory as regards the original home of the Dravidians postulates that India, Africa, Ceylon and a large tract of India south of Cape Comorin—land which is now submerged—formed part of a big continent known as the Lemuria and that this continent was the original home of the Dravidians. This theory further postulates that it is from this nidus that the Dravidians spread themselves to places like Mesopotamia, Palestine and the Asia Minor. Thus, P. T. Sreenivasagar Iyengar states that the archaeological finds in South India show an ancient Dravidian culture which was developed without interruption from the palaeolithic age.[1] Dr. Hall places the home of the Dravidians in the Indus Valley and states that it is from this area that they migrated southwards and northwards occupying Persia and Asia Minor. Sir John Evans locates the cradle of the human race in southern India.[2]

Sreenivasagar Iyengar, after referring to the two theories as regards the origins of the Dravidians, boldly asserts that the indigenous theory (i.e. that which postulates that their home is India) is unanswerable.[3] Eminent Indologists are also of the view that the Tamils originated in South India and the regions adjoining this part.[4]

The Dravidians were also called '*Dramilas*' and the word 'Tamil' is a derivative of the word *Dramila*. The Tamil civilization has developed for a period of two millenia, and their literature shows that they had three learned assemblies in the past, known as the three *Sanghams*. The *Tholkapiam*, a work on grammar attributed to the second *Sangham*, sets out a large number of works in Tamil which are not extant today. The fact that such an advanced work in Tamil grammar and prosody was attempted at such an early age shows that the language must have possessed a developed literature even before it was written.

The *Purananooru*, a work of the last *Sangham* period, refers to a river which flowed south of Cape Comorin. Eminent geologists also support the 'Continental Drift Theory' which suggests that there existed a huge continent of which India, Ceylon and Africa were parts. Traces of underground river-beds under the Mannar Sea floor have been found. This conclusively shows that rivers which had their sources in India, continued their courses in Ceylon in some remote past and that the island of Ceylon represents a continuation of the geological structure of peninsular India.[5]

1. R.A.S. (C.B.) New Series 1959, Vol. VI, p. 80
2. *Dravidian India*, Vol. I by J. R. Sesha Iyengar
3. Presidential Address of the British Association of Science, August, 1901
4. *Pre-Historic South India* by V. R. Dikshitar (1951) University of Madras, p. 169; *Problems of Dravidian Origins* by M. Arokiaswami, *Tamil Culture*. Vol. II, p. 334
5. *Lexique Stratigraphical Internationale*, Vol. III, Asie Fascular 8 (c) Ceylon, p. 331

The Origin of the Aryans

The Aryans are believed to have left their homeland which was to the south of the Ural Mountains and set forth either to Central India or to the Caucasus regions, and from there, migrated to Northern Mesopotamia. According to one view, that part of Central Asia which lies to the north-east of Iran was the place where the primitive Indo-European language and culture were modified to Aryan or Indo-Iranian. It was from there that the Iranians spread to the south-east and the Indo-Aryans to the south-west and to the south-east into India.

According to another view, the Indo-Aryan European tribes who were being gradually modified into Aryan or Proto-Indo-Iranian races, were first noticed in northern Mesopotamia where they lived for some centuries before they formed themselves into ruling aristocracies and developed their language and culture through contact with the local people, particularly the Asiatic races to the west and the Assyrio-Babylonians. Their language was so modified that it became the immediate source of both the Iranian and the Indo-Aryan languages.

The Aryans from the islands of the Middle East, were in the main, a tall, fair, blue-eyed, straight-nosed, wavy-haired, long-headed people who were known as the Nordics. Another group, consisting of shorter and round-headed people, having a different ethnic origin, were called the Alpines. This group was linguistically absorbed by the Nordics.

These two ethnic groups could be noticed among the Aryan people who came to India after 1500 B.C. The language they brought was the old Indo-Aryan speech which later developed as Sanskrit, the language which profoundly influenced Indian civilization. The Aryans ate meat, drank an intoxicating liquor called *soma* and were worshippers of nature. Vedic literature gives an insight into their civilization.

On Indian soil, the blending of the Aryan and Dravidian culture went on for a millenium or two. The *Mahabharatha* and the *Ramayana* depict some of the great battles which were fought between the Aryans and the Dravidians during this period. This period of blending, identified as the Vedic period, is one of the most important epochs in the cultural development of India. Dr. S. K. Chatterjee, in a very illuminating article says:[1] "The Indian man was created out of a fusion of these four chief elements of ingredients which were operative in Northern India, the Austric or Austro-Asiatic, the Mongoloid or Sino-Tibetan, the Dravidian and the Aryan." These four language groups, loosely spoken of as races, coalesced to form the Indian man.

1. *The Indian Synthesis and Racial and Cultural Inter-Mixture in India —Tamil Culture*, Vol. VIII, No. 4, Oct.-Dec. 1959, p. 278

At one stage, colour played an important part. "*Varna* or skin colour", says the same writer, "white or yellow or brown or black, was the basis of the division of the diverse types of humanity." In the first period, the Aryans, the Dravidians, the Mongoloids and the Austrics stood face to face with each other. The basis of the differentiation, however, became meaningless with the incursions of the coloured elements into Aryan culture. As a consequence of racial fusion, the difference of pigmentation became irrelevant and a new theory of caste (in which the original realistic notion of the Vedic Aryans was lost) was developed, the basis of which was birth within a recognized profession or industry or guild. The economic aspect was regarded as superior to the racial, and the social to the biological. Caste, based on this theory, was developed by the Indian people generally to help the stability of their economic structure. Dr. Chatterjee states:[1] "It is now at least 2500 years too late to try to revive them once again now as an engineered upsurge of a suppressed Adi-Dravida or primitive Dravidian in the extreme South of India against the so called Aryan from the North. It would be as futile to separate the Saxon from the Norman, or the Celt from the German, or the basic Iberian from the Indo-European in the composition of the present-day British people." These pregnant words of an eminent scholar would no doubt serve as a reminder to the scholars of Ceylon who are trying to bring about a schism amongst the people of Sri Lanka by classifying the Sinhalese as 'Aryan' and the Tamils as 'Dravidian'. It is a basic fallacy to bring about this differentiation when unity is not merely desirable but an absolute necessity in the national interest.

Geiger, while referring to the Aryan settlements in India, states:[2] "There the Aryans are immigrants who have come from the north-west, and gradually mixed with the original non-Aryan population of the country and, finally absorbed it, so that a new race came into existence."

From what has been said, it is clear that it was the amalgam consisting of the Dravidian, Aryan, Mongoloid and Negro people that formed the early settlers of India and these people ultimately found their way into Ceylon which has been called various names such as 'Eelam', 'Serendib', 'Taprobane', 'Tambapanni', and 'Sinhaladipa'.

The history of Ceylon in the dim and distant past, is lost in obscurity, but modern researches in archaeology, geology, anthropology and history throw a good deal of light on the early settlers of Ceylon.

According to the priestly chronicle the *Mahavamsa*, which was written somewhere about A.D. 600, Ceylon was originally inhabited by two races known as the Yakkas and the Nagas, even before the

1. op. cit. p. 296
2. *Culture of Ceylon in Medieval Times*, p. 18

advent of the eponymous hero, Prince Vijaya. The existence of Nagas in Ceylon is proved by many archaeological finds, some of which are found in ancient irrigation works (e.g. the Five-hooded Cobra Stone unearthed at Padaviya), showing that gigantic irrigation projects must be traced to the Naga period.

The *Mahavamsa* refers to a visit paid by Lord Buddha to Nagadipa, the present Island of Nainathivu, an island adjoining the Jaffna Peninsula, to settle a dispute between two Naga princes who started waging war over a throne set in gems. The *Manimekalai*, a Tamil classical work of the second century A.D., which depicts the civilization of the Tamils when they were Buddhists, refers to the same fact. Although there is a controversy about the Buddha's visit to Ceylon, these works have recorded traditions connected with Nagas. The Tamil *Sangham* work, *Purananooru*, refers to the Naga kings of Ceylon.[1] These Naga kings are said to have had their seats of Government in Kalyani (the modern Kelaniya) and Kudiraimalai (a place on the west coast of Ceylon).

In the course of time, the civilization of the Nagas became intermingled with that of the Dravidians. In their form of worship, culture and civilization, the Tamils had drawn heavily from Naga civilization, and it is likely that the Nagas were gradually absorbed into the Dravidian language group.

According to the *Mahavamsa*, the Yakkas were another aboriginal race which occupied Ceylon at the dawn of Ceylon's history. The Yakkas, mentioned in the Ceylon chronicles, were a race of people who occupied Ceylon at a later period than the Nagas. The Hindu epics and the *Puranas* refer to them as the Rakshasas. The *Ramayana*, the great epic, states that Kubera was the chief of the Yakkas.

It is surmised by some scholars that the Veddas, found today in the jungles of Ceylon, are the remnants of the Yakka tribe. The Rakshasas described in the Hindu epics, however, are said to be a people of strong build who had attained a high degree of civilization and were endowed with great physical strength. Thus, Ravana, the king of the Rakshasas, was said to have lived in a palace and is believed to have been well versed in various arts including music. Therefore, it is likely that the Yakkas had Dravidian mixture.

The Veddas of Ceylon resemble very much the jungle tribes of the southern parts of India, the Mulvetans, Thulas and Shalabas, and probably, the Mediterranean Austroloid and Negrites, fused together into a homogeneous group. The Yakkas were a robust and virile race with a great culture and could have been a mixture of the Austroloids and Dravidians who were settled in Ceylon.

The Aryans described their inveterate enemies, the Dravidians, as Yakkas and often used derisive names to describe those whom they found in the countries in which they settled. Recent archaeolo-

1. Puram 5176

gical finds in Ceylon show that the pre-Vijayan civilization was Dravidian. A few years ago, urns typical of those found in places in South India were unearthed in a hamlet named Ponparippu.

Urn burials were resorted to when the Tamil kings and chiefs were buried in South India in ancient times. This honour was not accorded to plebeians. Thus, the *Purananooru* sings the praises of Killiwalluvan, one of the greatest monarchs of the *Sangham* period, in the following terms:[1]

"As in the Heavens the sun with resplendent ray,
Valavana the great, on the brows
Of whose warrior elephants, bright banners wave,
Hath gained the world of Gods.
And so it is time to shape an urn, so huge
That it shall cover the remains of such a one."

In the records of the Madras government there is an account of urn burials discovered at Pallavarm in the Tinneveli district.[2] Urn burial is a typical custom peculiar to the ancient Tamils.[3]

Urn burials were not only found in the west coast of Ceylon but also in the environs of Anuradhapura, Maradankadawala and other places.[4] This shows that at some ancient period, the customary mode of burying Tamil chiefs was adopted in these areas. It is significant that the other remnants of Tamil culture were also found in Indonesia, Malaya, Java and Sumatra.[5] Thus, both lithic and literary records substantiate the theory that the pre-Vijayan civilization of Ceylon was Dravidian. Dr. Paranavitana states:[6] "The persons of Dravidian race figuring in the Brahmi Inscriptions of Ceylon are, characteristically, described as merchants or mariners But they bear Aryan names, and therefore appear to have come under Aryan influence before they moved to the Deccan and to Ceylon."

The advent of Vijaya with his seven hundred followers, is not regarded as history by scholars. However, the Vijayan legend contains a kernel of truth in that a people who spoke an Aryan dialect, came over to Ceylon at some early period in its history and settled down in various parts of Ceylon. The *Mahavamsa* states that Vijaya, having married Kuveni, a Yakka princess, later abandoned her to seek the hand of a Pandyan princess. It is also stated that the seven hundred nobles who came along with him, also married Pandyan princesses. Although this version may not

1. *Purananooru* (226), *Two Thousand Years of Tamil Literature* by J. M. Somasunderam Pillai (1959) p. 44
2. Madras Records 12.5.1887
3. *Two Thousand Years of Tamil Literature* by Somasunderam Pillai, p. 45
4. Article by Senaratne *Journal of the National Museums of Ceylon*, Vol. I, p. 7 et. seq.
5. *Tamil Cultural Influences in South East Asia* by Xavier S. Thaninayagam, *Tamil Culture* Vol. IV No. 3, July 1955, p.203; also *Early Tamil Cultural Influence in South East Asia* by S. J. Gunasegeram, M. A. (London)
6. *History of Ceylon*, Ceylon University Press (1959) Vol. 1, Ch. 6, p. 96

be true, nevertheless it forms a very important phase in Ceylon's history in that it shows that the people who came to Ceylon and settled down in various places ultimately married among South Indians from the Pandyan territory.

Geiger, a noted scholar, observes three streams of immigration into Ceylon. He states:[1] "According to my theory, we learn from them that Ceylon was overrun by three successive waves of immigration. The first is represented by Vijaya and his companions who came from North-West India. The second wave started from Kalinga. Its representative is Panduvasudeva. He brought to Ceylon the name of Sihala, which afterwards by reason of legendary ties between him and Vijaya, was transferred to the latter. The third wave, starting from Vanga (Bengal) and Magadha, is represented by the traditions of Bhaddakaccana and the six Sakya princes."

The lithic inscriptions in the Yala East in the south-east of Ceylon show that the ancient settlers of Ceylon were Dravidians who had Aryan names.[2] Basham, an eminent Indologist, said:[3] "In my opinion, Vijaya is not an individual, but a type: a bold and ruthless Ar an pioneer, who was one of the elements responsible for the spread of Aryan culture all over India and beyond. The other element is perhaps typified by Panduvasudeva who is said to have landed in Ceylon with his followers, in the guise of religious mendicants. These two Aryan types, the man of action and the man of thought, together no doubt with Dravidian and aboriginal elements, produced the great civilization of Ceylon."

Basham, however, did not know of the lithic inscriptions which were discovered later, when he expressed the view that Aryan pioneers came over to Ceylon. But later researches have shown that the people who came and settled in Ceylon with an Indo-Aryan dialect, were not Aryans, but Dravidians.

Gunawardhana referring to the origins of the Sinhalese race, states:[4] "The Sinhalese are a Dravidian race, slightly modified by a Mongoloid strain and an Aryan wash." He was of the opinion that the race originated by the combination of three racial elements—Vijaya and his followers who were probably the Kals and other tribes of the Dravidian family from the administrative province of Bihar and Orissa; a second component formed of the contribution of seven hundred maidens from Madura, and Vijaya's followers with a large train of servants representing various crafts and professions, who were Tamils, and therefore, Dravidians; and the third component was the aboriginal population of Ceylon consisting of two divisions, Yakkas and the Nagas, both Dravidian.

1. *Culture of Ceylon in Medieval Times* by Geiger, p. 28

2. Paranavitana, *History of Ceylon*, Vol. I, p. 96

3. Lecture delivered before the Curia Historica—Ceylon University—Nov. 1951 reproduced in *Medieval Ceylon* by Dr. Ariyapala, p. 2

The Aryan Question in Relation to India by W. F. Gunawardhana (1951) Colombo Apothecaries, p. 44; also R. A. S. (C.B.) Vol. XXVIII, p. 59

He states:[1] "To these must be added two very small contributions, and a third family largely from Nagoda. The character of these contributions ethnologically was that of an intermixture in varying proportions of Aryan and Dravidian types, with perhaps also a touch of the Mongoloid."

The last of these arrivals was in the reign of Devanampiyatissa when the Sinhalese nation may be said to have been in a fair state of development. But from that point forwards for nearly a millennium and a half, Ceylon received from time to time large accessions to its populations from Deccan, all Dravidians. Though they were directly from South India, they were not of its people but were partly a warrior tribe of northern India. On the conquest of their country by the Muslims, they had preferred to migrate rather than live in submission to the conquerors and had taken service with the princes of South India. These people, too, though fully Aryan in their lives, were Dravidian in origin.[2]

Dr. Derrett, an eminent Indologist, states:[3] "Yet of course the Sinhalese were not Aryans. From whence then comes the notion that their descendants are? This presents no difficulty. The Buddhists referred to any respectable member of the *Sangha* as an Arya, and that usage must have been common throughout the former Buddhist world. Moreover, the Dravidians were accustomed to refer to non-Dravidians as Aryans. Thus the Kannada-speaking peoples of the Deccan and Mysore refer to the Marathas as Aryans, though of course the proportion of Aryan blood was hardly any higher amongst the Marathas than amongst the Kannadigas; 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 today preserve the character of border-lands between sub-Aryan and the Dravidian peoples, for even the Maharashtrians 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 Aryan is patent, and Orissans feel that though their language separates them from their Dravidian Telugu neighbours, their customs are more akin

1. *The Aryan Question in Relation to India* by W. F. Gunawardhana, p. 47
2. ibid. p. 81
3. *Origins of the Laws of the Kandyans*, University of Ceylon Review Vol. XIV, Nos. 3 & 4 p. 149

to those of the latter than to those of their Bengali neighbours on the other side."

Discoveries from the writings in the Brahmi Inscriptions of Yala East, show that an independent dynasty, having as its emblem the single fish, ruled in the south-east of Ceylon for many years. They paid no tribute to anybody and were completely independent of the Anuradhapura kings. The Pandyans had the double fish as their emblem. The origin of the Kshatriya race that ruled in the south-east of Ceylon in the ancient days is a matter of conjecture. Names such as Mutasiva, indicate that these princes were Hindu Saivites.[1]

The amalgam of people, who were occupying the border-land between the territories occupied by the Aryans and the Dravidians and who had come in contact with Aryan civilization, migrated to Ceylon and mingled with the people from South India as a result of waves of invasion and of peaceful penetration. The repeated invasions from South India from time to time must have brought large numbers of families to the verdant pastures of Ceylon.

After the death of Mahasena, the last of the great dynasty of kings who ruled Ceylon, the country came under the reign of the lesser dynasty of kings. The rule of these kings was intermittent and often of brief duration as a result of the constant invasions by the Pandyans and the Cholas. Referring to the later period, Codrington states that from about A.D. 500, the chief port of Ceylon, Mahatittha or Mantota (a place near Mannar) was in the hands of independent kings.[2] The Pandyan invasion established Tamil rule at Anuradhapura for twenty seven years till Dhatusena expelled the Pandyans in the fifth century A.D.[3] During the reign of Sri Mara Sri Vallabha II (A.D. 815-16). Pandyan power extended to Ceylon.[4] In A.D. 840, the Pandyans overran the north of Ceylon.[5] From the seventh century A.D., Tamil influence became strong in the north and the Chola conquest of Ceylon which began in the time of Rajadhiraja and was concluded by Rajendra resulted in the fall and final destruction of Anuradhapura.[6]

In the fifth year of the rule of Rajendra, the son of Rajadhiraja, (A.D. 1017) a fresh invasion completed the Chola conquest of Ceylon.[7] Polonnaruwa, which was re-named as Jananatha-mangalam by the Cholas, became the capital of their kingdom.

1. The Article by Mr. Nicholas R. A.S. (C. B.) 1951 New Series, Vol. 6, p. 51 and also Paul Pieris's Felicitation Volume pp. 59-65
2. *A Short History of Ceylon* by H. W. Codrington, p. 32
3. *History of Ceylon*, Ceylon University Press. Vol. I, p. 293
4. *A History of South India* (3rd Ed.) Nilakanta Sastri, p. 157
5. *The Sacred and Historical Books of Ceylon* by Upham, Vol. II; *Rajaratnakara* p. 84
6. *History of Ceylon*, Ceylon University Press, Vol. I, p. 349; also Codrington p. 40
7. *History of Ceylon*, Ceylon University Press, Vol. I, p. 350; also Codrington p. 40

From the seventh century onwards, Tamil influences were greatly felt in the Sinhalese court.[1] Many Tamil words occur in the Sinhalese inscriptions from the ninth century onwards, particularly words connected with administrative functions and land tenures. Villages and lands were gifted by the kings to Tamil officials and residents. In the inscriptions of the last decade of the ninth century, an official called *Demila-adhikara* is mentioned. Throughout the tenth and eleventh centuries, the Pandya and Sinhalese kingdoms were closely allied and ranged themselves against the Cholas, their common foe.[2] Many Tamil mercenaries came to Ceylon with the Chola conquest and having settled down, became mercenaries under the Sinhalese kings. Thus the Velakkara forces, the Tamil mercenaries who came with the Cholas, remained in Ceylon and were employed by Vijayabahu in driving the Cholas out of Ceylon.

The militia of the Sinhalese after the seventh century consisted of Dravidian mercenaries. Geiger states, referring to the soldiery after that period:[3] "Thus the custom arose in Ceylon, probably since the seventh century, of enlisting Dravidian mercenaries, Damalas, Keralas, and Kannatas, in the Sinhalese army. Their number seems to have been even greater than that of the less warlike Sinhalese." Even in times of peace, *Demalas* customarily came over to Ceylon and settled in various parts, where they earned their livelihood as merchants or artisans or perhaps as field labourers. Thus, at the end of the eighth century, a constituent element of the population of Ceylon appears to have been Tamils, as is evident from the *Mahavamsa*. The *Mahavamsa* mentions that Mahinda presented bulls to lame people, no doubt for their conveyance. But it also states that if they were *Demalas*, the king gave them horses as the *Demalas* would not take cattle for that purpose.[5] Geiger refers not only to Tamil courtiers who wielded great influence in the Sinhalese court during that period, but also to the group of Tamil priests called Damila Bikkshu Sangha. Tamil influence spread even to the harem of the Sinhalese king's court. Many of the Sinhalese kings had in their harems Tamil women. Marriage between Tamils and Sinhalese was brought about for political considerations. Many prominent Sinhalese families sought their brides in prominent Tamil families.[6] "It is obvious," states Geiger,[7] "that owing to the continual influx of Damilas, both soldiers and non-soldiers, the Sinhalese must have been considerably influenced by the Dravidian race, not only culturally but also physically and mentally.

1. *History of Ceylon*, Ceylon University Press, Vol. I, p. 432
2. ibid. p. 433
3. Geiger, *Medieval Ceylon*, p. 19
4. *Mahavamsa*, pp. 48, 145
5. Geiger, p. 20
6. ibid.
7. ibid.

"But a complete amalgamation of the two races never took place in Ceylon. The Damilas were always considered as foreigners, even in times of peace, and the Sinhalese never lost consciousness of their Aryan descent and of their right of political independence. They even preserved their old Aryan language in spite of the geographical isolation. The dialect which the first colonists spoke was probably cognate to that in which the Western and North-Western inscriptions of Asoka are composed. In Ceylon it was influenced and enriched by dialects of the Aryan immigrants who came from North Eastern India, from Bengal, Bihar and Orissa, so that it became a mixed dialect, which in the sequel developed on the same lines as all the Indo-Aryan vernaculars."[1] Ceylon shook off the Chola yoke during the reign of Vijayabahu I. This great king gathered sufficient men and material to drive away the Cholas, who, due to internal dissension, were unable to control their far-flung empire. Vijayabahu's reign is an important landmark in the annals of Ceylon history as he brought the whole of Ceylon under one banner, thus laying the foundations of a new era of Sinhalese civilization and culture.

In the reign of Parakramabahu (a Dravidian on his grandfather's side[2]), there was a resurgence of Sinhalese nationalism, but the great king meted out justice and fairplay to his Tamil subjects. Parakramabahu improved and developed the city of Polonnaruwa by building more vihares and temples. He also utilized the ancient tanks for irrigation and brought about prosperity and happiness to Lanka. With the death of this illustrious king, decline and decay once again set in. A Pandyan prince invaded Ceylon with an army and ruled from A.D. 1212-1215. He in turn was followed by Magha, a Kalinga prince, who with "his mighty army of Kerala warriors", invaded the north of Ceylon. When he was driven back, he and his followers settled down in large numbers and ruled over the northern part of Ceylon.

A series of later invasions from South India resulted in more Tamil settlements. Owing to those invasions, the capital was moved from Polonnaruwa to Dambadeniya and thence to Kurunegala in the 13th century. From Kurunegala, the capital was then moved to Gampola and later to Kotte. Tennent, describing the state of the country at the beginning of the 16th century, states: "The political condition of Ceylon at that time was deplorable. The seaboard on all parts of the island were virtually in the hands of the Moors; the north was in the possession of the Malabars, whose seat of government was at Jaffna Patam; and the great central region (since known as Vanni) and Neurakalawa, were formed into petty fiefs, each governed by a *Vanniyar*, calling himself a vassal, but virtually uncontrolled by any paramount authority. In the south, the nominal sovereign, Dharmaparakramabahu IX had

1. Geiger, pp. 20-21
2. ibid. p. 25

his capital at Cotta, near Colombo, while minor kings held mimic courts at Badulla, Gampola, Peradeniya, Kandy and Mahagama and caused repeated commotions by their intrigues and insurrections."[1]

The north was occupied by the Arya Cakravarti who since the time of Magha settlements ruled an independent kingdom. The Arya Cakravarti's power grew in course of time and he became a powerful monarch in the north exacting tribute even from the kings and chieftains of the south.[2] The very position of Kotte in the 'swamps near Colombo'[3] is proof of the straits to which the Sinhalese had been reduced, and there can be little doubt that the Jaffna kingdom was for a time paramount in the low-country of Ceylon.

In this state of affairs, the Portuguese, under the command of Lopo Soarez De Albergaria, arrived in Ceylon in A.D. 1517 and established themselves in Colombo. In 1518, the Sinhalese king declared himself a vassal of Portugal. For a period of a century and a half, the Island was involved in a continuous fight between various royal princes who claimed supremacy, but the Portuguese by their intrigues, supported a particular prince in the hope of acquiring Ceylon for themselves.

Portuguese and Dutch Occupations

Gradually, the Portuguese obtained a foothold in all the chief seaports. They built fortresses in some of the places and engaged themselves with much energy in converting to Catholicism the people in the areas occupied by them. After much exertion on the part of the Portuguese, Dharmapala, the great-grandson of Vijayabahu, was baptized under the name of Don Juan, and remained a puppet-king under the protection of the Portuguese governor of Colombo. In 1597, on his death, he bequeathed the kingdom of Ceylon to the king of Portugal. In that year, the king of Portugal became the king of the Maritime provinces occupied by the Portuguese. During this period, many Sinhalese withdrew themselves into the interior. Those who continued to live in the maritime provinces became differentiated from the Sinhalese of the interior by adopting the civilization of the Portuguese. Many of them adopted not only the Portuguese dress and mode of living, but also their religion and names. During this period, several waves of settlers came from South India and settled in the southern and western coasts of Ceylon and got merged with the low-country Sinhalese.

Parakramabahu VI brought the Tamil warriors, the Karavas, to fight the Portuguese. The names of these military leaders and

1. Emerson Tennent, Vol. II, p. 7
2. Kegalle Inscriptions, *The Kottagama Inscription Report of Kegalle District*, p. 85
3. Codrington, *A Short History of Ceylon*, p. 84

their banner have been fully investigated by Mr. Raghavan.[1] "The Karavas, true to their name," says Nilakanta Sastri,[2] "claim that they are the descendants of the Kuras who dispersed after the great battle of Kurakshetra. But the many references to Kurakalarajas of Kurakulattoriyam in the medieval Tamil inscriptions of South India and the prevalence of the title pattabandige (cf. pattangatti of the Tamil records) gives us a real clue to their origin from South India."

Mr. Raghavan has found a collection of Karava caste plays in the proud possession of a remote Hindu village, Manampitiya, near Polonnaruwa, a far-flung outpost of Karava culture and influence.[3] In reviewing this work, Nilakanta Sastri states:[4] "All the chapters in the book bear ample evidence of South Indian influences at work among the Karava through the centuries."

The leading Karava families owned slaves[5] and wielded great influence and had immense wealth. Their counterparts are found amongst the leading Karava Tamil families in the north of Ceylon. Origins of caste in Ceylon and India are not identical. Raghavan states:[6] "The difference which is vital, turns to the fact that the concept of caste is not only not repugnant to Hinduism but fundamental to it. In Ceylon on the other hand with no religious sustenance, caste is the product of the nuclear culture of the immigrants as they settled in different times with their Hindu ideology influenced and modified in the course of ages by several cultural forces which have gone into the growth of a distinct regional social system with its related cultural systems."

It is natural, therefore, that the Portuguese *thombos* should refer to a number of Tamil castes who were regarded as foreigners on the soil of Ceylon. These "foreigners", who belonged to the Tamil castes, were penalized by the Portuguese and were compelled to pay certain special taxes. Thus, Codrington, referring to the various taxes imposed on foreigners, speaks of the *Agampadippanam*— which means the taxes paid by the Agampadi people. The Karava people paid the tax *dal panam* or in Tamil *valai panam* or Net Money.[7]

The *Floral* also mentions the *thupatti-panam* which was a tax paid by the caste known as Chalias who were weavers (Thuppatti—

1. *The Karava of Ceylon Society and Culture* by M. D. Raghavan, p. 16 et seq. (1961) K. V. G. de Silva & Sons
2. *Journal of Indian History*, Vol. XXXIX, Part I, April 1961, Series 115; also *Ethnography of Ancient India* by Robert Shafar, p. 3 (1954) Otto Harrassowitz, Weisbaden
3. Raghavan, p. 66 et seq.
4. *Journal of Indian History*, Vol. XXXIX, Part I, April 1961, Series 115
5. *vide* Vol. I, Collection of Legislative Acts of the Government of Ceylon from 1796-1833, p. 213 for a list of slaves of the Karavas of Negombo
6. Raghavan, p. 62 et seq.
7. *Ancient Land Tenure and Revenue in Ceylon* (1938) by Codrington, p. 47

cloth in Tamil).[1] The Chalias are referred to by Boake in 1888 as a Tamil caste in the Madras state who were residents of Mannar.[2] Taxes were paid by the Agampadis and other castes such as the weavers and chetties who were living in the south-western coasts of Ceylon.[3] The existence of these taxes during the Portuguese and the Dutch periods shows that many Tamils who belonged to different castes had come and settled down in these areas during this period. German travellers who visited Ceylon during the middle of the 15th and the early 16th centuries state in their travelogues that from Galle, Batticaloa, Trincomalee, Jaffna, Mannar, Calpetyn, as far as Negombo, they found a Tamil population along the coast.[4] This again supports the view that during the Portuguese and the Dutch regimes, large numbers of Tamils came and settled down in the littoral area. The subsequent settlements of the Tamils, however, could not in any way have influenced the Kandyan law which is a law applicable to the Sinhalese who occupied the territory under the sway of the Kandyan kings.

The mixture of Dravidian and Aryan blood could be illustrated by the number of Tamil place-names in Sinhalese areas.[5] Tamil influences could also be seen in the similarity of construction of sentences in the two languages,[6] in the religious beliefs common to both linguistic groups,[7] in the fine arts as painting,[8] and in works of art. Ananda Coomaraswamy states:[9] "Hence it is that not only do we find the closest correspondence in detail and technique between South Indian (Tamil) and Sinhalese work, but also that the artificers families have often Hindu names (such as Rajesvare Devasurendra), they preserve traces of Siva worship (such as Sanskrit slokas written in his praise), and of other Hindu ceremonies (netra mangalaya etc.,); their technical works are obviously a part of Indian *silpasastra*; some of their technical terms are corruptions of Tamil words; they make use of Hindu mantrams; they are occasionally referred to as Kammalar and so forth." Although Sinhalese is an Aryan dialect and Theravada Buddhism was a North Indian development, a belt of Dravidian territory and culture separated Ceylon from India. Hence the culture of Ceylon had more and more acquired a Dravidian pattern.[10]

1. *Floral* 161; *Thombo* 3; S. p. 2
2. *Mannar*—a *Monograph* by W. J. S. Boake, Ceylon Govt. Press (1888) p. 22
3. Codrington, p. 48
4. *Germans in Dutch Ceylon*, Vol. I, p. 47, translated by R. Raven-Hart, National Museum of Ceylon
5. *Ceylon Historical Journal* Vol 13, p. 243—Sinhalese Places by D. J. Perera
6. *Sinhalese Language* by W. A. Gunawardhana, p. 13
7. *The Literature of the Sinhalese* by Ariyapala, pp. 1-11; also The Tamil Contribution to Sinhalese Literature by N. Subramanium, a lecture before the Ceylon Historial Research Circle.
8. *Indian Architecture* by Percy Brown (2nd Ed.) Vol. I, p. 201, and *The Story of Sinhalese Painting* by D. B. Dhanapala, pp. 43, 53
9. *Medieval Sinhalese Art* by Ananda K. Coomaraswamy
10. *Ceylon Today & Yesterday* by Dr. G. C. Mendis (2nd Ed.), The Associated Newspapers of Ceylon Ltd., p. 100

In later times, the influences came more from South Indian than from the Northern drama.[1] The *nadagams* came into existence in the 19th century. These are lyrical plays consisting of verses and songs[2]—the verses are in Tamil metres and are chanted without measured time. A large number of metres are used, the commonest of them being the *viridhu*, corresponding to the Tamil *viruththam*; the other Tamil metres used in Sinhalese nadagams are *innisai*, *kalippa*, *kavi*, *konjakam*, *venpa* and *paranithi*.

After giving a graphical account of the nadagam, Dr. Sarachchandra states:[3] "The foregoing account would make it clear that the Sinhalese *nadagam* is wholly derived from a variety of South Indian folkplay known as *terukkuttu* in the Tamil Nad, and as *vithi natakam* in Andhra." The *terukkuttu* was in vogue at one time in Jaffna and has now disappeared entirely from the north. It is now preserved in the Eastern Province, mainly in Batticaloa and the neighbouring villages.

Evolution of the Kandyan Kingdom

The civil strife between the kings and princes of Ceylon who vied with one another to wrest sovereignty, and the intrigues of the Dutch and the Portuguese strategy caused much unrest amongst the people of Ceylon. In 1580, the king of Kotte claimed sovereignty over the kingdoms of Sitawaka, the Seven Korales of 'Candee' and the Hill country and also the principality of the Four Korales. There were also the *Wanniyars* who pretended to pay tribute either to the king of Kotte or to the king of Jaffna, but were in fact independent petty chiefs.

In 1557, when Dharmapala received baptism taking the name of Don Juan, many of his subjects abandoned him and found in Rajasingha a new leader. Rajasingha defeated the Portuguese in a fiercely fought battle at Mulleriyawa. About 1580, Rajasingha turned his attention to Kandy and succeeded in annexing that kingdom after disposing of the royal family of Karalliyadde Bandara. Virasundara, the scion of the Peradeniya branch of the royal house, betrayed his own sovereign and joined Rajasingha. In 1581, Rajasingha became the master of nearly the whole of Ceylon.[4]

Hostility with the Buddhist clergy made Rajasingha to reject Buddhism and embrace the Hindu faith. During his reign several hundreds of Tamil families were brought from South India to Ceylon. He became unpopular with his subjects as a result of his cruel acts and his antipathy towards Buddhism. Virasundara's

1. E. R. Sarachchandra, *Sinhalese Folk Play*, Ceylon University Press Board, p. 14
2. ibid. Ch. V
3. ibid. p. 103; also *Sanskrit Civilization among the Ancient Sinhalese, Ceylon Historical Magazine* Vol. I, p. 28, by O. H. de A. Wijesekere
4. Codrington, *A Short History of Ceylon*

son Konappu Bandara who greatly distinguished himself in the last siege, hated Rajasingha and offered his services to the Portuguese who made ample use of him to create a division in the Kandyan kingdom. With this objective, he took Don Philip, Karaliyadde Bandara's nephew Yamasinha, to Kandy and tried to instal him as the rightful sovereign of the Kandyan kingdom.

Don Philip was placed on the throne and a fort was built to withstand the attack of Rajasingha, but the new king suddenly died under suspicious circumstances. Thereafter, Konappu turned upon the Portuguese at Gannoruva and defeated them and proclaimed himself as King of Kandy under the name of Vimaladharma Surya. In 1592, Rajasingha attacked his new opponent but was defeated. Rajasingha retired to a wood and died as a result of a wound caused by a bamboo splinter. With the reign of Vimaladharma Surya I (A.D.1594-1604) begins the era of the Kandyan kingdom. From this period, up to the deposition of Sri Vickrama Rajasingha in 1815 by the British, the Kandyan kingdom was in full bloom.

The Kandyan Period

The Kandyan period could be considered to have ushered in a new era in the creative history of the Island. It marked the complete eclipse and isolation of the region of the ancient tanks, and the civilization of the north-central dry zone. It also consolidated Sinhalese civilization in the wet zone highlands.[1]

Vimaladharma Surya died in the year 1604 leaving his kingdom to his first cousin, Senerat (A.D. 1605-1635), a priest, who abandoned his robes and married his predecessor's widow, Dona Catherina.[2] The reign of Senerat saw the decline of the Portuguese power and the ascendancy of the Dutch.

Senerat, after ruling the country for some years, divided his kingdom among his own son Rajasingha upon whom he conferred the title of King, alloting to him five districts in the mountainous regions (corresponding to the modern Kandy district), and the other sons of Dona Catherina, Kumarasinha and Wijayapala, to whom he gave Uva and Matale respectively. Kumarasinha was poisoned by Rajasingha during the lifetime of Senerat, and Rajasingha ascended the throne as Rajasingha II (A.D. 1635-1687).

In 1658, the Dutch occupied the Maritime Provinces and, during Rajasingha's reign, they tried to wrest the Kandyan kingdom from the Sinhalese king both by intrigue and strategy, but failed in their attempts.

Rajasingha was succeeded by his son, Vimaladharma Surya II (A.D. 1687-1706). The new king ruled Kandy for a few years

1. *Sinhalese Social Organisation* by Dr. Ralph Pieris, p. 3
2. Codrington, *A Short History of Ceylon*, p. 109

and was succeeded by his son Sri Vira Narendra Sinha (A.D. 1706-1739). Narendra Sinha's queen belonged to the Nayakkar dynasty of Madura and, with the succession of her brother Sri Vijaya Rajasingha (A.D. 1739-1747), the Kandyan kingdom came under the away of the Nayakkar dynasty.

The Nayakkar Dynasty

The Nayakkar dynasty came from Madura and although there is some doubt as to their place of origin (some ascribed their original home to the Andhra country (*thesa*)[1]), in fact, they belonged to the linguistic group called the Tamils and they brought with them the culture and the civilization of the Tamils. They were followed by a retinue of nobles from the Madura country who, when they came over to Ceylon, became naturalized Sinhalese and held important positions such as Disavas in the Kandyan Courts.[2] The Dutch made an attempt to set up the old Kandyan aristocrats against the Nayakkar chieftains who held important positions in the Kandyan Court.

During the reign of Sri Vijaya Rajasingha, several incursions were made into Dutch territory but the Dutch, on instructions, did not retaliate.

Sri Vijaya Rajasingha was succeeded by his brother-in-law, Kirtisri Rajasingha (A.D. 1747-1782). The new king became a devout Buddhist, and in 1750, due to a paucity of Buddhist priests, despatched a mission to Siam to bring Buddhist priests to this country. In 1753, a number of Siamese priests established the Siamese sect and thereby enriched the Sangha. Kirtisri died of injuries caused as a result of a fall from a horse and was succeeded by his brother Rajadhi Rajasingha (A.D. 1782-1798). On the 26th July 1798, Rajadhi Rajasingha died and was succeeded by his youthful relative Kannasamy who was set on the throne by the first adigar Pilama Talavve under the name of Sri Vickrama Rajasingha.[3]

The rule of Sri Vickrama Rajasingha is one of the most important epochs of Kandyan history. It was during his reign that the British made several attempts to capture the Kandyan kingdom. Some of their campaigns ended in the complete massacre of the British troops. The valour and bravery of the Kandyans who put forward stiff resistance to the onslaught of the British who were in possession of superior armaments, is most praiseworthy.[4] However, the British made a final onslaught on the Kandyan kingdom proceeding from four directions and they seized it in the year 1815.

1. *In the Days of Sri Wickrama Rajasinghe* by P. Dolapihilla (1959) Saman Press, p. 86
2. *Historical Manuscripts Commission* (Ceylon) Bulletin No. 3, p. 4
3. Codrington, p. 162, also *In the Days of Sri Wickrama Rajasinghe* by P. Dolapihilla, pp. 1–23 for the intrigues of Pilama Talavve
4. *Sinhala Patriots* by Paul Pieris

Internal dissensions caused by intrigues amongst the nobles and the unscrupulous behaviour of Sri Vickrama Rajasingha made the conquest easy for the British. When they arrived at Kandy, there was hardly any opposition from within. The Kandyan Convention was signed in 1815 and from that year onwards till Ceylon gained independence, Kandy remained under the British.

From this short historical survey it is clear that the theory that the Sinhalese are Aryans and the Tamils Dravidians is not only a pure myth, but one which has already proved to be dangerous as it has tended to disrupt the national unity of our country. As Sir Ivor Jennings says:[1] "The invention of the theory of 'race', which is so widely prevalent that it is assumed to be axiomatic, enables one line of distinction to be drawn: for it is enough to ask at the Census to which 'race' a person belongs. If 'race' is biologically inherited through males, the correct answer is 'not known,' because hardly anybody can trace his ancestry for more than four generations. Since every person believes that he has a 'race', however, it follows that he has a race, one of his social conventions being that he belongs to the 'Sinhala Race' or the 'Tamil Race'."

The Spread of Sinhalese Civilization

The civilization of ancient Ceylon seems to have flourished on the plains which are now represented by the North Central Province and parts of the Northern Province. From there, due to insurrections and pestilence, there has been a movement of the Sinhalese kings to the valley of the Mahaveli Ganga where the Sea of Parakramabahu was formed. After that, the movement was into the regions dominated by the south-west monsoon. Kurunegala is on the edge of the wet zone; Gampola and Kandy are in that portion of the valley of the Mahaveli Ganga which lies to the west of the closed spurs of the hills, and Kotte nestles in the valley of the Kelani Ganga.

Referring to this movement, Sir Ivor Jennings states:[2] "The location of inscriptions shows that the population moved into the wet zone and down to the sea. There it met the Karava and the Salagam of the coast and eventually joined up with the population which had moved northwards from Tissamaharama. These movements resulted in the division of the people of Ceylon into two language groups, with a fluctuating boundary between them. The Tamils had spread south of Elephant Pass and have occupied most of the Wanni. There, they seem to have been absorbed into a Sinhalese-Tamil community in which ultimately the Sinhalese language predominated. In what is now known as the Eastern Province, on the other hand, the Tamil language predominated. On the west coast, there is a vast mixed area in which the Sinhalese

1. MS. on *Customary Laws*, Ceylon University Library, p. 12
2. ibid. p. 11

have tended to predominate. South of this line, Sinhalese became the common language."

After constant invasions from the 5th century A.D., a time came when the Sinhalese kings sought protection in the hills and occupied the hilly tracts of Ceylon. The Maritime Provinces, the littoral area of Ceylon, was sparsely populated, and the Moors, who were traders, came from the Coromandel coast and other parts of India. They settled down in these areas for the purposes of trade. The mother tongue of the Moors of Ceylon is still Tamil and Sir Ivor Jennings surmises that they either brought with them Tamil wives (which is most unlikely), or perhaps, married amongst the Tamil population of the coasts. From this, he concludes that the persons who occupied the littoral parts of Ceylon during the period of these settlements were Tamil-speaking.[1]

Alternatively, Sir Ivor Jennings states that there must have been no population at all when the Moors brought Tamil-speaking wives from the Malabar or North Ceylon.[2] The flourishing Moorish trade and the lure of the coconut palm brought the Sinhalese speaking people from the interior. They flourished in the new environments with the result that the coastal belt became Sinhalese, except for the Moors who remained a separate community by reason of their religion and owing to the fact that they had a large enough population to remain Tamil-speaking, even though some of them did (as they still do) marry Sinhalese women.

The observations of Sir Ivor Jennings are supported by historical data. Thus, in one of the earlier memoirs which has not been translated into English, one of the Dutch Governors says that none but the Malabars can be found all along the coastal regions from Negombo to Jaffna on the western side of the coastal region of Ceylon and from Jaffna to Batticaloa, Hambantota and Matara on the east and north-east portions of Ceylon.[3] Schweitzer, a German traveller who visited Ceylon in 1677, states that there are two types of inhabitants in Ceylon:[4] "Those of *Negombo* over *Columbo* and *Galture* as far as *Gala* are called *Cinguleeses* or *Cingulians*. ..... The other part of inhabitants of this Island, are those of *Gala, Batacola, Trinconomala, Jafnapatam, Manara, Aripen, Calpintin,* as far as *Negombo* and are called Malabars."

There is also evidence that the Karava and the Salagama communities at one time formed the cream of the Chola and Pandyan armies, and if not for their valour the Sinhalese civilization might have been extinct. That the Salagama and the Karavas were the

1. MS. on *Customary Laws*, Ceylon University Library, p. 15
2. ibid.
3. Governor van Goens's Memoirs
4. *Germans in Dutch Ceylon*, Vol. I. Translated by Raven-Hart, pp. 44-47 in the National Museums of Ceylon—Translation Series

doughty warriors of the Tamil linguistic group is beyond any conjecture. Constant peaceful penetration from South India augmented their numbers.[1]

The observations of Sir Ivor Jennings are strengthened by the material found in the Portuguese *thombos* and the *Floral* where Tamil caste names were found in the West Coast of Ceylon.[2] The people who were absorbed in the language, traditionally came to be known as 'low-country' in view of the constant contact they had with the Portuguese and the Dutch and they became a prosperous and a progressive people. Their blood inter-mingled with European blood.[3] A Portuguese settlement which began in 1595 seems to have followed as much the same lines as the Moorish settlements. Though some Portuguese were sent or brought out their wives from Portugal, most of the Portuguese married local women. We know from Portuguese sources that most of the Portuguese of the second generation were Eurasians. It had indeed been suggested that the initial Portuguese influx was slowed down because they failed to send out sufficiently new immigrants. The result of this mixture of stocks was that both Sinhalese and Portuguese became local languages though the latter was of a corrupt variety of the type commonly known as Indo-Portuguese. This variety of Portuguese became extinct only quite recently, i.e. in the early parts of the present century; sporadic groups of corrupt Portuguese-speaking people are still to be found. The survival of these groups was due to the fact that they became in effect a new caste engaged in leather work and other trades not undertaken by any pure Sinhalese castes. Generally, though, the descendants of the Portuguese were absorbed by the Sinhalese; tradition that caste and race descend through males, enabled the children to take the caste of their fathers, though in India they would have belonged to new subcastes. The absorption of the males was more difficult and must have taken a longer time.

A solemn and an important truth is worthy of repetition from the above discussion, namely, that no Sinhalese or Tamil is pure blooded. There has been much intermingling of blood between the many communities which have either passed through or have come to exist in this little Island of ours.

1. *Legal Systems of Ceylon* by Sir Ivor Jennings, p. 15
2. *Ceylon Littoral* (1593) by P. Pieris
3. *Legal Systems of Ceylon* by Sir Ivor Jennings, p. 15

CHAPTER II

THE SINHALESE CUSTOMARY LAWS

THE Sinhalese customary laws were never codified. Is their source to be found in Kandyan law? Did the low-country Sinhalese have a different system of customary laws from that of the Kandyans? These, and other allied questions, could only be satisfactorily answered by considering the socio-political changes which differentiated these two classes of people.

The unsettled conditions in the Maritime Provinces and the vulnerability of the sea coast compelled the peace-loving Sinhalese settled in these areas to move into the interior and to seek the protection of their leaders. The separation of the Kandyan Sinhalese from their low-country brethren is due to this historical reason. When the Sinhalese kings moved their capitals to Dambadeniya, Kurunegala, Gampola and Kandy, the patriotic Sinhalese from the Maritime Provinces withdrew into the interior. In the mountain fastness, they preserved their modes of life, and their customary law remained unaffected by foreign influence.

The Portuguese Period

The littoral of Ceylon had a different history. With the exodus of the Sinhalese, it must have become thinly populated and also become the habitat of the Muslims who came over to Ceylon from the Coromandel coast, and other racial elements from South India. The Portuguese called the Muslims 'Moors'. Even before the advent of the Portuguese, there were Muslim settlements which date back to the tenth century A.D., or even earlier. But when the Portuguese took occupation of the Maritime Provinces, large numbers of Muslims came from the Coromandel coast. The fact that Tamil is their mother-tongue strongly suggests the inference that they came to Ceylon from the Tamil districts of India.

With the advent of the Muslims, more members of the Karava and Salagama castes would have settled in the coasts.[1]

The sparseness of the Sinhalese population in the littoral areas arrested the growth of Sinhalese customary laws in the Maritime Provinces. To assume, on the other hand, that no Sinhalese customary laws existed in the Maritime Provinces is contrary to fact. When King Dharmapala bequeathed his kingdom to the King of Portugal and the latter became sovereign of Ceylon, the Portuguese attempted to apply the Portuguese laws to the Sinhalese, but the delegates, consisting of Disavas who were summoned, insisted that the Sinhalese laws should be maintained. Thereupon, by the

1. *Customary Laws* by Sir Ivor Jennings—MS. in the University of Ceylon Library p. 15

Malwana Convention, the Portuguese undertook "always to preserve the kingdom and vassals of Ceilao, all their laws, rights and customs, without any change or diminution whatever".[1]

The Portuguese rule, therefore, did not produce a climate conducive to the growth of Sinhalese laws in the littoral. The religious zeal of the Portuguese to 'proselytise the pagan' made them to convert many Sinhalese and Tamils to Catholicism. A large number of Tamils and Sinhalese in the northern, eastern and the southern coast of Ceylon not only received baptism but also began to adopt Portuguese names and modes of life. The Sinhalese and Tamil forms of dress were discarded in favour of Portuguese apparel. To those who tenaciously clung to their own religion and customary modes of life, little encouragement was given and in this climate customary laws underwent little or no development. Customs which were repugnant to Christian ideals, were gradually eschewed.

Being a trading race, the Portuguese would have applied Portuguese laws in commercial matters. Portuguese criminal law would have gradually replaced the Sinhalese penal law.[2] The Portuguese, however, retained the indigenous system foi the administration of justice among the inhabitants of this country who had not adopted Christianity as their religion. They also retained the administrative machinery of the Sinhalese kings, but appointed their own officials as heads of political administration.

The Disava continued to function as before, but with increased civil, military and judicial functions. He was often a Portuguese official and had more powers than his Sinhalese counterpart. At the head of the administration was the Captain General who resided at Malwana. He was assisted by a *vedor da Fazena*, who was in charge of the revenue, and by an *Ovidor* or Judge, who dispensed justice. The Viceroy of Goa had an overall superintendence over the affairs of Ceylon.[3]

Some of the customary laws administered to the Sinhalese who remained Buddhists, are recorded by the Portuguese. The custom of polyandry, for example, was recognized by the Portuguese courts.[4] Marriages solemnized in the customary manner were valid among the Buddhists.[5] The greatest liberty was given to parties to dissolve their marriages. Mutual consent was sufficient to effect a divorce. On dissolution, each party was allowed to take the property which he or she brought at the time of marriage; as a rule, the male issue remained with the father, while the female issue remained with the mother. Polygamy was tolerated in rare cases. Marriage did not

1. Ribeiro's *History of Ceilao*, translated by P. E. Pieris (1909) Colombo Apothecaries Ltd., p. 29
2. *Customary Laws* by Sir Ivor Jennings, MS. p. 54
3. *A Short History of Ceylon* by Codrington, p. 124
4. *Ceylon—Portuguese Era* by P. E. Pieris, Vol. II, p. 105
5. ibid. p. 104

make a Sinhalese woman a chattel of her husband. She retained her rights to her separate property.[1] Annual Assizes were held by the Portuguese.

A creditor who had a claim against his debtor was allowed to come before the Portuguese Assizes (Maralla). If the claim was admitted by the debtor, then the latter was condemned to pay the amount due to the creditor. If the debtor denied it, he was asked to swear on his child or some near and dear relation chosen by the creditor. The party taking the oath then placed three or four stones picked up from the ground, on the head of the son or his dear one and said "I do not owe the debt". A similar procedure was adopted by a person accused of a crime if he denied it. If he admitted the crime, adequate punishment was meted out to him. In the event of denial, he had to take an oath, and on taking the oath (to the effect that he did not commit the crime), he was acquitted of the charge, but the complainant was condemned to pay the costs and watch whether any calamity would befall the person who took the oath. If some misfortune happened to the debtor then the creditor was vindicated in the eyes of his countrymen.

This form of appeal to divine justice is common both to Ceylon,[2] and India.[3] It is founded on the generally-received belief that when a person makes a statement with a definite formula or with a particular formality before the Gods, divine punishment would be meted out to him if he speaks an untruth.[4]

If a murder was committed and if the murderer was apprehended within six months, the Disava or the General had jurisdiction to condemn him to death at his discretion. If a period of six months had already elapsed before the apprehension of the murderer, then this Disava had no power to pass sentence of death. Murderers therefore, absconded and appeared before the Portuguese Assizes and confessed their crimes after a lapse of six months. When they surrendered after six months, they were ordered to pay one hundred and twenty *reals* of Portuguese money to the Treasury. If they paid this amount, they were given an ola document (palm leaf) of safe conduct and became free citizens.

If a man of low caste committed the murder of a man of high caste, then he could not buy his freedom in the manner aforesaid, but suffered the extreme penalty of death.[5] Various other disputes were decided by the officers who presided at the Assizes. The judges who presided at these Assizes were called *Marelleiros* and

1. *Ceylon-Portuguase Era* by P. E. Pieris, Vol. II, p. 105
2. ibid.
3. Kane, Vol. I
4. *Evolution of Law* by Sen Gupta, p. 77
5. Ribeiro's *History of Ceilao*, translated by P. E. Pieris, Chap. XVIII

were assisted by two assessors who gave their opinions on points of law.[1]

Although the Portuguese applied the customary laws to the Sinhalese people who maintained their indigenous ways of life, nevertheless certain important changes were made. The rule that a Sinhalese king was an heir to his predecessor was not followed. The rules of intestate succession, which formed an important part of Sinhalese customary laws, were abandoned and the rules of succession framed at Goa for application to 'gentiles' were applied in Ceylon.[2]

The procedures adopted in hearing suits and crimes among the Buddhist Sinhalese during the Portuguese period appear to be the same as those observed during the time of the Sinhalese kings. Persons who violated laws were punished with fines or imprisonment. If the fine was not paid, the person condemned was deprived of his cap, sword, knife and doublet, and was, in addition, kept in confinement. " If payment was still deferred, " says Philalethes, "he is condemned to carry a heavy stone upon his back till it is discharged." Besides these, other expedients were employed to force the payment of debt. One of most effectual methods was for the creditor to threaten to destroy himself and thus to load the soul of the debtor with the guilt of his death.[3]

Questions of caste and irregular marriages, also came before the Assizes, and the ordeals of oil, red-hot iron, and the like were commonly in use.[4] The system of criminal jurisprudence in the Portuguese period was therefore comparable with that prevailing in the tenth century.[5] The Assizes held by the Portuguese tried civil and criminal cases.

In spite of the hostile atmosphere for the growth of Sinhalese customary laws, the Portuguese applied them in other matters such as personal relations (especially family relations), rules governing caste, cultivation, land tenures and also the general laws applicable to movables.

The Dutch Period

The Dutch also followed the same practice for some time. Cleghorn states:[6] "In civil cases it was judged expedient and even necessary to allow the people to preserve the laws and customs which had been established by the ancient princes or by the King of Kandy."

Klerck writes: "From the beginning the Dutch Courts exercised justice according to the old Dutch and Roman Law, also with

1. Ribeiro's *Hitory of Ceilao*, translated by P. E. Pieris, p. 154
2. *Ceylon—Portuguese Era* by P. E. Pieris, Vol. II, p. 80
3. *The History of Ceylon* by Philalethes, p. 243
4. *A Short History of Ceylon* by H. W. Codrington, p 126
5. ibid.
6. Cleghorn's *Minutes of* 1799

respect to natives and foreign Asiatics. As early as 1625, this was imperatively prescribed unless the matter was arranged otherwise than by Indian regulations."[1]

The settled policy of the Dutch in Ceylon can be discerned from the memoirs of Anthony Paviljoen, who says:[2] "Justice is administered to the Dutch according to the laws in force in the fatherland and the Statutes of Batavia. The natives are governed according to the customs of the country, if they are clear and reasonable, otherwise according to our laws." Experience soon suggested the desirability of permitting judges to take into account the customary laws even if they were not obliged to follow it.[3]

In order that the Dutch officials might be better appraised with the customary laws of the people of Ceylon, the Dutch assiduously collected any customary laws that were available. They collected the customary laws of the Tamils, called the *Thesawalamai*, and the laws of the Moors but left no record of the Sinhalese customary laws. Dutch records, however, reveal that customs pertaining to lands, servitudes and the different caste rules were not only recognized during that period but also enforced.[7]

The Dutch offered many inducements to convert the indigenous people to Christianity.[5] Attracted by secular benefits, a large number of the maritime Sinhalese were converted. These new Christian converts ceased to be governed by such customary laws as were inconsistent with the teachings and precepts of the new religion. Even otherwise, the Dutch were very slow to recognize customs which conflicted with Christian concepts and ideas. If however, the custom in question was a deep-rooted one, or a religious custom of the people, then they recognized it. Thus, there is evidence that the Dutch recognized polygamy among the Tamils of the North and the Muslims (the *Thesawalamai* Code and the Mohammedan Code make express provisions regarding this). The conversion to Christianity of the large number of Sinhalese is another reason for the disappearance of the customary laws of the Sinhalese in the Maritime Provinces.

Another reason for the disappearance of the Sinhalese customary laws in the Maritime Provinces is the exodus of the powerful

1. *A History of the Netherlands East Indies* (1938) by E. S. De Klerck, Vol. I, pp. 350-1

2. *Memoirs of Anthony Paviljoen* (1656-1665). Translation by Sophia Pieters, p. 117, Ceylon Govt. Press.

3. *A History of the East Indian Archipelago* (1943) by B. H. M. Vlekke, pp. 131, 141, 207-208 and 231

4. *Memoirs of G. L. de Coasta, Dissawe of Colombo*, dated 15.12.1770, translated by Peter Slaysen, C. O. 54/124, gives a description of the principal affairs of the country's services—the different castes, customs and servitudes of the natives; also *Memoirs of Van Schruder*, translation by Reimers (1935) pp. 27-31

5. *Christianity in Ceylon* by Sir J. E. Tennent (1850) London, John Murray, Albemarle Street, pp. 45-46.

landed gentry among the Sinhalese from the Maritime Provinces to the hill-country. It is recorded that gradually, customary laws pertaining to land tenures in the Maritime Provinces ceased to have any force since a large number of landowners had abandoned their lands.[1]

It is not surprising, in this context, to find that the customary laws of the Sinhalese disappeared. They "do not seem to have received the regular and consistent application which the laws of the Moors and Malabars have received".[2] With the disappearance of the landowners, the Customary Law of Intestate Succession became extinct by the introduction of the rules framed at Goa during the Portuguese period. Whatever little of the customary laws that was left over would have also suffered the same fate, especially after the landowners had migrated into the interior of Ceylon. Thus, the Roman-Dutch law of intestate succession became applicable to the Sinhalese of the Maritime Provinces.

The British Period

The early British administrators were asked to collect the customary laws of the people of Ceylon. Sir Alexander Johnstone, with great zeal, set about this task and sent several despatches in one of which he states:[3] "The different modifications of the Roman-Dutch Law introduced among the Sinhalese inhabitants of the Western and Southern Maritime Provinces, and the ancient Sinhalese laws and customs of the Province of Ceylon" (according to the most ancient Sinhalese histories of which Sir Alexander Johnstone had translations) "were found to have been the same as those in the Kandyan country; they have, however, been known to be completely obliterated but a few of them are still to be found in their original form relating to the local laws and customs of the Western and Southern Maritime Provinces of Ceylon."

Although Alexander Johnstone was successful in his attempt to collect the customary laws of the Tamils of Ceylon,[4] the customary laws of the Mukkuwas in the different parts of Batticaloa and Trincomalee, the customary laws of the Colombo Chetties, the customary laws of the Tamils of Puttalam, the customary laws of the Parawas of Tuticorin, and even the customary laws of the Parsees,[5] he was unable to collect the customary laws of the low country Sinhalese. However, the existence of some vestiges of the customary laws of the Sinhalese in the Maritime Provinces, at the

1. *Instructions from the Dutch Governor-General and Council of India to the Governor of Ceylon* (1656-1665) Translated by Sophia Pieters (1908) Ceylon Govt. Printer, p. 17
2. *The Roman-Dutch Law—as it prevailed in Ceylon* (1901) by A. St. V. Jayawardene, p. 9
3. C. O. 54/124, Schedule 8, Report by De Costa
4. C. O. 54/123, Schedule I—this includes the *Thesawalamai*
5. C. O. 54/123 and also *The Laws and Customs of the Tamils of Ceylon* by H. W. Tambiah

time of the early British occupation, is borne out by the fact that the Charter of 1801 was framed on the basis that the laws and usages of the Sinhalese were in force at that time.[1]

Johnstone, however, made a collection of the Kandyan customary laws. In his despatches, he states that he has collected D'Oyly's *Sketches of the Kandyan Kingdom*,[2] Sawers's *Digest of the Kandyan Law*,[3] *Judicial Kandyan Provinces* and *Opinions of His Majesty's Law Officers*.[4]

Johnstone, however, could not find any traces of Sinhalese customary laws applicable to the maritime Sinhalese on topics such as wills, inheritance, executors and administrators, guardians or minors, and unsoundness of mind. Referring to these topics, he suggested legislation and said: "This regulation, in so far as it relates to Mohammedans and Hindus, must be founded upon their respective laws; but in so far as it relates to the Cyngalese, it must be founded upon the Roman Dutch law, since all traces of their own law have been obliterated from their recollections by the policy of the Dutch."[5]

Johnstone's observations are supported by Justice Marshall's who in his evidence before the Colebrooke-Cameron Commission in 1830, said: "Cinghalese, at least in the maritime provinces, have no code of law, as I am informed by persons who have had long practice and experience in the Provincial Courts, or any peculiar usages and customs of sufficient importance to require consummation. They were governed as to the rights of property and inheritance by the Dutch law."[6]

For the reasons given, the customary laws of the Maritime Provinces did not differ from the Kandyan law, but due to the political and social changes set out earlier, the customary laws of the Maritime Sinhalese gradually disappeared. Traces of the true customary laws of the Sinhalese are yet found in the principles of Kandyan law in a pure form before it became modified by judicial decisions since the Kandyan kingdom remained intact till the British conquest.

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1. Clause 32 of *The Colebrooke-Cameron Papers—Commentary* by G. C. Mendis, Vol. II, p. 180
2. C. O. 416/19 G. 1, p. 1
3. C, O. 416/19 G. 2, pp. 84, 89
4. 14 Sept. 1816 p. 135
5. Ceylon Archives, MS. Lot 5/79, pp. 44, 45
6. Proceedings of the *Colebrooke-Cameron Commission*, MS. in Colombo Law Library

CHAPTER III

THE KANDYAN JUDICIAL SYSTEM DURING THE BRITISH REGIME

AS stated earlier, when the kingdom of Kandy was ceded to the British in the year 1815, the Proclamation issued subsequent to the Convention held at Kandy between Sir Robert Brownrigg and the chiefs who represented the Kandyan people, expressly guaranteed, *inter alia*, to all classes of the people, the safety of their person and property and their civil rights and immunities "according to the laws, institutions and customs established and in force among them".[1]

Even after the historic rebellion in 1818, the kingdom of Kandy was under separate administration. The Executive Council and the Supreme Court of the Maritime Provinces had no jurisdiction or powers over the Kandyan Provinces. Governor Brownrigg delegated his powers to a Board of Commissioners who were to rule through Agents of Government under whose control the Kandyan chiefs were placed. All minor civil and criminal cases were tried by the Agents of Government while all other cases were tried by the Judicial Commissioner or the Agents of Government assisted by two or more Assessors. From the decisions of the Courts of Agents, appeals were granted to the Judicial Commissioner or Agents of Government with the aid of two or more Assessors in cases where the land in question or personal property exceeded the value of one hundred and fifty Rix Dollars. Appeals from the decisions of the Judicial Commissioner were granted to the Board of Commissioners and the Governor in cases of the same description.[2]

In the Kandyan Provinces, the judicature consisted of the Judicial Commissioner's Court in Kandy, which incidentally acted also as a Court of Appeal, the Sitting Magistrate's Court in Kandy and the Courts of the superior and inferior "Agents of the Government" in the Provinces. The Judicial Commissioner and the Agents of Government had to be assisted by a minimum of two Assessors in all land cases where the subject in dispute or its value exceeded the sum of 100 Rix Dollars, and in all criminal cases except those such as common assaults, petty thefts and breaches of the peace,[3] which belonged to the Courts of inferior jurisdiction.

According to Cameron, the Assessors were selected from a very small class of the aristocracy and, from the conversation he had

1. Clause 4 of *The Colebrooke-Cameron Papers—Commentary* by G. C. Mendis, Vol. II, p. 228
2. *The Colebrooke-Cameron Papers—Commentary* by G. C. Mendis, Vol. I, 157
3. ibid. p. 150

with the different chiefs, he concludes that their "ignorance was put forward as a matter of boast and that they considered the removal of it by study and reflection as a drudgery very unworthy of their condition".[1]

The position seems to have been the same even during the time of the Kandyan kings. Knox states that during his time, the inferior officers instructed the superior officers in the manner of performing their duties.[2] D'Oyly states:[3] "The chief officer being principally chosen from the noble families, it frequently happens that they are men of inactivity and inability, and, being inexperienced in the affairs of the provinces or department committed to their charge, they were frequently guided in judicial as well as in other matters, by the provincial headmen or by those of their household."

Hence, the views of the Assessors are not weighty and often reflect the views of the minor headmen or the members of their household. Where however, the majority of the Assessors differed from the Agents of Government, the proceedings were transferred to the Court of the Judicial Commissioner instead of the case being tried by the inferior Court. The decision of the Judicial Commissioner was subject to an appeal to the superior Court by the losing party. In like manner, when the majority of Assessors differed from the Judicial Commissioner, the case was transferred to the Collective Board consisting of the Commissioner, the Judicial Commissioner and the Revenue Commissioner, who jointly reported upon the case to the Governor, who in turn pronounced a decision upon it.[4]

The intrinsic value of these decisions

Some customs gave rise to no controversy. In such matters there was seldom any divergence, but with regard to those customs which were doubtful or which gave rise to a conflict of opinions, it often happened that varying views were expressed, sometimes influenced by "impure or partial motives". For example, as regards the question whether reasons should be adduced by a person who wished to disinherit an heir, the Commissioners stated that there was a diversity of opinion among the Assessors and it was afterwards found that the Assessors were influenced as the latter had interests in the case.[5] In view of these discrepancies, the Board of Commissioners recommended that the legislature should settle these doubtful points of Kandyan law by appropriate legislation.[6]

1. *The Colebrooke-Cameron Papers—Commentary* by G. C. Mendis, Vol. I, p. 151
2. *A Historical Relation of Ceylon* by Robert Knox, Part I, Chap. 5
3. *Sketch of the Constitution of the Kandyan Kingdom* by D'Oyly p. 29
4. *The Colebrooke-Cameron Papers—Commentary* by G. C. Mendis, Vol. 1, p. 152.
5. Wright's Answers C. O. 516/19, G. pp. 121 and 129.
6. *The Colebrooke Cameron Papers—Commentary* by G. C. Mendis, Vol p. 124

Although no express sanction was given by the Government, the Judicial Commissioner often consulted the works of Sir John D'Oyly and Sawers and considered himself bound by their opinions.[1] The decisions of the Agents of Government are contained in their respective diaries and the decisions of the Judicial Commissioner are found in several volumes at the Government Archives. Some of the decisions of the Board of Commissioners are also found in the Archives.[2] These decisions, in spite of the vagaries of the Assessors, form one of the original sources of Kandyan law in its pristine purity.

The decisions of the Board of Commissioners

An appeal lay from the decisions of the Judicial Commissioner to the Board of Commissioners. These decisions are contained in the Minutes of the Board of Commissioners.[3] The inward and outward correspondence of the Agents of Government is worthy of study in ferreting out the sources of Kandyan law on obscure matters.

1. *The Colebrooke-Cameron Papers—Commentary* by G. C. Mendis, Vol. I, p. 125
2. Hayley, Appendix II
3. G. A. Lot 21

CHAPTER IV

SOURCES OF KANDYAN LAW

OUR present knowledge of the Kandyan law is based entirely on the collections and records made during the early British regime. There are, however, some Sannas (Royal grants written on copper plates), Talipots (conveyances written on Ola leaves) and Sittus (Royal written decrees), which have never been examined fully by scholars.

From the materials and opinions of Assessors, the Board of Commissioners was able to formulate the main principles of Kandyan Law. In 1818, the Board of Commissioners agreed that each member should prepare a separate memoir on "the ancient institutions, customs and prejudices of the Kandyan people". These memoirs were to be discussed by the Board and then submitted to the Government. The scheme adumbrated was never carried out.

The institutional writers on Kandyan Law— Sir John D'Oyly

It is to John D'Oyly that the legal world is indebted for reducing the materials on Kandyan law available to him in his time, to a comprehensible form. D'Oyly came to Ceylon in September, 1801, and served the administration in various responsible capacities. During the period of his office, he had the advantage of acquiring a thorough knowledge of the Sinhalese language and the laws and customs of the Sinhalese. He wrote a book entitled *The Sketch of the Constitution of the Kandyan Kingdom*, which until 1929, was only available in manuscript in the Ceylon Branch of the Royal Asiatic Society, at the Kandy Kachcheri and at the Secretariat. In consequence of Sir Alexander Johnstone's address at the Royal Asiatic Society in London on the 7th of May 1833, on the subject of D'Oyly's *Sketch*, parts of the latter's writings were embodied in the Journal of the Society of that year. In 1929, the *Sketch* was published by the Government of Ceylon.[1]

Sir John D'Oyly also made another compilation of Kandyan Law known as *Notes of Sir John D'Oyly*. Commenting on this work, Sir Charles Marshall states: "This latter work touches on a variety of subjects. They give an account not only of the land tenure of the Kandyan districts, but also of the constitution, police, divisions of the Kandyan kingdom, the different classes of inhabitants, and their respective duties, of the Crown and Temple Villages, the mode of administering justice, and the jurisdiction exercised by the Maha-Naduwa (or Great Council of Chiefs) and by the respective headmen, of crimes and punishment, and of the different

1. *The Sketch of the Constitution of the Kandyan Kingdom* by Sir John D'Oyly, Ceylon Government Printing Press (1929), edited by Le Mesurier, Panabokke and Turner.

kinds of oaths used in judicial proceedings." Modder remarks that all this is very intersting to a student of sociology, but it does not afford much help to the student of law.[1] The *Notes* have not been published except in fragmentary excerpts by Marshall in his *Judgments* and by the editors of the *Sketch* in 1929.

It would suffice here to state that Le Mesurier's *Introduction to the Niti Nighanduwa* appears to have been copied from D'Oyly's work which was often cited in the Courts before 1840.

Simon Sawers

Simon Sawers was a Civil Servant who came to Ceylon in 1815. He too, like Sir John D'Oyly, became well versed in Sinhalese, and in the laws and customs prevailing in the Kandyan Provinces. He was appointed Revenue Commissioner in 1815 and functioned as Judicial Commissioner in the years 1821–1827.

Following upon Sir John D'Oyly's compilation, he prepared a *Digest of Kandyan Law* which however, was only published after it had been edited by Sir Charles Marshall. The decisions up to 1836 relating to the principles of Kandyan law formulated by him, were incorporated in it. There was more than one version of Sawers's *Digest*. One published by James Campbell contains an Appendix which includes the decisions and orders of the Supreme Court in appeal in the years 1851–1860. Modder states that this edition is incomplete and is not a faithful transcription of the original manuscript.

Austin, in his *Appeal Reports* in 1862, refers to a second version of the *Digest* edited by Campbell, but it is doubtful whether there was in fact a second version. It is more probable that Austin referred to that published by Campbell. Another version of the *Digest* was published by Aelian Ondaatjie, a proctor of the Supreme Court who practised his profession at Kegalle in 1900. Both these omit the commentary in the original manuscript but the entire work has been published by Dr. Hayley in his treatise on the *Sinhalese Laws and Customs*.[2]

John Armour

John Armour was the son of the Rev. Andrew Armour, a Scotsman noted for his deep piety and a remarkable capacity for acquiring a knowledge of languages. The latter came as a soldier in the year 1800 and was attached to the 51st Regiment. Later, he was appointed Deacon by Bishop Middleton, and in 1825, was ordained priest by Bishop Heber. He was acquainted with no less than thirteen languages and of these he was proficient in Sinhalese, Tamil, Dutch and Portuguese.[3] Armour Street in Colombo was named after him.

1. Modder, XLIV-XLV
2. Hayley, Appendix I
3. Spencer Hardy, p. 67

John Armour, his illustrious son, became assistant teacher in his father's school after a brilliant scholastic career. He was then turned out of his father's house for disseminating anti-Christian literature among the boys of the Colombo Seminary. Being proficient in Sinhalese like his sire, he migrated to Kandy and succeeded in getting a post as Interpreter. He married a Kandyan lady and acquired a good part of Kandy. The premises which have now been handed over to the Maha Nayaka Thero of Malwatte and where the present Hotel Suisse is situated were once owned by him.

Armour's "The Grammar of Kandyan Law"

John Armour was appointed Clerk and Interpreter to the Judicial Commissioner in October 1819, in place of Mr. Foenander who resigned.[1] Armour subsequently held the posts of Secretary of the District Court of Kandy, District Judge of Tangalle, District Judge of Matara and District Judge of the Seven Korales.

Under the shade of the Elephant Rock at Kurunegala, he prepared his famous work *The Grammar of Kandyan Law*. He published it in a paper called *The Ceylon Miscellany* in the form of a series of articles entitled '*Niti Nighanduwa* or *The Grammar of Kandyan Law*'. As Dr. Hayley remarks, the heading of this work within inverted commas suggests that it is a quotation from some other work by another author. No citations are given and the latter parts are headed as 'Notes on Kandyan Law'. These articles were later published in the form of a book by J. M Perera who also published as a companion volume. his own collection of cases on Kandyan law.

Lawrie, comparing the texts in the *Niti Nighanduwa* and Armour's *The Grammar of Kandyan Law*, concludes that Armour translated a part of the *Niti Nighanduwa* and published the series of articles under the title of *Niti Nighanduwa*. As pointed out by Lawrie, Armour did not accept the *Niti Nighanduwa* as correct, e.g. he indicates that a passage in the *Niti* "If a poor person goes to a rich person's house..."[2] is not given by Armour; Lawrie further states that the chapter on slaves shows that Armour did not accept the *Niti Nighanduwa* as a correct statement of the Kandyan law on this topic, and that Armour "omits a good deal and he quotes one or two passages which I do not find in Sawers. Perera sets out Armour's chapter on slaves in an appendix".[3]

Hayley, commenting on the intimate connection between the *Niti Nighanduwa* and Armour, states:[4] "It is certain that Armour was either intimately connected with its compilation or else indebted to it for his own articles." Lawrie goes on to say that

1. Rev. Commissioner's Diary, 27th August 1819; Lawrie, MS. p. 11
2. *Niti*, p. 8
3. Lawrie, MS. p. 2
4. Hayley, p. 17

though Armour and Le Mesurier both vary in their versions, nevertheless they both seem to be translations of the same text: Le Mesurier's version is fuller and more comprehensive while Armour's is compressed and abbreviated.[1] The quotation of certain passages from the chapter on slaves shows that Armour himself was quoting somewhat copiously from some other work.[2]

Armour's interpolation of the Kandyan castes in the *Niti Nighanduwa* shows that Armour was a low country Sinhalese (cf. the opinion of Lawrie that Armour's interpolation on this matter is unauthorized)[3].

The merits of this work

Armour's work received the highest praise from a number of eminent judges and many of them preferred Armour's version to that of Sawers on a number of disputed points which arose from time to time in Kandyan law (*vide* the dictum of Sir Archibald Lawrie in *Dingiri Menika* v. *Sirimalhamy*[4] in which he states that where Sawers and Armour disagree, he preferred to follow the latter. For a contrary view from the same judge, *vide Kiri Menika v. Mutu Menika*[5]). Carr, C.J. states:[6] "Mr. Armour's work, founded as it is on a series of decisions of the late Judicial Commissioner's Court, is certainly entitled to greater weight than is sought to be assigned to it." Sir Edward Creasy in *Re Kershaw*,[7] characterized Armour's works as "the best work on Kandyan law". Creasy, C.J., said "it seems to us that the District Judge did right in following Armour".[8] Layard, C.J., in *Sangi v. Mohotti*,[9] followed Armour in preference to Sawers.

The late Justice F. R. Dias, when he was a District Judge, chose to follow Armour in preference to Sawers in the case of *Ranhatta* v. *Belinda*[10] and his views were subsequently approved by the Supreme Court. In *Super Chetty v. Kumarihamy*[11] Middleton, J., characterized Armour's work as a *"magnum opus"*.

Hayley however, was rather critical of Armour. He says:[12] "The lack of system in Armour's articles and the fact that he often dealt with one subject in several places, led to errors even in apprehending the rules laid down by him." He characterized Armour's work as an "amorphous medley in composition and bears obvious

1. Lawrie, MS. p. 1
2. Armour, Appendix B (Perera's Edition)
3. Lawrie, MS. p. 1
4. (1898) C. R. Kurunegalle 4944
5. (1899) 3 N.L.R. p. 376
6. (1851) D.C. Kandy 21127, Austin's Reports, pp. 124-125
7. (1858) B. & S. p. 87
8. (1873) D.C. Kandy 56750, 2 Grenier Reports, p. 25
9. (1903) 6 N.L.R. p. 201
10. (1909) 11 N.L.R. p. 111
11. (1905) 5 Balasingham Reports, p. 96
12. Hayley, p. 19

traces of the influence of Roman-Dutch law and the legal practice in force in his own day".[1] According to Hayley, soon after the Charter of 1833 had constituted the Supreme Court, the Tribunal of Appeal in Kandy, D'Oyly's work was forgotten, the *Niti Nighanduwa* had not been translated and, perhaps the decisions of the earlier Courts were not available. Thus, the only authorities which were accessible, were the printed works of Sawers and Armour and hence these acquired an exaggerated importance. Be that as it may, as Carr, C.J., pointed out,[2] "the authority of Mr. Armour is founded as it is on a series of decisions of the late Judicial Commissioner's Court". Armour's work therefore, on a balance of weighted opinion, can be considered to be an important source of Kandyan law.

The Niti Nighanduwa

In the year 1880, C. J. R. de Le Mesurier and T. B. Panabokke, President of Dumbara, published in Sinhalese and English, a work entitled *Niti Nighanduwa or The Vocabulary of Law as it existed in the last days of the Kandyan Kingdom.*

The origin of this work has led to much conjecture. In the introduction to the English version, Le Mesurier, after mentioning the intention of the Board of Commissioners to draw up the memoranda of laws, traces its history as follows:[3]

"This intention does not seem to have been carried out. The only member of the Board who prepared anything like a detailed account was the Resident, Sir John D'Oyly, and his, though an exceedingly valuable document, was very fragmentary and imperfect. At or about the same time, however, a committee of the chiefs was assembled under the direction, it is believed of Mr. Sawers, the Judicial (afterwards the Revenue) Commissioner, and this committee prepared a code of Kandyan law, which was arranged as far as possible in a systematic manner by their secretary, a priest, it is said, of the Malwatta monastery. Though I have been unable, either from intrinsic or extrinsic sources, to discover the exact date of the compilation of this work, its after history is fairly clear. The original copy of the manuscript was for a long time in Mr. Armour's possession, after which, it, or a copy of it passed into the hands of Wegodapola, the present lay High Priest of the Pattini Dewale. This is still extant. From him, Welagedera, the Korala of Pallepane, afterwards Ratemahatmaya of Kotmale obtained a copy, and from this gentleman, the Ratemahathmaya of Udapalata secured another, which his nephew Mr. Panabokke, the President of Dumbara, transcribed and made a rough translation of. This came into my hands in 1876, since when I have to the best of my ability, re-translated and re-cast it into its present form."

1. Hayley, p. 20
2. (1851) D.C. Kandy 21127, Austin's Reports, p. 124
3. *Niti Nighanduwa*—Introduction

Some scholars do not accept this account of the genesis of this important compilation. Hayley, for instance, states that Sawers did not assemble the chiefs but that the results of their deliberations were embodied in Sawers's *Digest*.[1] Further, no official compilation was ever made. The *Niti Nighanduwa* is not mentioned in any of the cases published prior to the year 1880 when this work was published. After referring to the intimate association of Armour with this work, Hayley states:[2] "The early portions of each are identical, save for a curious difference in the relative order of castes, possibly due to revisions by, or oversights of, the various copyists. Later on, however, the two works diverge considerably and finally become entirely distinct, and occasionally conflicting."

Further, Hayley is of the view that it was published by a person who had a knowledge of Roman, or Roman-Dutch law, in view, *inter alia*, of its classification of things as animate and inanimate. Further, he credits the authors with a knowledge of jurisprudence, since many terms familiar to students of modern jurisprudence are frequently used. Hayley also states:[3] "The exordium asserts that it was compiled from the archives of the Court of Kandy with the help of elders versed in the ancient law. The Maha Naduwa kept no records, so that the archives referred to can only be those of the Judicial Commisioner's court. At the end of the collection of manuscripts mentioned above,[1] is one in Sinhalese dated May 9, 1829, headed නීති නිඝණ්ඩුවය හෙවත් සිංහලේ නීති මාර්ගය සංක්ෂෙපයෙන් ප්‍රකාශකරණලද සංග්‍රහ ග්‍රන්ථය. It is apparently a synopsis or outline of a work to be completed in thirteen chapters. The first five have been embodied in the first two chapters of the published *Niti Nighanduwa*, which are however much more elaborate, and the last eight consist of mere headings and outline. It was written by one familiar with English, as is shown by the use of Roman figures and the introduction of English words here and there. If, as seems probable this manuscript is the first rough sketch of the *Niti Nighanduwa*, it proves that Sawers was not the author, for he had left the Island two years earlier. A comparison with other manuscripts leaves little doubt that the handwriting is Armour's (this is the opinion of Mr. Earle Modder who has examined the manuscript), and that the *Niti Nighanduwa*, was the work of Armour and the chiefs whom he consulted. When writing his articles to *The Ceylon Miscellany*, Armour presumably started with a translation of the earlier chapters of the work, but subsequently, although drawing from it, abandoned mere translation and elaborate portions, inserting quotations from Sawers's memoranda and omitting other portions as superfluous.

1. Hayley p. 160; also Sawers's Letter dated 30.12.1826, Hayley, Appendix I, p. 2
2. Hayley, p. 17.
3. Hayley, p. 14, note x; pp. 17, 18

"It has been suggested that the *Niti Nighanduwa* is a forgery, whatever such a term can mean when applied to a book which does not purport to have been written by any named person or at any fixed date. Who was there competent to execute such a forgery, or what benefit he expected to derive, or why he should begin by a palpable imitation of another work, are questions to which it is difficult to suggest answers. Neither Mr. Le Mesurier nor anyone in Ceylon during the latter half of the nineteenth century, can have had sufficient knowledge of the law to write a treatise of this nature."

Lawrie compares Armour's work in Kandyan law published in the *Legal Miscellany* in the year 1842, and the edition of the *Niti Nighanduwa* published by Le Mesurier and Panabokke, and says that Armour's work and the *Niti Nighanduwa* vary and that they were the translations of the same text, though Le Mesurier's is much fuller, while Armour's was compressed and abbreviated. Lawrie concludes that the *Niti Nighanduwa* is the work of John Armour and sums up his conclusions as follows :—

"It professes to be the work and compilation of a single individual written in the time of the Kandyan kings. There are no allusions to a change of rule to indicate that it was being undertaken at the request of the English Government. Nor were after 1818 any of the principal chiefs of the last Kandyan kingdom surviving. Of those whom the cruelty of the last King had left alone many lost their lives or were banished. I think that the *Niti Nighanduwa* is the work of a single author. The *Niti Nighanduwa* was not known to Sir John D'Oyly nor to Sawers. The *Digest* was published probably when he (Sawers) returned. From the silence of Sir John D'Oyly and Mr. Sawers, I am inclined to the opinion that the *Niti Nighanduwa* was compiled after Sawers's *Digest* (i.e. sometime between 1827 and 1842)." Referring to pages 46 and 47 of the *Niti Nighanduwa*, Lawrie also remarks that a couple of notes were evidently written later.

It is also a matter of interest that neither the decisions of the Board of Commissioners nor of the Judicial Commissioners make any mention of the *Niti Nighanduwa*. One of the questions posed by the Colebrooke Commissioners on was in reference to the authorities on Kandyan law cited by the Judicial Commissioners or the Board of Commissioners. The answer given by Wright, one of the Commissioners, is that Sawers's *Digest* and Sir John D'Oyly's *Notes* were often cited. No mention was made of the *Niti Nighanduwa*.

Referring to the *Niti Nighanduwa*, Hayley states:[1] "Obscure as its origins, and vexatious as its examples occasionally are, its statements nevertheless generally coincide with the evidence furnished by olas, sannasas and other historical books."

1. Hayley, p. 20

Modder's views on the Niti Nighanduwa

Modder criticizes Le Mesurier and Sir Archibald Lawrie for their conjecture that much of the *Niti Nighanduwa* has been embodied in Sawers's *Digest* and a still larger portion of it was copied by Armour, without acknowledgment by either of them. "A careful comparison, says Modder, "of the text of Sawers and Armour with that of the *Niti Nighanduwa* will satisfy the student that no such purloining can be detected, and that there is no foundation whatsoever for the supposed wholesale literary theft. The period, *circa* 1830–40, surmised by Sir Archibald as that in which the *Niti Nighanduwa* is said to have been written, synchronizes with more than half the term of Armour's service at Kandy as interpreter to the Judicial Commissioner and Secretary of the District Court (1819–37)."[1] Sawers had retired in 1827 and was in all probability enjoying the salubrious climate of his homeland. Having conceded that the *Niti Nighanduwa* and Armour's *Grammar* contain several common matters such as "cosmogony of the world, the evolution of the caste system, the origin and institution of slavery and the technical classification of persons and property—subjects treated in the Books which were accessible to all alike", Modder poses the question: "Can this have induced Sir Archibald Lawrie to his hasty conclusion that Armour's is mainly a translation of the *Niti Nighanduwa*?" He says that such a deduction cannot reasonably be subscribed to, for the source of information which might have been open to both the compilers was the same, and each of them made use of the materials available to him from the common origin.[2]

The preamble to the *Niti Nighanduwa* states: "I make obeisance to Buddha, and the spirit of his teaching, and to the best of my ability, compile *Niti Nighanduwa*. In this Island of Lanka there are three kinds of law. Of these, Royal Law and Sacred Law have been set forth in the books, but that kind of law which is called Traditional Law has not as yet been committed to writing. As this law, therefore, must have been doubtful and uncertain, in the interests of the Sinhalese community, that the dispensers of justice may learn what it is, and avoid bias in their investigations, and that Sinhalese law may be better known, I undertake this work. It is called the *Niti Nighanduwa* and is compiled from the Archives of the Court of Kandy with the help of elders versed in the ancient law. Its contents may be summarised as the deviation and the general support of the term law, and a brief account of what is legal and what is not."[3]

Modder concludes that Le Mesurier's statements (i) that the code of Kandyan law was prepared by a committee of priests; (ii) that it contained expositions of law from conclusions arrived at after

1. Modder, lvi
2. Modder, lvi-lvii
3. Modder, lvii

long deliberation by many of the principal Chiefs of the last Kandyan kingdom; and (iii) that it was arranged in a systematic manner by a secretary of the priests, are all contradictory of the statements set forth above.[1]

Modder also points out that both Armour and Sawers have been recognized as standard authorities for well over three-fourths of a century whereas the *Niti Nighanduwa* was unheard of by (or unknown to) the legal profession until it was rescued from obscurity by the praiseworthy efforts of the translators in 1880.[2]

He sums up his criticisms of the *Niti Nighanduwa* as follows:[3] "The absence of any credentials, the atmosphere of doubt and uncertainty which its origin is shrouded in, and the very date of its existence being a matter of speculation, cannot entitle it to any claim for consideration, much less to take a place in the legal literature of the land, although its enthusiastic sponsors would have it soar above the ranks of such admitted standard works as Armour and Sawers."

Judicial dicta are not wanting to support Modder's criticisms. In 1889, Sir Bruce Burnside gave expression to an opinion as condemnatory as it is decisive, against the claims of the *Niti Nighanduwa* to be classed as a legal authority. He said:[4] " I cannot regard the dicta in Marshall and Armour and even the *Niti Nighanduwa*, whatever may be its pretentions as a legal authority, as sufficient to disturb a solemn decision of the Court."

Turnour

Turnour was one of the Commissioners. He wrote a Memorandum entitled "Turnour's Law of Inheritance of the Sabaragamuwa Province". This work is extant and is in the Ceylon Government Archives.

Other sources of Kandyan law

Apart from the institutional compilations of the early writers referred to, glimpses of Kandyan law and custom may also be obtained from Royal grants written on copper, sannas and sittus or decrees of courts. Many of these documents are referred to at length and sometimes quoted verbatim by Lawrie in his *Gazetteer* published in two volumes, and they provide much material from which the land tenure of the Kandyan Provinces and the system of succession could be understood. Hayley appears to have examined a number of them but unfortunately he does not give details of his researches. The Official Diaries and Reports of the Agents of the

1. Modder, lvii
2. ibid.
3. Modder, lviii
4. (1889) 9 S.C.C. p. 45

Government of the Kandyan Provinces contain valuable information on Kandyan Land Tenure.[1] The Administration Reports of the Government Agents of the Kandyan Provinces are also of interest.[2]

The works of European writers

Apart from the works of these institutional writers, some information on Kandyan law can also be had from the works of writers such as Bertolacci (*View* (1817)), Cordiner (*History of Ceylon*, Vol. I Chap. IV Sinhalese Castes (1807)), Knox (*Historical Relations of the Island* (1681)), Parker (*Ancient Ceylon* (1909), *Village Folk Tales* (1910)), Percival (*Account of the Island of Ceylon* (1849), Chapter XII—Civil and Military Establishments of Candy), Forbes (*Eleven Years in Ceylon* (1841) 2 Volumes), Richard Bently (*vide* Vol. I, Chap. XIV for Kandyan Festivals and Marriage Ceremonies, Chap. IV, Trial by Ordeal, Chap. VI, Lawsuits and Perjury; Vol. I, p. 77 et seq. for Kandyan forms of Government), Colvin R. de Silva (*Ceylon Under the British*, Vol. I, p. 292; f. Hayley's pamphlet) and Pridham (*An Historical, Political and Statistical Account of Ceylon and its dependancies* (1849)).

The modern writers of Kandyan law

One of the principal contributions of modern writers on the Kandyan law is Dr. Hayley's work entitled *The Laws and Customs of the Sinhalese*. It contains a critical study of the Kandyan law and a criticism of various decisions of the Supreme Court on the subject. Another work is Modder's *Kandyan Law*, which has been commented upon as the most authoritative book cited in modern times, and runs into two editions. After referring to the glorious uncertainties of this system of law, Modder states in his preface:[3] "It is remarkable, however, that no endeavour has been made to reduce the existing chaos of law and the decisions thereon into any properly organised system, especially with a view to facility of reference. To find out the law, or to get an authority on a required point, involves no end of difficulty."

Relative merits of the works on Kandyan law

Although Hayley's and Modder's works are frequently cited in our Courts, they are not authentic sources of Kandyan law. Controversies have arisen in our Courts as to which of the works of institutional writers should be followed when there is a conflict on some important question of Kandyan law. As stated by Hayley, shortly after the Charter of 1833 constituted the Supreme Court

1. Reports on Sabragamuwa by George Turnour and Herbert Wrigh (C.G.A.A. 551)

2. Lawrie's *Gazetteer of the Central Province* (1894-96)

3. Modder, lix; also *Kandyan Law and Buddhist Ecclesiastical Law* by T.B. Dissanayake and A. B. Colin de Soysa (1963)

the tribunal of appeal in Kandyan cases, D'Oyly's work was forgotten, the *Niti Nighanduwa* was not translated and was perhaps unknown, decisions of the earlier Courts were inaccessible, and the only authority to which reference could be made was to the printed edition of Sawers's 'Memoranda' and Armour's *Notes*. These, therefore, acquired an exaggerated importance and this view was expressed in a number of cases. Thus, Sir Archibald Lawrie said:[1] "I regard Mr. Sawers as the best authority on Kandyan law. He was Judicial Commissioner of Kandy from August 17th, 1821, until he retired on pension on 3rd July, 1827. Armour's opinions have not the same weight as Sawers, for he was not a judge. He was appointed Interpreter to the Judicial Commissioner in 1819. Afterwards, he was Secretary to the Judicial Commissioner's Court, an office he held when Mr. Sawers was Commissioner."

Other judges have, however, preferred to follow Armour. Thus, in the unreported case of *Dingiri Menika* v. *Siri Mulhamy*,[2] Sir Archibald Lawrie says: "Sir Charles Marshall whom Dias, J., praises as the best writer on Kandyan Law, did not profess to know much about it. His paragraphs are taken from Sawers's *Digest*, but Sawers was a Judicial Commissioner in Kandy after 1815 and is no mean authority, though I think when he and Armour disagree, I prefer to follow Armour."

Sir Edward Creasy, in his judgment in *Kershaw's* case,[3] characterizes Armour's work as the best work on Kandyan law. Layard, C.J., in *Sanghi v. Mohotti*,[4] discusses the relative merits of the opinions of Sawers and Armour and approved and followed both. Dr. Hayley sums up the position as follows:[5] "The manner in which Sawers's *Digest* was composed and the fact that he was for years Judicial Commissioner are sufficient to give his opinions great weight. That Armour was an able scholar and a man of learning is true, but his work is later in time and an amorphous medley in composition, and bears obvious traces of the influence of Roman-Dutch Law and the legal practice in force in his own day. The merits of the *Niti Nighanduwa* do not appear to have been sufficiently appreciated hitherto. Obscure as is its origins and vexatious as its examples occasionally are, its statements, nevertheless, generally coincide with the evidence furnished by olas, sannasas, and other historical books."

Dr. Hayley thus places some reliance on the *Niti Nighanduwa*, but there are judicial dicta condemning this work.[6]

1. Lawrie, MS.
2. C. R. Kurnegalle 4944 S. C. Civ. Min. May 30, 1898.
3. 1860-62 Ram. Reps. pp. 157, 162
4. (1902) 6 N.L.R. p. 20
5. Hayley, p. 201
6. *Siriya* v. *Kalu* (1889) 9 S.C.C. p. 45, per Burnside, C.J.

Legislation affecting Kandyan Law

The Kandyan law was nebulous and uncertain on many matters and piecemeal legislation was enacted to settle the law on certain topics. Ordinance No. 13 of 1859 was enacted to govern Kandyan Marriages and Divorces. The Kandyan Marriages and Divorce Ordinance, No. 3 of 1870, as amended by Ordinance No. 9 of 1870, No. 13 of 1905, No. 1 of 1919, No. 10 of 1922, dealt with the formalities in Kandyan marriages, the grounds for divorce and the tribunals before which divorce could be obtained. This Ordinance applied to all marriages between residents in the Kandyan Provinces, except:

(i) Marriages under the Ordinance in force in the Maritime Provinces
(ii) A marriage in which either party was an European or a Burgher, and
(iii) Marriages between Muslims.

In *Narayane* v. *Muttusamy*,[1] Lawrie, A.C.J., and Wille, J., held that this Ordinance did not apply to immigrant Tamils, the principal ground for the decision being that the Kandyan law was applicable only to Kandyans.

A doubt arose as to whether Kandyan marriages contracted before 1870 were affected by the provisions of the Kandyan Marriages Ordinance. To settle the doubt the Kandyan Marriages Removal of Doubts Ordinance was passed on November 25, 1909. In view of certain decisions, doubts arose as to who was a Kandyan for purposes of succession. These doubts were cleared by the Kandyan Succession Ordinance.

The earlier statutes governing Kandyan marriages and divorces have now been repealed and this subject is now governed by the Kandyan Marriages and Divorce Act, No. 44 of 1954.

Since some of the writings of the institutional writers contained conflicting views on important questions of Kandyan law, and the matter became further complicated by judicial decisions, the Kandyan Law Commission was appointed. It functioned from August 1927 to September 1930. Another Commission was appointed in September 1930 with Dr. Hayley as its Chairman. This Commission held its first session on 15th December, 1933, and sought the views of the leading practitioners in the Kandyan Provinces. Ultimately, it was decided that the following matters required consideration: Revocation of Grants, Disinheritance of Heirs, Adoption, the Definition of Acquired and *Paraveni* Property and the Law of Intestate Succession. The Commission made its recommendations in a Report published in September 1935, suggesting the necessary legislation on these matters. In

1. (1894) 3 S.C.R. p. 125

consequence of the recommendations of the Commission, the Kandyan Law Amendment Ordinance, No. 39 of 1938 was enacted. Later, this Ordinance was amended by Ordinance No. 25 of 1944.

Admittedly, the legislation affecting Kandyan law makes no pretence to codify the law, and, indeed, the greater part of Kandyan law still rests upon a customary foundation as settled by judicial precedents.

Case law

The most important source of Kandyan law is precedent. From 1833 up to modern times, the Kandyan law had been developed by a series of decisions of the Supreme Court. Some of these decisions have profoundly altered the views of the institutional writers. In such cases, our Courts have often proceeded on the principle expressed in the maxim *Communis error facit lex*, and have followed the decisions of the Courts rather than upset a long line of cases which have established a principle of law affecting property.

A suggestion to codify the laws of Ceylon has now been mooted and one is uncertain of the future that awaits the law of our land. Any drastic changes by the Legislature are bound to alter the fundamental characteristics of Kandyan law.

Chapter V

THE GENESIS OF THE KANDYAN LAW

THE genesis of the Kandyan law is inextricably interwoven with the origins of the Sinhalese race. In the early chapters, an attempt was made to trace the origins of the Sinhalese by referring to the various waves of immigration. A student of social sciences and history would make a monstrous mistake if he assumed that a Sinhalese race consisting of one ethnological group speaking the same language and having the same culture and tradition, migrated *en masse* to Ceylon. A study of history makes it clear that there have been various waves of immigration from the sub-continent of India to Ceylon at different levels of culture, which ultimately united in a linguistic group called the Sinhalese. These various groups which settled down in Ceylon at different epochs of the country's history, would naturally have customs, manners and traditions different from one another, and sometimes even diametrically opposite to one another. There is evidence that groups whose social habits and traditions unmistakably point to the existence of father-right, have fused with a group which was based on mother-right. Some groups were bilineal, having already assimilated some elements of father-rights and other elements of mother-rights before they left the sub-continent of India for this Island. An examination of the basic principles and concepts of the Kandyan law again reveals the diversity of cultural elements which are bound to exist in a multi-racial group which ultimately came under the cultural influence of a language and a religion.

In this chapter, a juristic approach is made to trace the roots of Kandyan law, the only remnants of true Sinhalese law. In this branch of research, scholars are deeply indebted to the erudite article by Dr. Derrett on *The Origins of the Laws of the Kandyans.*[1]

In an attempt to trace the roots of Kandyan law, a student is beset with many difficulties in view of the dearth of material from which the true customary laws of the Kandyans may be discerned. The true principles of Kandyan customary law are not accurately reflected by precedents and they have been largely truncated by legislation. Hence, the deeper one delves into the realms of Kandyan customary law as it existed in its earliest periods, the more useful will be the results of research by a student of historical jurisprudence.

No true Sinhalese jurisprudence exists for a student to make it the basis of any legal approach to the origins of such customary laws.[2] The *Niti Nighanduwa* itself cannot be said to contain true customary law. Throughout this work, the influences of Roman law and principles of modern jurisprudence make themselves felt.[3]

1. University, of Ceylon Review, Vol. XIV Nos. 3 & 4 p. 105 et seq.
2. ibid. p. 105
3. Hayley, p. 17

In one of his despatches, Sir Alexander Johnstone refers to the various collections of Kandyan law for which he had been responsible. It is rather unfortunate that none of them is available except the *Lok Raj Lo Sirita* referred to earlier, but this work cannot be said to contain true Kandyan customary law in all matters. It appears to be a sophisticated work with marked sacerdotal influences. Many of the answers given to the questions of Falck reveal that the priestly class who gave those answers, were more concerned with the reformation of the law than with the state of the existing principles of Kandyan customary law. One can clearly discern the influence of Buddhist scriptures and the tenets of the Buddha's teaching in some of the answers given by the priests at Kandy. Hence, even this work cannot be said to contain true Kandyan customary law in all matters.

As Dr. Derrett states :[1] "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 1815-1833, supplemented by details derivable from earlier sources such as Knox, Ribeiro and augmented by inferences which may legitimately be drawn from the picture so established."

Such an approach must necessarily involve conjectures and surmises, but certain basic facts can be established if a student approaches the subject with an open mind and takes care "not to fall into traps, which an as yet uncontrolled mass of comparative legal material seems to have been prepared for the unwary".[2] Did Sinhalese customary law evolve out of Aryan custom? Since the Aryan theory as to the origins of the Sinhalese has been seriously set out by scholars,[3] it is necessary to compare and contrast the basic concepts of Kandyan law with those of the *Dharmasastras* which reflects the true Aryan law. In this connection, it is also profitable to compare the concepts of Kandyan law with those of the customary laws of India, as opposed to the *Dharmasastras*. These customary laws of India have evolved through centuries and were in existence before the Aryan hordes swept into India and occupied the Indus Valley. They reflect a state of society which was not influenced by any Aryan concepts of social organization or traces of what may be termed the Aryan patriarchal system. No better method can be devised than to take different sub-topics, both in public and private law, and to compare and contrast the Kandyan law with the customary laws of India and Ceylon. Before one sets

1. *The origins of the Laws of the Kandyans*, pp. 105, 106

2. ibid. p. 106

3. *History of Ceylon*, Vol. I, p. 87, University of Ceylon Press. Dr Paranavitana speaks of two waves of immigration of Aryan people into Ceylon, which contradicts his earlier statement that the original settlers were from Dravidian stock.

about this task however, it is necessary to explain in greater detail what is meant by 'Indian customary law' as opposed to the *Dharmasastras*.

The neighbouring sub-continent of India has been the home of many tribes, castes and races, who professed various religious beliefs. The customs prevailing in different parts of India varied from matriliny to patriliny, and to bilineal rules of succession. Traces of mother-right and father-right are found in many customary systems of law throughout the length and breadth of India.[1] Many impartial investigators found that Brahminical law has had little or no influence upon the customary laws of certain racial and linguistic groups. Mr. Ellis, referring to South India, says:[2] "The law of the Smritis, unless under various modifications, has never been the law of the Tamil and cognate nations." Recent researches in the Tamil customary laws of Jaffna and in other parts of Ceylon confirm this view.[3]

Hindu law is itself based on immemorial customs of the Indian tribes and races who inhabited the sub-continent before the Aryans. When the Aryans penetrated into the heart of India, they found a number of usages, some of which had similarities to their own, and others which were totally alien. Mayne states:[4] "That when Brahmanism arose and the Brahman writers turned their attention to law, they at first simply stated the facts as they found them, without attaching to them any religious significance. That the religious element subsequently grew up and entwined itself with legal conceptions, and then distorted them in three ways. Firstly by attributing a pious purpose to acts of purely secular nature; secondly by clogging those acts with rules and restrictions suitable to the assumed pious purpose; thirdly by gradually altering the customs themselves, so as to further the special objects of religion or policy favoured by Brahmanism."

The Aryans never succeeded in forcing their views, usages and customs on all the tribes which had made India their home. Mayne observes:[5] "It is impossible to imagine that any body of usages could have obtained general acceptance throughout India, merely because it was inculcated by Brahman writers, or even because it was held by the Aryan tribes."

Sources of Aryan law

To understand what is true Aryan law as developed by the Aryan mind, is a task which is rather difficult. The nomadic tribes which

1. For a detailed study, *vide Mother-Right in India* by Baron Omar Rolf Ehrenfels, Govt. Central Press, Hyderabad, Deccan (1941)
2. 2 Stra, H.L. 163; *Vide* also Mayne's *Hindu Law* (8th Ed.) p. 2; Introduction to Dayavithaga by Dr. Burnel, p. 13; Nelson's *View of Hindu Law*, preface, Chap. I
3. *Laws and Customs of the Tamils of Ceylon* by H. W. Tambiah and *The Laws and Customs of the Tamils of Jaffna* by H. W. Tambiah
4. Mayne's *Hindu Law* (8th Ed.) p. 4
5. ibid.

trekked into India and occupied the Gangetic plains, had the *Rig Yajur* and *Sama Vedas*. Later, a fourth *Veda*, referred to as the *Atharva Veda*, was added. These four *Vedas* are regarded as of divine origin—like the Laws of Moses. Each of these four *Vedas* consists of literature, a collection of *Mantras* and *Brahmanas*. The word *Mantra* is derived from '*man*' meaning thoughts divinely inspired to guide human beings, contained in invocations, prayers and hymns in praise of deities for showering some of the choicest blessings on their chosen people. The Brahmins, like the Jews, considered themselves the chosen people of God, and hence these *Vedas* contain many songs of exquisite beauty, extolling the goodness and the greatness of the Divine Being. The *Brahmanas* are theological dissertations on the *Mantras* which explain the meanings, and set out the rituals of sacrifice.

The Aryan settlers thought that through these *Vedas* the divine law of the Hindus should be sought for and found. Each *Veda* had a set of *Brahmanas* attached to it (three are attached to the *Rig*: *Achariya, Kaushitaki* and *Sankhayana*, and there were eight attached to the *Sama Veda*). These *Mantras* and *Brahmanas* are collectively called *Sruti* or revelations which formed the basic knowledge of the Aryan law.

A *Sutra* consists of 'a string' of terse aphoristic rules which facilitated memorizing. It contains a collection of the principal facts, principles and discoveries in all branches of Vedic literature, digested under proper titles and arranged under appropriate headings.[1]

The *Sutras* are divided into three categories, namely, *Srauta Sutra, Gruhya Sutra* and the *Dharma Sutra*. The first deals with rituals, the second with the performance of domestic ceremonies such as are usually observed at birth, marriage and death, and the third deals with principles of law which alone is of interest to students of jurisprudence.

The *Dharmasastras* are aphorisms which tersely deal with the principles of law. It deals with the duties and obligations of a householder, the functions of government, the administration of justice, the law of inheritance and other connected legal matters. These aphorisms are also called *Samaya Charika* (*samaya* means agreement and *chariya* means custom).[2]

In Vedic times, the Aryan tribal organizations were based on the patriarchal pattern. The patriarchs, who were the heads of the families like the *paterfamilias* of the Roman *gens*, administered justice to members of their household and had supreme power over the life and liberty of the members of their household. The word of the elder was law and there was none to whom an appeal could

1. *Principles of the Hindu Law of Inheritance* (2nd Ed.) by Sarvadhikari (Tagore Lectures) p. 108, et seq., also *History of the Dharmasastras* by Kane, Vol. I, p. 7

2. *Principles of the Hindu Law of Inheritance* by Sarvadhikari, p. 116

have been made from his decisions. In such a dispensation, uniformity in the decisions of the heads of families was neither aimed at nor expected. It was only when the family became enlarged and foreign elements crept in, and the rights of individuals were recognized as distinct from those of the family, that the need for uniform rules arose and traditional customs came into existence to cater for such needs.

Hence, during this stage of transition, a set of rules which were followed by the heads of the families became ultimately approved customs, out of which the jurists moulded the rules of law. Therefore the *Mantras* and *Brahmanas* were not continuous treatises on civil and criminal law. The rules of law were scattered in Vedic literature in the rituals, moral aphorisms, religious practices and philosophical musings.

When the *Sutra* works were composed, schools of law (called *Charanas*) also came into existence. Each school consisted of members who accepted a particular interpretation given to the *Sutra* of the Vedic text and followed certain rules and ceremonies laid down for that particular spiritual fraternity. Each school had its own scriptures, both *Brahamanas* and *Sutras*. These schools were divided into four classes, according to the four *Vedas*. As these *Vedas* had various ramifications, the schools also had corresponding sub-divisions.[1]

Both ceremonial and legal aphorisms were cultivated by the respective schools and elaborated in the course of time. Due to the establishment of civil government, the march of social progress and the authority assumed by the Sovereign, the priestly class which formerly held a monopoly of the legal lore and which claimed ascendancy over the rest, gradually lost its power. Buddhism and Jainism destroyed the power of the Hindu sacerdotal class and ultimately the schools confined themselves to the study of the ceremonial branches of the divine law and neglected the *Dharmasastras* and the study of the true principles of law.

These different schools had to submit to the civil tribunals which administered the law to the people. With the advent of organized government and the establishment of both popular and official assemblies to decide disputes, the legislative power of spiritual brotherhoods considerably dwindled and independent jurists who were the repositories of legal lore, made their appearance and expounded the law. With their appearance, another source of Hindu law, the *Smritis*, came into existence.

The *Smritis* were metrical versions of the *Dharmasastras* with certain elaborations.[2] Rules, as distinct from instances of conduct, are for the first time embodied in the *Smritis*. The *Smritis* or traditions are said to be of human origin and are assumed to have been

1. *Principles of the Hindu Law of Inheritance* by Sarvadhikari, p. 118
2. Mayne's *Hindu Law and Usage* (8th Ed.) p. 18

remembered by the sages. The *Smritis* of Yaknavalkya gives a list of twenty sages as the repositories of law (Manu, Aatri, Vishnu, Harita, Yaknavalkya, Usanas, Angiras, Yama, Apastamba, Sarvyka-dharsa, Gautama, Satapa, Vasista are described as the propounders of the *Dharmasastras*). The *Mitakshara* states that this list is not exhaustive. The legal lore contained in the *Dharmasastras* formed the subject of critical study by the elder jurists, who either wrote exhaustive commentaries on particular subjects or prepared digests of the whole law. Thus, the *Code of Manu* has been the subject of many commentaries, the most renowned being those of the Madhatihi, Govindaraja and Kalukka. Not only were these commentaries written on the particular *Smriti*, but the whole of the *Smriti* law as stated earlier, has been summarized by jurists in what may be described as digests or *Nibandas*.

The age of the *Vedas* is a matter of controversy, but the more correct view is that the *Vedas* might have been compiled at any time between 1500-800 B.C.[1] The more recent are the caste and tribal customs collected in the 19th centuries, which throw some light on the customary laws of India. In between these lie the *Dharmasastra* texts consisting of the *Mula* or root, which is the collection of *Sutras* or *Smritis* and the commentary body– partly in the form of a straightforward *Vriti* or *Tika* on a chosen text for that purpose, and partly in the form of digests of selected *Smriti* aphorisms or commentaries—nominally upon a single continuous *Smriti* treatise, but in reality, in the shape of legal digests. Evidence of the law in practice, such as inscriptions in collections or individual examples of legal documents, should be also taken into account.

The age of the Commentaries and the Digests has been placed by the scholars at any period between A.D. 600 and 795. Inscriptions are found from the time of Asoka Maurya, but it is really from the 5th century A.D. to the 17th century that substantial records of inscriptions exist in India. In Ceylon, inscriptions dating from the second century B.C. up to the seventeenth century have been discovered.

Existence of Courts and Tribunals before the British period

The existence of the courts and tribunals prior to the British period is no longer doubted, although the law actually administered is by no means clear for all periods or for any period in relation to all the castes and tribes.

The historical development of the law of *Dharmasastras* is still a matter of conjecture, although a great deal of light has been shed by the labours of research workers.[2] These show the relative

1. *The Origins of the Laws of the Kandyans* by Derrett, p. 107
2. *History of Dharmasastras* by Kane (Poona) 4 Vols. (1930–53), also *Hindu Customs and Modern Law* (Bombay) (1950); Varadacharrya's *The Hindu Judicial System* (Lucknow) (1946); Sen Gupta's *Evolution of Law* (2nd Ed.) (Calcutta) (1953); and Mazzarella's *Etonologia Analytica Dello Anglico Dritto Indiana*, 14 Vols (1913–38)

priority of some of these works and the interrelations between the *Dharmasastras* and the Indian customary law.

Dr. Derrett states:[1] "For the method of construction of the *Smritis* did not require that every aspect of the 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 improve upon the great masters, 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 different interpretations could be placed upon the text so as to render the choice inevitable. In this sense, a knowledge of contemporary customary law is really essential for the understanding firstly, of what the *Smriti-karas* themselves meant and, secondly for a comprehension of what the *Vrtti-karas* and *Nibandha-karas* wished them to be thought to mean."

"Kandyan Law," says Derrett, "in fact provides a missing link in the story of Indian legal development."[2]

The origins of some of the basic concepts—Slavery

The Sinhalese law governing slavery squares with the Indian customary law so far as it can be ascertained from the records of customs and inscriptions. The nature of slavery, the means of liberation, the methods of enslavement and the status of the children of slaves, the proprietary rights of slaves and the rights of succession, all find comparable rules in both systems of law.[3] When the *Dharmasastras* took a different view of the effect of liaisons with slaves, it was performing a reformatory act in reducing the inequalities on this topic found in the customary laws.

Caste

Almost every caste in Sinhalese society finds a counterpart among the Tamils of South India, although Buddhism preached the equality of man and never encouraged caste. The caste system in the Sinhalese social order is attributable to the Tamil aristocrats who came from South India with their retinue and made liaisons with the Sinhalese monarchs. Apart from such connections, there is also clear evidence of certain castes peculiar to the Tamil linguistic group migrating to Ceylon at certain epochs of her history. Such groups brought with them their own serfs.

Caste played an important role in Kandyan social structure and customary laws. Many incidents peculiar to particular castes were

1. Derrett, pp. 108, 109
2. ibid. p. 107
3. ibid. p. 138

enforced by special tribunals during the times of the Kandyan kings in the early British regime. Caste affected marriage, adoption and even illicit connection. It affected succession to property, and any conduct infringing rules of caste was considered a heinous crime punishable with brutal penalties. All these characteristics existed in India as well as in Ceylon.[1]

Minority

In dealing with the age of minority, the classical writers of the *Dharmasastras* made a woman *'vyavahara prapta'* at twelve, and the boy reached such a status at sixteen.[2] The Sinhalese law treated sixteen as the age of majority for both sexes, but recognized a limited capacity to perform certain legal acts even before this age. It also gave the opportunity to a person to resile from his juristic acts till he reached the age of forty. The Tamils were unaffected by the rules of majority postulated by the writers on the *Dharmasastras*—among the Tamils of Pondicherry, majority was not reached till 25 years.[3]

Guardianship

When the joint family system disintegrated, the customary laws of the Sinhalese and the Tamils preferred the maternal relations to the paternal relations in granting the custody of the child. Here again the influence of the *Dharmasastras* is absent in the Kandyan law.[4]

The motive for preferring the maternal relations as guardians of minor children is explained by Dr. Derrett. He says:[5] "If the property remains with the agnates, especially the separating brothers or cousins, it would be extremely difficult for the infant heir to assert his separate rights and prevent deliberate or accidental embezzlements of his property. Perhaps, this is the reason why maternal relations, whose interests in preserving their charges' 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."

The ultimate guardianship of the sovereign is also recognized in the *Dharmasastras* as well as in the Kandyan law.[6] According to the rules of Kandyan law, a guardian is personally liable for the maintenance of the minor but he was allowed to enjoy the usufruct of the minor's property without the power of alienation.

1. Derrett, p. 138
2. Kane III, pp. 573–574—although there is a controversy whether the end or commencement of 16 confers majority on boys, *vide* Soma-deva's *Niti-vakyamtra*.
3. Sorg's *Introduction a'la Etude du Droit Hindou* (1897)
4. for a fuller discussion, *vide* Chap. XVI
5. Derrett, p. 123
6. Kane III, p. 574; Hayley, p. 214

The status of guardianship itself gave the guardian a preferential right of succession over relatives of similar relationship but this does not find any parallel in Indian customary law. Dr. Derrett observes that this is due to the fact that upon this subject little or no material of customary law exists. He says that there is nothing inconsistent with such rules in the *Dharmasastras*.[1]

Adoption

Adoption was recognized both in the archaic and the relatively more mature systems of law as an institution to perpetuate the family. By adoption, the adoptive child became a member of the adopting parents' family, acquiring certain rights to succession. Here again, on first impression, the law of adoption as set out in Kandyan law, in *Thesawalamai* and other customary laws, are so unlike the law elaborated by the *Dharmasastras* that any historical connection between them might be denied; but as Dr. Derrett observes:[2] "Once again, appearance is misleading. Just as in the realm of marriage the *Dharmasastras* 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."

Both in the *Thesawalamai* and in the Kandyan law, parents with children could adopt boys as well as girls. Here again, the customary laws of the Tamils and the Sinhalese differ from the provisions of the *Dharmasastras* which required that the adoptive parent should be childless,[3] and that a woman could never adopt except with the permission of the husband.[4] Both under the Kandyan law and the *Thesawalamai*, any number of children could be adopted,[5] but under the *Dharmasastras*, only one could be adopted.[6]

The *Dharmasastras* insisted that a child could be adopted only if it had not reached the age of maturity, but this requirement was not found either in the *Thesawalamai* or in the Kandyan law. The *Dharmasastras* prevented an only son, or the eldest son, from being adopted, but no such restrictions existed either in the Kandyan law or in the *Thesawalamai*. The object of adoption under the *Dharmasastras* was to provide an heir who would perform the religious ceremonies at the funeral of the adopting parent;[7] under the Kandyan law, as well as in the *Thesawalamai*, the purpose of adoption is to provide an heir who would succeed to the inheritance.

1. Derrett, p. 124
2. ibid. p. 119
3. Kane III, p. 667
4. ibid. p. 663 et seq.
5. Law of *Thesawalamai*, in *The Laws and Customs of the Tamils of Ceylon* by H. W. Tambiah, p. 44; Co. 54/123 p. 29
6. Kane III, p. 667
7. ibid. p. 665

Here again, as stated by Dr. Derrett, although the *Dharmasastras* tried to implement the existing institutions governing adoption, still the influences of Aryan law are not found either in Kandyan law or in the *Thesawalamai*.

Under the Kandyan law, there should be intention to adopt and though an open declaration of adoption was not necessary, still there should be clear proof of it. In the *Thesawalamai* and amongst the Tamils of Puttalam too, a simple but colourful ceremony was performed. Saffron water was drunk by the persons adopting and the close relations who could have been heirs if the adopted parents died intestate, after all of them dipped their fingers to signify their consent (*manjal*—ceremony of adopting children).[1]

Marriage

Customary law recognizes marriage as an important institution. The interrelation between the principles governing marriage in Kandyan law and those governing marriage in the Indian law is most pronounced. The Sinhalese, sharing their traditions with their Tamil brethren, did not believe in marriage contracted by elaborate religious ceremonies. The Tamils, during recent times, have adopted certain Brahminical practices which were unknown to their ancestors.[2] Like their Tamil brethren, the Sinhalese were quite content to accept a connection as marriage despite the absence of any ceremony if the intention of the parties were to contract a marriage.[3]

In both communities, the propriety and fitness of two persons to be joined in conjugal life were considered so strictly that marriage was often confined to members of the same caste. The prohibited degrees of marriage are almost identical in both communities. The kinship classificatory system of the Sinhalese is identical with that of the Tamils. Some of the names describing the close relatives are the same as the Tamil terms.[4]

Parents and close relatives must approve of the marriage, and this requirement is considered paramount in both communities. There was also the likelihood that unions which were not recognized by the family would not be considered legal and in consequence the issue of such union would be rendered illegitimate.

On the contrary, when one examines the *Dharmasastras*, one could see the insistence on ceremonial observances.[5] The *Dharma-*

1. *Thesawalamai* Code II, 1; also *The Laws and Customs of the Tamils of Ceylon* by H. W. Tambiah, pp. 44, 71, 74
2. Commentary on the *Tholkapiam Porulathikaram*, translation by Varatha Raja Iyer, Vol. I, Part II, p. 253, *Sutra* 145 which gives the simple ceremony of marriage amongst the ancient Tamils; also *The Laws and Customs of the Tamils of Ceylon* by H. W. Tambiah, p. 74; *The Laws and Customs of the Tamils of Jaffna* by H. W. Tambiah, p. 132.
3. Hayley, pp. 174, 175
4. Hayley. Part IV Chapter IV
5. Kane II, Part 1, p. 516 et seq.

sastras insisted that only children born after the celebration of marriage by proper ceremonials could be regarded as legitimate,[1] but both Sinhalese and Tamil customary laws adopted a different attitude. Among the Sinhalese the prohibited degrees of marriage were almost identical with those of the Tamils but the *Dharmasastras* set out taboos of prohibited degrees which were exceedingly numerous when compared with those of the Tamils and the Sinhalese. Thus there were bars against *Sapindas*, *Sagotras*, and *Sapravaras* in the *Dharmasastras*.[2]

The later *Dharmasastras* did not demand an exact compliance with the requirement of the sameness of caste and even permitted marriages between two castes (*anuloma* marriages),[3] in which the male was of the higher caste. The recognition of *anuloma* marriages shows the impact of customs prevalent amongst a community based on *Dharmasastras*. The purists view that the son procreated by the wife of the same *varna* was only regarded as *aurasa*. This was later modified to mean a son born of a union with a wife of a different *varna*.[4]

Marriages between a man and his mother's brother's daughter (*ewessa* cousin) was considered not only proper but morally obligatory among the Sinhalese and Tamils. Failing such a union, a person's marriage with his father's sister's daughter is considered proper. Although these practices were considered as obligatory in South India, some of the writers on the *Dharmasastras* regarded this practice as a mortal sin. Apastamba includes this as one of the practices peculiar to the South and states that those who practice this in parts where it is not in vogue commit a mortal sin.[5] The Sinhalese, in common with the Hindus of South India, regarded marriage with the maternal uncle's daughter, failing which a paternal aunt's daughter, as not merely properly desirable but even obligatory. It was, one might also say, the corner-stone of the social and economic arch of the agricultural settlements of the South Indian communities. From remotely early times, the *Dharmasastras* regarded such a custom as curious and questionable; tolerable among those classes which practised it upon the bare ground of primeval habituation.[6]

There is evidence that the different forms of marriage referred to in the *Dharmasastras* were not practised amongst the Aryans but that they were only an enumeration of the forms of marriage which existed in early Indian customary law. Some of these marriages were known to ancient Tamils.

1. Kane III, p. 647—The legitimate son was called *aurasa*.
2. Kane II, Part I, p. 452 et seq; Mayne (10th Ed.) p. 153 et seq.
3. Kane III, p. 599
4. ibid. p. 655.
5. Apastamba, *Dharmasastras* 1–7; Kane II, Part I, p. 458
6. *vide* also the authorities cited by Dr. Derrett, p. 110, Sen Gupta, *Evolution of Ancient Indian Law*, pp. 1-2, 97; Ganganath Jha, *Hindu Law in its Sources*, Allahabad (1930–3) i. introd. p. 6 et seq.; also the South Indian Commentator Haradatta on Apastambadharma-sutra II, 6, 15, 1

Thus, the *Tholkapiam*[1] classifies *Asuram Rakkhasam* and *Paisacham*, though they could not be strictly called *Kaikali* as the other forms such as *Brahman, Prajapatiyam, Aridam, Deyvam* are classified, as *Perunthinai Unaiya Moondrim, Kaikalai Kuripai, Pinner, Nanku, Perunthinai, Perumey*.[2]

There appear to have been eight forms of marriages during the age of the *Tholkapiam*. "The celebrated eight 'forms' of marriage," says Dr. Derrett,[3] "were an attempt to regularise different methods of contracting a union, all of which were undoubtedly in use in ancient times, mostly among the pre-Aryan 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 Brahma 'form' of marriage described by Manu and other *Smriti* writers and the last is nothing other than the *Gandharva* form in which mutual attraction, once acknowledged by the parties, serves to establish the union without any further requirement."

The *Magul Dahansiya*, an ancient Sinhalese marriage custom of reciting *Tahanci Kavi* or prohibitive verses at wedding ceremonies, although now obsolete in many parts of Ceylon still lingers in some remote villages of the Kandyan country. On the day of the wedding when the bridegroom arrives at the residence of the bride to perform the nuptial ceremony, the kinsmen of the bride obstruct him at the *kadulla* or gate, forbidding his entry by reciting a *kadultahansiya* or prohibition at the gate. The people who accompany the bridegroom will reply with a set of counter-verses, summoning the aid of Gods to nullify the prohibition. In this manner, at every turn, the bridegroom is assailed with prohibition. On the ceremonial *pavada* (floor cloth), he enters the bridal throne, and standing under the bridal canopy he listens to the prohibitive verses being sung.

The bride who meets the bridegroom, goes through the same ordeal while receiving the bridal cloth and in accepting the ceremonial sheaf of betel leaves. The party must be prepared to nullify such prohibition by reciting a set of counter-verses, and surmounting all impediments. The bridegroom then makes a solemn declaration that all articles in the bridal hall, including canopies, the ceremonial *pavada*, beds, chairs and the bridal throne, as well as the bride, had been captured and won by him and that all are his property.[4]

1. *Tholkapiam Porulathikaram*, Vol. I, Part I, Annamalai University Tamil Series, No. 9 (1948) p. 80 et seq. and p. 101
2. *Tholkapiam Sutra*, p. 105
3. *Tholkapiam-Porulathikaram*, Vol. I, Part I, p. 110 et seq.
4. The Article on *Magul Dahansiya* by C.A. Austin de Silva, *Paul Pieris Felicitation Volume*, p. 29 et seq.

Thus, the form of marriage simulating capture was known to the ancient Sinhalese and the Tamils and other Indian tribes. In fact, it was more common than the more sophisticated ritual forms of marriage later developed by the Aryan jurists.

Kandyan law distinguished between marriage in *diga* and marriage in *binna*. The *diga*-marriage is the usual form of Kandyan marriage and in the absence of any evidence to the contrary, a marriage is presumed to be in *diga*. The girl who marries in *diga* goes to her husband's house, adopts his house name and becomes to all intents and purposes, a member of her husband's patriarchal family. A *diga*-mariage should not be described as patrilocal since the couple may seldom reside in the bridegroom's father's house, yet such description may be of help to the extent that the children of a *diga*-marriage normally belonged to their father and they succeeded to him on intestacy and were represented in such succession by their own issue by a *diga* marriage. Although it is not essential, still it is customary for a *diga*-married daughter to bring a dowry to her husband. The practice of giving a dowry is prevalent throughout India and amongst the Tamils of Ceylon, and is one of the greatest social evils of the modern day. Both among the Sinhalese and the Tamils, the daughters were seldom consulted regarding their inclinations. The parents often arranged the marriages. The establishment of family connections by marriages is equally dear to the hearts of the Sinhalese and the Tamils.

The *binna* form of marriage, however, must not be considered to be something which is peculiar to the Sinhalese. It is essentially an Indian institution notwithstanding the paucity of the texts in the *Dharmasastras* dealing with this form of marriage. There are, however, references to this type of marriage even in the *Dharmasastras*. The institution in Hindu law known as *putrika-putra*, by which a father who had no sons treated a daughter as his own son for purposes of succession, was known to the ancient Indian customary law.

The *putrika-putra*, although it is no longer recognized in India except amongst the Nampudri Brahmins of Malabar, appears to be an ancient institution which was prevalent in South India (the *Illatom* adoption of Madras), and in certain portions of North India.[1] The essence of a *binna*-marriage is that the bride does not go to or become a member of her husband's household but retains her full connections with her parents or parents' household. Thus she in particular, and her issue, continue the line of her parents who, but for the *binna* association might have been in danger of dying intestate.

The children thus become the normal heirs and the husband gives up his rights to his natural family to some extent. He comes to live

1. Kane III, pp. 647, 657–659; for Malabar influence on Sinhalese Society, *vide* Raghavan

with the bride's parents and to assist them. He, however, does not become an adopted son and has rather a precarious existence in the wife's family. Parallels can be found in the *ghar-jammai* or *ghar-jawai* adoption of Northern and Western India.[1] Roy deals with this institution under the title *Khana Damada*.[2] The *Illatom* adoption of Madras, or more particularly the Andhra State, provide further parallels.[3] In India, the *Illatom* method was one of the popular devices adopted to prevent ancestral property from going out of the family, if there were no male lineal heirs. In treating *putrika-putra* the *Dharmasastras* itself appears to have conceded the demand of the daughter to retain the father's property, if she had no brothers.

A *binna*-marriage cannot be strictly called matrilocal because it is not essential that after the *binna*-marriage a couple should live in the mother's house. The strict patrilineal rule whereby property passes from father to son without interruption is however modified by the institution of *binna*-marriage to the extent that the son of a *binna*-married daughter succeeds to her grandparents' interest. Dr. Derrett remarks that there is absolutely no question of a *binna*-marriage being a relict of matriliny or matriarchy. "Even in those rare instances," states Derrett,[4] "where property is kept in the female line by a succession of marriages in *binna*, what we are presented with is very different from matriliny." Such a custom might be the direct influence of Malabar women who came from India. The absence of any restraint on the daughter to marry in *diga* if she so desires, the right of a male issue to inherit shares in *paraveni* (ancestral) property and to be represented by issues by *diga*-marriages whether male or female, tend to show that matriliny was not practised among the Kandyans. Matriliny does not affect marriage at all but recognizes only blood connections through females. It relegates the issue of males to their respective mothers' houses, while retaining their fathers' in their ancestral homes; it makes no provision for interruption of the line by the choice of individuals. None of these characteristics are present in Kandyan law.

Ehrenfels states that some distinct elements of probable or certain matriarchal descent are to be found all over India and within all the different ethnic, cultural, linguistic, racial and religious groups, although in very varying degrees.[5] It is likely that in the dim past, matriarchal cultural elements from South India got inextricably interwoven with the cultural instincts of the streams of invaders.

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1. Rattigen, Sir W., *Digest of Civil Law for the Punjab* (13th Ed.) (1953) pp. 450–61
2. *Customs and Customary Laws of British India* (1911) by S. Roy, p. 477
3. Mayne, *Hindu Law & Usage* (11th Ed.) pp. 280–281; Sorg L., *Avisdu Comite Consultatif de jurisprudence indienne* (1896) pp. 233–240
4. Derrett, p. 113
5. *Mother-Right in India* by Ehrenfels (1941)

From the mere absence of rules of matriliny one should not conclude that mother-right did not prevail among the Sinhalese at some stage of their evolution. The puberty rules of girls, the taboo attached to women during their period of seclusion, the charms developed, the religious observances connected with phases of the moon, the square houses, and many other sociological factors go to prove the existence of the remnants of mother-right in the Sinhalese society even after it had changed from the matriarchal to the patriarchal system.

It has been shown that the *Vedda* clans organized themselves into a matriarchal form of society.[1] These *Vedda* clans became the satellites, lifeguards, officers, sons-in-law and finally the ancestors of influential aristocratic families of the Courts of the Sinhalese kings in Ceylon.[2] It is possible that the remnants of mother-right element found in the Sinhalese usage crept in through the *Vedda* influences or at least became augmented by them. The importance of the mother's brother at the wedding where he had more important ceremonial functions to perform than the father, the prevalence of cousin-marriages, and many other customs tend to show the influence of mother-right in Sinhalese society. The impact of Tamil customs relating to mother-right on Sinhalese society should not be overlooked.

It will also be shown later that even in the rules of intestate succession, the deeper one delves into the distant degrees of kinship, the more mother-right appears to prevail over father-right. Nevertheless, the Sinhalese are not matrilineal.[3]

Polygamy and Polyandry

Both polygamy and polyandry were known to the old Kandyan law. The *Dharmasastras* did not prohibit the practice of polygamy in India absolutely, but required the husband to settle a special fee upon the first wife before he married a second time. It is a matter of interest that even in Kandyan law, a person who wished to marry a second time was expected to provide for the wife and children by the former marriage. Polyandry is a characteristic feature of the Kandyan law during the pre-British period. Polyandry among brothers was more common than among strangers. There are grounds to suppose that fraternal polyandry which was later capable of enlargement in special cases to strangers existed, but the permission of the wife's parents was required if a stranger was admitted at the husband's request.[4]

1. *The Veddas* by Seligman (Cambridge, 1911)

2. Eicksted, *Die Historische Stellung der Veddas in der frudesiedelung Ceylon*, pp. 51, 73, et seq.

3. Chapter XXII

4. Hayley, pp. 170-173

Polyandry was an institution specifically condemned by the *Dharmasastras*. Not a single text in the *Vedas* can be cited to show the existence of the practice.[1] Polyandry is traced to an institution known as *Niyoga*, generally known as the *Levirate*. There are texts to support the existence of a custom whereby either during the lifetime of the husband or after his death, his younger brother or a close agnate, or even a stranger, could be authorized to have sex relations with the wife, whose own wish appears to have been not consulted for the purpose of begetting issue for the husband.[2]

Polyandry of the fraternal type was known in ancient India, even in the north.[3] Even today, it survives in practice in the foothills of the Himalayas, in the Punjab, and in many other parts of North India among the under-developed communities.[4] Dr. Derrett observes that there are reasons for supposing that the famous Pandya dynasty of Madura, known to history as the Five Pandavas, was both polygamous and polyandrous. The mere existence of polyandry does not mean that there is any connection with matriliny. There are some matrilineal societies which practice polyandry and this is because of the natural urge of the females when there is an absence of any proprietary hazard to call for restraint, and the total absence of the concept of marriage. Further, in such societies, the alleged polyandry which almost amounts to promiscuity, is not fraternal but entirely unrestricted and does not co-exist with polygamy because the possibility of the latter is denied. "Fraternal polyandry, however disgusting to the *Dharmasastras*," says Dr. Derrett,[5] "is perfectly consistent with patriliny. But it is a non-Aryan custom, which must have been a profound shock to the Aryans when they first settled in India." No Aryan community could have allowed itself to have been modified not to say contaminated by such a custom; whereas those that practised it might well adopt a great many Aryan characteristics, such as special religious beliefs and innumerable superficial habits and prejudices not too inconsistent with this fundamental ancient institution."[6] The practice of polyandry might have come from Malabar.

Divorce

The Hindu law was more tolerant towards divorce. Among the Mukkuwas and the *Vanniar* of Ceylon, wide liberty to obtain divorce existed.[7] The *Thesawalamai* itself provided no ceremonies for divorce, and speaks of the separation of the property when the husband or wife live apart and contemplate re-marriage, as a matter of course.[8]

1. Kane II, Part I, p. 554.
2. for the *Niyoga*, *vide* Kane II, Chap. 13, p. 599
3. Kane II, pp. 555–556; Sen Gupta, p. 87
4. Ehrenfels, p. 111 et seq.
5. Derrett, p. 115
6. ibid.
7. *Laws and Customs of the Tamils of Ceylon* by H.W. Tambiah, p. 95
8. *Thesawalamai Code* Part I, Section 10; Part IV Section 1

The *Dharmasastras* did not deny the validity of divorce although there are certain texts in *Manu* which express a contrary view.[1] Dr Derrett states:[2] "Since the *Dharmasastras* of medieval times has followed the texts of *Manu*, which apparently deny the validity of divorce, it is generally believed that 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 *Manu* himself and of Narada, and the legal portions of *Kautiliya* reveals that the widest liberty prevailed in classical times, and that the *Dharmasastras* 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 was immoral." The provisions of Kandyan law facilitating divorce are in conformity with the provisions of many cults and systems of customary law of non-Aryan origin. Even the reformative influence of the *Dharmasastras* cannot be traced in Kandyan law on this subject.

Joint Family System

Joint ownership of family property is not limited to the Aryan races but is found in many parts of the world where men have settled down to an agricultural life. In India, such a co-operate system of tillage was universally found either in the shape of village communities or in a simple joint ownership. In Ceylon, too, as will be shown later, property was owned by village communities first, and later by families. Mayne, referring to the simple joint family system, states:[3] "So far from the system owing its origins to Brahmanism or even to Aryanism, its most striking instances are found precisely in those provinces where the Brahman and Aryan influence was weakest. As regards the Village Communities, the Punjab and the adjoining districts are the only regions in which alone they flourish in their primitive vigour. This is the tract which the Aryans must have first traversed on entering India. Yet it seems to have been here that Brahmanism most completely failed to take root. Dr. Muir cites various passages from the *Mahabharata*, which establish this. The inhabitants 'who dwelt between the five rivers which are associated with the Sindhu (the Indus) as the sixth', were described as those impure Bahikas, who are the outcasts from righteousness." Mayne states:[4] "Next to the Punjab, the strongest traces of the Village Community are found among the Dravidian races of the South. Similarly, as regards Joint Family. It still flourishes in its purest form, not only undivided but indivisible among the polyandrous castes of Malabar and Canara, over whom Brahmanism has never attempted to cast even the hem of its

1. *Manu* IX, pp. 46, 101
2. Derrett, p. 118
3. Mayne (8th Ed.) p. 6
4. ibid. p. 7

garment. Next to them, probably, the strictest survival of the undivided family is to be found in northern Ceylon, among the Tamil immigrants from the South of India. It is only when the family system begins to break up that we can trace the influence of Brahmanism and then the break up proceeds in the direct ratio of that influence."

In examining the customary laws of the Sinhalese, one can observe a similar trend. Land was distributed among villagers who owned it in communal ownership. Later, when the family disintegrated, the vestiges of the Joint Family System could still be discerned in the rights the father had over the properties of the mother after her death and the rights the mother had over the property of the father after the latter's death. It is not a matter of more coincidence that the Joint Family System practised among the Sinhalese was the same as that observed among the Tamils. The rights of the widower to have control of the property of his wife after her death, his rights of management of such property and his right to dowry his daughter out of such property are almost the same both in the Kandyan law and in the *Thesawalamai*.

The concept of the Joint Family System which was elaborated by writers on the *Dharmasastras*, is not of Aryan origin but germinated from the system of community of property which prevailed in ancient India before the advent of the Aryans. Thus Mayne states:[1] "My view is that the Hindu Law is based upon immemorial customs, which existed prior to, and independent of, Brahmanism. That when the Aryans penetrated into India, they found there a number of usages either the same as, or not wholly unlike their own. That they accepted these, with or without modifications. rejecting only those which were incapable of being assimilated, such as polyandry, incestuous marriages and the like."

Tenures

Many tenures which were prevalent in South India during the medieval period, were also adopted in Ceylon. Indeed, the very names of some of those tenures are the same in both South India and Ceylon. The Polonnaruva period, and the succeeding periods, adopted many forms of tenures which existed in the Tamil country in South India (for a fuller discussion, refer Chapter XIV on Tenures (Kandyan Period)).

Testamentary and Intestate Succession

The Law of Testate Succession which loomed large in litigation in the early British period, could be based either upon tradition of death-bed donations or upon some recent innovations which might have been an imitation of an institution brought to Ceylon by the Portuguese or the Dutch. It is not possible to surmise which view

1. Mayne (8th Ed.) p. 4

is correct (it is commonly accepted that testation was of recent development in Kandyan law).[1] In Indian customary law, testation as such, seems to have been unknown until 1760, when it appears to have prevailed in certain parts of South India. In view of the Joint Family System and adoption, testamentary disposition did not come into vogue in India.[2] The concept of giving property *inter vivos* and the power to disinherit unworthy natural heirs would have led to the custom of making donations *mortis causa* and partition of property among a number of children by several marriages, and former wives and concubines. A possible view is this practice might have developed to such a pitch of organization that when written documents came into more general use, the arrival of the concept of testation might have put the finishing touches to a steady development which was already taking place.[3]

Many pitfalls and snares have to be avoided if any scientific theory regarding the development of the Sinhalese Law of Succession is to be propounded. A proper appreciation of the differentiating features between patriliny and matriliny is necessary before one proceeds to discuss the Kandyan Law of Intestate Succession.

In pure patriliny as it existed in North India for centuries among the descendents of the Aryan conquerors, relationships were only claimed through males and no one succeeded to the property on death or retirement unless he was connected with the *propositus* exclusively through males; and the nearest male kindred excluded the more remote. In matriliny, inheritance was always claimed through the female line. The later rule which recognized the right of a nephew to succeed the mother's brother was influenced perhaps by some patriarchal form of inheritance in the female line. Mother-right developed in view of the important part women played as the first agriculturalists. Ehrenfels is of the view that the important position of women can easily be explained as having developed from the original bilateral social system in primeval culture.[4] The matriarchal cultural circle, says Ehrenfels, was developed through a long period of evolution. Ehrenfels distinguishes three grades, instead of two within the complex of the Mother-Right culture.[5] In the first and the oldest of these three strata, the dual system was not developed. Women in this state of culture not only invented a systematic tilling of the soil but also put this into practice, which could by no means have been an easy task as conservatism was very strong in primitive society, especially in primeval culture groups. Few remnants of these pre-agricultural groups have been preserved to the present day. Ehrenfels states that "in consequence of the tilling of the soil, the peoples of this first matriarchal culture

1. Hayley, pp. 318–319
2. Mayne (8th Ed.) p. 551; Kane III, pp. 816–818; Sorg, p. 356 et seq.
3. Derrett, p. 125
4. *Mother-Right in India* by Ehrenfels, p. 7 et seq.
5. ibid. p. 8

circle gave up roaming in the forest and became the first settlers". The "square house" too belongs to this group in which the custom of matrilocal marriage must have been easily developed. From this evolved the bilateral system of the primeval culture where patrilocal and matrilocal marriages seem to have altered. Ehrenfels is of the view that the dual system belonged to the second degree of matriarchal cultural evolution. He observes that the two classes of matriarchal cultures are not to be considered as essential but rather as accidental features in the second Mother-Right circle, perhaps influenced by totemistic conception of society, and states that this influence might also have been at work in the introduction of visiting marriages of polygyny (polyandry and polygamy) and the dominant position of the mother's brothers in the social and religious life. Similar influences may also be traceable to lunar mythology, the evolution of the human blood sacrifice, secret men's organizations with definitely anti-feminist tendencies, and also to the widespread superstitions, beliefs in omens, and ancestor-worship.

In the third grade of the matriarchal culture, says Ehrenfels, people became fine breeders of cattle and growers of edible fruits. At this stage, evolution seems to have divided itself into two different branches, the more primitive branch and the more progressive one: the former being restricted to Melanesia and the surrounding territories as far as Africa and South America, and the latter extending over the Neolithic town civilizations of Central and Western Asia and North Africa. Ehrenfels also states that the progressive group further developed swine breeding and fruit cultivation which used the knee-helve axe, or the so-called Melanesian hatchet. He also asserts that the matriarchal Joint Family System was developed here under foreign patriarchal influence perhaps even by nomadic herdsmen's culture circles. The more progressive branch of this type of matriarchal organization cultivated rice and millet. Agriculturists probably accentuated the democratic tendencies.

Ehrenfels has shown that pure matriarchal organizations exist in the south-west and north-east of India, but almost all forms of cultural groups in India are in some way or other affected by elements of Mother-Right. Referring to *binna*-marriage among the Kandyan Sinhalese of Ceylon, he observes that "this matriarchal determined form of marriage has been reported from Assam, Kashmir and Kandyan Sinhalese of Ceylon". These territories he describes as cultural backwaters of pre-Aryan Mother-Right cultures in India which retreated before the advancing creed, language and social order of Aryan Hinduism. But what Ehrenfels fails to note is that the *binna*-marriage among Kandyans might have crept into Ceylon through Malabar in the post-Polonnaruva period when Malabar influence was greatly felt in Ceylon. On the other hand, his views cannot be rejected.

The people who inhabited the highly civilized towns like those which were excavated at Mohenjodaro and Harappa and who were far from being primitive, had Mother-Right similar to that of the Nayakkar group of the south-west of India.[1] The remnants of the matriarchal organized society are found among the Brahui in Beluchistan who were said to be remnants of the Dravidian race. This again lends support to the view that the Dravidians who first spread their civilization in India were orginally matriarchal.[2] In Ceylon, the Mukkuwas of both Puttalam and Batticaloa and the *Veddas* were organized on the matriarchal pattern. The constant waves of immigration from South India, the impact the *Veddas* had on the Sinhalese community, and the existence of peculiar customs reminiscent of a matriarchal system of society among certain racial elements in the Sabaragamuwa Province, suggest that matriarchal influences had been at work from early times in Ceylon. Hence, it cannot be postulated with any degree of certainty that the rules of intestate succession found in Kandyan law as they existed during the early pre-British period, were the same two thousand years ago and had continued to remain unchanged for nearly two millenniums, before any theory could be advanced to suggest that in the remnants of Kandyan law one could glean evidence of the customs and usages of pre-Aryan India as it existed before the advent of the *Dharmasastras*.

Dr. Derrett, after referring to the matrilineal and patrilineal types of succession, states:[3] "These two types of succession 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-Aryan or sub-Aryan communities in Central India and eventually in the Deccan, so matriliny as we know it is not a pure, self-begotten institution, but a specialization of a patrilineally biased type of bi-liny, which must have been the characteristic succession-law of pre-Aryan 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 inter-dependent. It seems almost certain that before the Aryan invasions of India and for many centuries afterwards, the settled agricultural communities practised certain customs which were quite foreign to the Aryans. Amongst them was the scheme, assuming (as the pre-Aryans did) that there was nothing so valuable as ancestral land, whereby 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

1. Ehrenfels, p. 123
2. ibid. p. 185
3. Derrett, p. 127

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 Aryans. Amongst blood-kindred, males had a qualified preference to females in that females who 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 the sons' daughters were as competent to succeed as sons' sons. When women inherited, they took an absolute estate; a limited estate for women was unheard of.

The widow had a complex position. Her rights stood upon four feet: her dowry and gifts made to her by her husband with special reservations in relation to ancestral land remained her own; in the acquisitions made during the marriage she was probably entitled to a half-share; she had a right to be maintained out of the deceased husband's estate until her own re-marriage, and it is possible that she took an absolute estate in his movable and even undivided movable property if he died without issue. As regards his immovable property and chattels (such as slaves) connected therewith, it would appear that she could inherit an absolute estate in it only if there was no issue, or only daughters married out of the family, and the husband died separate from all his agnates. 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, 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 dependants out of it, but could not dispose of the corpus except for necessity. 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 re-marriage, which was a very real fear. A number of these incidents peculiar to the pre-Aryan society are found in Kandyan law.

In Kandyan law, the *diga* and the *binna* forms of marriage existed side by side and both were required to produce the desired effect. The nexus between the mother's and father's family was very close, being the result of continuously repeated bonds. Referring to the dowry system prevalent among the Sinhalese, Dr. Derrett states:[1] "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

1. Derrett, p. 129

relations by marriage, and the competition of such duties could not fail to produce a complex succession law. The Aryan system on the other hand admitted the dowry-system with reluctance; denied to females any right of inheritance, and when it relented, subjected them to a limited estate, so that the estate would always revert to the next agnate heirs. 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 Aryan 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. Dr. Derrett further states that the Aryan learnt to be interested in ancestral property from his predecessor in India, but the *Dharmasastras*, even in the hands of the southern jurists, never quite developed the almost hysterical respect for ancestral land which characterizes the pre-Aryan. The Kandyans on the other hand were highly caste-conscious and placed great importance on ancestral property.

When one examines the principles of intestate succession in Kandyan law, one will not fail to see the important position given to women. The recognition of the dowry system among the Kandyans, their right to keep ancestral property in the family, the distinction between ancestral property and acquired property, the recognition of the right of females to inherit the acquired property in preference to males, and various other incidents show the existence of predominantly pre-Aryan customs among the Sinhalese.

"Distribution of property between the beds," says Dr. Derrett,[1] "was the original pre-Aryan rule and many Aryan communities found no difficulty in adopting it." Referring to the absolute and limited interest in the estate of the husband given to the widow in all parts of India, Dr. Derrett states that this is a relict of a pre-Aryan scheme, somewhat modified by Aryan notions. Representations of collaterals in the Aryan system of law had no place Hence, this scheme could only be envisaged in the pre-Aryan system of intestate succession.[2] Such methods were well known to South Indian customary law.[3] Referring to the law of succession among females in Kandyan law, he states that it has strong similarities with the developed rather than the primitive *Dharmasastra* rules relating to the descent of *Stridhana*, and that the development itself must be attributed to the growing predominance in some parts of India of the surviving traces of pre-Aryan female independence and the necessity of keeping dowry and the acquired property of the females out of the hands of the husband's collaterals. He adds:[5] "The Indian Law relating to *Stridhana*, except in communities

2. Derrett, p. 131
3. ibid. p. 132
4. ibid.
5 ibid. p. 130

heavily influenced by Aryan ideas, shows a very strong influence of the pre-Aryan social set-ups."

The Kandyan law gave predominance to the maintenance of the widow, and in this respect shows similarities to the Indian customary law. The *Dharmasastras*, says Dr. Derrett, did not encourage the very wide distribution of this right. The Kandyan system was more liberal and it is possible, according to Dr. Derrett, that this was the position in India among the pre-Aryan communities. In both systems, property descended first to descendants, then ascended to parents (probably in one system, to both parents jointly, and in the other, to the mother), then to the collaterals of full blood, then to those of half-blood, then to grandparents in equal shares (excepting that the ancestral property coming from the particular side of the spouse returned to that side), then to uncles and aunts and their issue. "A preference for the maternal uncles and aunts over the paternal," says Dr. Derrett, "though perhaps not universal, is perfectly intelligible in view of the fact that the property must thus go either to the *propositus's* brother's widow or to some relation whose daughter would eventually marry into the *propositus's* 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 have supplied the *propositus* with his wife and dowry, or if he had neither, would be supplying as a wife or a husband to his agnates."[1] In all these matters, Kandyan law has much in common with Indian customary law and is opposed to the principles contained in the *Dharmasastras*.

Debts

Many works on Hindu customs and usages and the Hindu Law of Debts, Contracts, Family Rights, etc., have been published since the establishment of British rule in India.[2] The researches of some of these writers show that the law governing the recovery of debts is almost the same as in Kandyan law. These provisions of Indian customary law on this topic are again reflected in the *Dharmasastras*. In both the Kandyan law and the Indian customary law, the parate execution is absent.[3]

Presumably due to statutory provisions, Crown debts take priority over other debts, but the Kandyan king, like his Indian

1. Derrett, p. 130

2. Colebrooke's *Digest of Hindu Law*; Ghose's *Law of Endowments*; Dr. Jolly's *Tagore Lectures on Partition, Inheritance and Adoption*; Mayne's *Hindu Law*; Mellor's *Hindu Law*; Sarkar's *Elements of Rules of Interpretations*; Sarkar's *Hindu Law and the Hindu Law of Adoption*; Raj Jumar Sarvathikari's *Hindu Law of Inheritance*; Dr. Sen's *General Principles of Hindu Jurisprudence*; Steve's *Law and Custom of Hindu Castes*; Stoke's *Hindu Law of Texts*; Buller's *Digest of Hindu Law* and Kane's *History of the Dharmasastras*

3. Sen Gupta, p. 236; Kane III, p. 441

counterpart, was disinclined to assume any priority for any debts due to himself. This arises from the king's responsibility to administer justice to others. Spiritually, he was responsible for the unpunished wrongs in his kingdom, and therefore, this obligation made him to be fair-minded and to give priority to earlier debts of others.

In the Kandyan kingdom, services were performed in lieu of taxes, and cash collections, as taxes, were subordinate to the scheme of service in kind; but in India, most services were paid for in cash or shares of crops and unless taxes were paid, the whole machinery of government, including the judicial function, would suffer and might have come to a standstill. Therefore, it was natural that the notion existed that the king should assume priority for debts due to himself and this concept is found expressed once in *Kautiliya*. Yet, there are other texts which state that the king must give priority to a Brahmin.[1]

Self-help in the recovery of debts, loomed large in Kandyan law, and the institution of *velekme* is almost identical with the institution of *dharna* in Indian customary law. Even the belief that debts should be paid, and the special dread of indebtedness, are almost identical in the Indian customary law and the laws of the Sinhalese. However, in the methods adopted for the recovery of debts, there are differences between the Kandyan law and Indian usage. There was comparative freedom of Sinhalese legal customs from religious influences and the secularization of ideas which are based in India on ethical and religious sanctions.[2]

In the early Kandyan law, the selling of children and other blood-relations in satisfaction of debts was permitted[3] just as in Indian customary law.[4] The liability of the male issue to pay his father's debt[5] and enslavement for the failure to discharge a debt are found in both systems.[6]

Contracts

In an agricultural and pastoral community, there were very few needs which required elaborate contractual engagement as found in modern law. Caste rules, incidents of service tenures, and the rights and duties created by family law, determined a man's rights and duties. However, certain types of contracts were bound to develop in such societies. Thus, among the Kandyans, pledge, mortgage, loans, etc. were in vogue. Many of these types of contracts were also found in the Indian customary law. Loans of

1. Derrett, p. 133; Kane III, p. 441, note 740
2. Hayley, p. 518
3. ibid. p. 139
4. *The Colas* by Nilakanta Sastri (2nd Ed.) (Madras, 1955) p. 555; Derrett, p. 134
5. Kane III, p. 442 et seq.; Hayley, pp. 495–505
6. Kane III, pp. 416–417; Hayley, p. 139

money and grain and even the rates of interest and methods of repayment were on a basis familiar in India.[1] In both systems, rates of interests were high,[2] suggesting the scarcity of money. The issue were under a moral and legal obligation to pay off the debts contracted by their ancestors. The rules governing redemption and the peculiar rule that the interest should not exceed the principal, are found in both systems.[3] In both systems, again, consideration was necessary to support a contract; acceptance however was not a legal requisite to make a contract complete.[4] In both countries, deeds were not much used during the early period, but with the passage of time, the desirability of having written instruments came to be widely recognized with the view to obviate fraud. Writing was resorted to much earlier in India than in Ceylon.[5]

In both systems, witnesses did not necessarily attest the execution of the document.[6] Many South Indian inscriptions lend support to this view.[7] Ceylon inscriptions also support this view. The taking of earnest money (the *atikarama* in Kandyan law, and *achavaram* in the Tamil customary law) was a practice common to both India and Ceylon. It perhaps originated from some customary practice rather than as a matter of legal obligation.[8] The taking of token as evidence of a legal transaction is found in the practice of taking *kata sakkiya* in Sinhalese customary law. It is also a practice recognized in the Indian law.[9]

The Kandyan law is replete with contracts for assistance and support between aged parents and children to whom property had been given by the former. Such contracts are also found in India but they are not so common. In Kandyan law, following the Indian customary law, a wife might be a surety for her husband, but in the eyes of the *Dharmasastras*, a wife becoming her husband's surety was totally abhorrent since the latter system regarded the husband and wife as one legal entity.

The Kandyan concept that even a deed of sale was not complete and could be rescinded, found a sort of parallel in the *Dharmasastras* which provided that land should never be sold and, if sold, the sale should be conducted as if it were a gift.[10] Referring to this aspect,

1. Derrett, p. 144
2. For Sinhalese law, Derrett, p. 144; For Indian customary law, Kane III, p. 418
3. For Sinhalese law, Hayley, pp. 503–6; For Indian customary law, Kane III, p. 423 et seq.
4. For Sinhalese law, Hayley, p. 301; For Indian law, Kane III, p. 442
5. On the development of the use of documents in India, *vide* Sen Gupta; for law of Ceylon, *vide* Sawers, p. 29, who says that written deeds respecting rights to property were not in common use before King Kirti Sri.
6. For Sinhalese law, Hayley, pp. 291–293
7. Derrett, p. 144
8. ibid. p. 145
9. Kane II, p. 855
10. Kane III, pp. 496-7

Derrett observes that behind this rule lies a mystery for future solution—perhaps pre-Aryan customs hold the key.[1]

Topics common to any agricultural community are found both in Kandyan law and among Indian communities which had similar social developments.

Donations

In donations, at first sight it appears that the rule of Kandyan law that gifts and even sales, with certain exceptions, may be revoked by the alienor during his lifetime, is something which is peculiar to Kandyan law. Although there is no material from any other source to prove the habit of revocation in Indian customary law, yet certain chapters of the *Dharmasastras* and certain well known practices of a kind which might be labelled as residuary, lead us to believe that in early times this custom was in great vogue. Derrett states:[2] "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." A thin line divides mortgages from revocable sales and the actual intention of the alienor has to be established, apart from the terms of the document if any, before it could be asserted that a deed is irrevocable.

Revocation of gifts and automatic retraction of gifts belong partly to the law of succession and are related to the concept of quasi-vested rights in close relations, such as issue, and also partly to the law of contract. The *Dharmasastras* give only negative evidence on the subject of retraction of gifts which is found under the heading of "Partibility".[3]

In dealing with the wider question of the reclaiming of gifts by donors, and the annulling of sales, Dr. Derrett states:[4] "Firstly we are told that there are a large number of alienations which should not be made at all; it is curious to note that the system does not refer to them as 'ungivables', 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." The resumption of gifts is dealt with under the title of '*Dattaupakarma*' in the *Dharmasastras*.[5]

The text in the *Dharmasastras* refer to certain kinds of things which cannot be gifted or alienated to, such as one's son or wife. Further, he states that seven kinds of *datta* gifts cannot be resumed—thus, the price paid for goods bought, wages, what is paid for

1. Derrett, p. 145
2. ibid. p. 134
3. ibid. p. 135; *Yajnavalkya* II, 123(a); *Mitakshara* I, vi, pp. 13–15
4. Derrett, p. 135
5. Kane III, Chap. 19

pleasure, and gifts through affection, a gift made in gratitude, money paid to a bride's kinsman, and gifts for spiritual or charitable purposes could not be resumed.[1] It appears that the *Dharmasastras* here were trying to reform the Indian customary laws which made all gifts revocable. The *Dharmasastras*, therefore, in their reformative zeal, made a distinction between the things that cannot be gifted and the things of a certain kind given for a consideration which could not be revoked. The revocability of gifts in Indian customary law is due to the concept which prevailed among the pre-Aryan races that they had a right in the object, particularly the land, which even after they had parted with it, had the right of resumption. This typically pre-Aryan custom finds its counterpart in Kandyan law but due to the reformative influences of the clergy and the development of moral ideas, certain types of gifts became irrevocable under both the Indian customary law and the Kandyan law. In both the Kandyan law and the Indian customary law, the alienor could deprive himself and his heirs of the right to revoke by binding himself by an imprecation not to use the right of revocation.

Many Indian inscriptions show that alienation of land conveyed to the temples of Brahmins usually contained the consent of the relations not to question such gifts.[2] The *Dharmasastras* not only state that alienations by persons without adequate authority are void, but has a chapter on annulling sales. In doing so, the hand of the reformer could be seen.[3] The provision contained in the *Dharmasastras* that after a sale is completed, the purchaser can return the article and regain the price paid provided he did so within a short specified time[4] suggests again that it was a rule enacted to reform the existing customary law which perhaps made a sale rescindable at any time. Here again, the Indian customary law on the freedom to rescind a sale is similar to that of the Sinhalese.

Tort

Dealing with the topics of tort, crime and punishment, Derrett states:[5] "The amorphous character of tort in Kandyan Law faithfully represents the vague character of that chapter in the *Dharmasastras* and this can hardly be a co-incidence. The great similarity between contractual and delictual indebtedness, the feature of self-help, the thin division between tort and crime, the special function of the king in repressing crime, but his indifference to tortious wrongs, the feature of compensation, of restitution plus fine and

1. Kane III, p. 471 et seq.
2. Derrett, p. 136
3. ibid. pp. 136, 137
4. Repentance after sale—*vide* Kane III, pp. 489–493
5. Derrett, p. 141; also Kane III, p. 259 for the proposition that the same courts tried crimes and civil matters and the procedure was also the same.

damages, the objections to sorcery, liquor and gambling, the grada tion of crimes and the gradation and types of punishment, in all these contents *Dharmasastra* parallels are very generally forthcoming."

Crime and Punishment

The law of crimes, as set out by Kane, Sen Gupta, Varathachariya and Jha is further supplemented by inscriptional details collected by Mahalingam and Nilakanta Sastri—in Ceylon, the *Epigraphica* and the collections of Nicholas contain glimpses of criminal law. Both in India and in Ceylon, the abettor was not guilty of murder[1] but in India he was punished.[2] Rape, and even sexual intercourse between a woman of high caste and a man of low caste, had grave consequences in both countries. In many of these matters, parallels could be found in the *Dharmasastras*. But the penal law as found in India, was not the same as that which existed in Ceylon. Thus for example, the taking of an animal's life was not invariably an offence in India although there are passages in the *Dharmasastras* which show that a king might make valid order that meat should not be sold on certain days. King Silaka (A.D. 526-539) decreed that there should be no manner of life-taking in the Island;[3] Sri Sangabo prohibited the destruction of animals.[4] D'Oyly states that a similar decree was in force in the upper districts of the Kandyan provinces in the latter half of the 18th century.[5]

In Kandyan law, prostitution was regarded as an offence, but in Indian law, it was condoned. Many offences against revenue and law and order as found in the inscriptions in Ceylon, may find their counterparts in India although they may not be in identical terms. The responsibility of the village to bring an offender who had committed an offence within their territory to justice, is common both in Indian as well as in Kandyan law.[6] The obligation which the king felt to compensate the wronged party who did not receive compensation from the offender is found both in Kandyan law as well as in Indian law. Derrett states that this concept is a markedly Indian concept.[7]

Retribution loomed large in the Kandyan law of crimes, whereas in the *Dharmasastras* the only basis of punishment was its value as a deterrent. The untutored Indian judge saw nothing in punishment, but retribution and the savagery of some punishment for crimes against the State, and the mildness of punishments for crimes against low caste people or against those who were in no

1. Hayley, p. 105
2. Kane III, p. 529
3. *Mahavamsa* XLI, 31
4. *Mahavamsa* XLVI, 4
5. D' Oyly's *Sketch of the Kandyan Kingdom*, p. 35
6. Hayley, p. 263; Kane III, pp. 167–8
7. Derrett, p. 141

position to complain, tend to suggest that that may indeed have been the case.[1] Similar observations may be made of the Sinhalese laws.

Suicides

Suicides committed for the alleged wrongs done by others were not strange phenomena among the Indians and the Sinhalese. Both had a marked sense of personal dignity and self-respect and were very sensitive to what their western brethren call trivial abuse.[2] There was a superstitious belief that the person who committed suicide brought about a curse on those who had done the wrong which necessitated the suicide. Dr. Derrett states:[3] "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." There are recorded instances in Ceylon that persons who had sustained injuries, had threatened to commit suicide.[4] Even foreign observers have had occasion to remark on this tendency in modern times.[5]

The rationale of self-torture is that by committing an act of self-humiliation, the doer expected that a grave misfortune would befall the party responsible, and the sufferer expected the whole village to be polluted by this unseen curse. This necessitated an inquiry by the king who would take up his cause. Similar practices are found in South India. Dr. Derrett states:[6] "The South Indian instances of such conduct reveal a belief 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." Dr. Derrett also states:[7] "Suicide was a challenge to the indicated party to follow suit; hence it was received with terror rather than with pity, which would be the European reaction, and hence its value as a weapon of attack. It has quite rightly been identified as an institution of a pre-legal period in human development and it is of course pre-Aryan, finding no place in the *Dharmasastras*, though by no means unknown in Northern Indian history."

Public Law

In the realm of public law and governmental organization, Indian influences could be felt in Sinhalese policy. First, during the early

1. Derrett, p. 142
2. ibid. p. 143
3. ibid.
4. Hayley, p. 112
5. *vide* Derrett, p. 143,f or an ncident witnessed by Dr. Derrett during his stay in Ceylon,
6. Derrett, p. 43; Nelson's *Madura Country* Part II, pp. 52–53
7. Derrett, p.143, Nelson's *Prospectus of the Scientific Study of Hindu Law*, p. 165

period, Mauryan influences are clearly discernible. After the Chola invasion, many institutions of the Chola country became part of Ceylon. The divine role assumed by the Sinhalese kings finds its counterpart in India. The attributes of an ideal king set out in the *Kautiliya Sastra* and the *Manu Smriti* find their counterpart in Sinhalese customary law. The South Indian kings also appear to have borrowed these rules from the same sources.[1] As Buddhism was the state religion, the injunctions contained in the Buddhist scriptures were imposed on the kings of Ceylon by the clergy.

The hereditary principle of succession to the throne which was followed in India, was adhered to in Ceylon in spite of the political vicissitudes of the Island. Many a pretender, by force of arms, dethroned his predecessor and then asserted title to the kingdom through some rule of succession which was not followed earlier. The patrilineal or the matrilineal rule of succession to the throne alternated at various periods of Ceylon's history.

Governmental Organizations

The Sinhalese kingdom was feudal in character. The feudal system and even the names given to the officials have an Indian complexion, says Dr. Derrett.[2] A comparison of the names given by D'Oyly of the various officials who functioned in the Kandyan court with those appearing in the Appendix to Kane[3] shows the great similarity between the two governmental organizations. There is clear evidence that during the period of decline, the governmental organization of Ceylon was based on the contemporary Indian pattern. But as Dr. Derrett points out, from mere similarity no conclusive inference should be drawn.[4]

Social Habits

A study in comparison between the social habits of the Sinhalese and the Tamils of Ceylon shows remarkable similarities in the puberty rights, in the ceremony of boring ears, in wedding ceremonies, funeral rites and in a variety of other matters,[5] although there may be some differences. The so-called Kandyan hospitality should not be considered as the practice which was prevalent only among the ancient Kandyans. The Tamils of South India also had a similar practice.[6] These rules of hospitality which were considered moral in one age, may be immoral and even revolting in another age and therefore cannot be viewed in a spirit of derision. It showed the generous spirit of certain tribes in an age when sex jealousy did not take deep root in their minds.

1. Nilakanta Sastri's *The Cholas and the Pandyas*
2. Derrett, p. 146
3. Kane III, Appendix at p. 975 et seq.
4. Derrett, p. 146
5. For Sinhalese habits and customs, *vide* Ariyapala's *Society in Medieval Ceylon*, Ch. 16
6. Details given by Nelson in *Madura Country*, and Derrett, p. 142

International practice

International practice was eagerly studied and practised in medieval Ceylon and the precepts of *Manu* and *Kautiliya* were applied by the kings, as far as possible or advisable, to the people of Ceylon.[1] Before the beginning of the war against the Rajarata, Parakramabahu is said to have worked out a plan of campaign in a way suited to the ingenuity of the times. The *Mahavamsa* states that by a careful study of the literary works useful in making wars, such as the textbook of *Kotalla*, (i.e. *Kautiliya Arthasastra*)[2] Parakramabahu made a successful onslaught. There are frequent references to various types of spies employed by the Sinhalese kings. The spies mentioned in the *Mahavamsa* are also described in the *Arthasastras*. The four means of success, *upaya*, as mentioned in the *Mahavamsa*,[3] appear to have been taken from the four stratagems enumerated in *Kautiliya*—*bheda* (division of the enemy), *danda* (open war offensive), *sama* (friendly negotiations) and *dānāni* (gifts and bribes). Hence, many rules of international law and practice, state-craft and military stratagems were taken from Indian texts. The Brahmin advisors would not have failed to refer to the *Kautiliya Arthasastra* and other *Niti* works.

Ecclesiastical Law

The influence of Buddhism on the culture of the Sinhalese can never be underestimated. Both in India and in Ceylon, Buddhism and Hinduism flourished side by side and received royal patronage. The *Mahavamsa* and the *Culavamsa* give many instances where Sinhalese kings had gone and made their obeisance at Hindu shrines such as the Kataragama Devale and the Mahadevale at Matara.

By the side of the vihares could be found Hindu devales in almost every part of Ceylon. In spite of the introduction of Buddhism, worship in the Hindu devales continued during the Buddhist period of the Sinhalese kings. The Hindu consorts of the Sinhalese kings and their retinue also continued to worship in Hindu shrines for their religious advancement. The Sinhalese firmly believed in the efficacy of worshipping some of the leading deities in the Hindu pantheon. Thus, one finds Siva, Vishnu and even Pattini and many other Hindu deities worshipped by the Sinhalese. Hinduism made a significant contribution to the growth of the Buddhist ritual by offering to the people tangible forms of worship, such as propitiating the Gods Siva and Vishnu, who, in turn, conferred their blessings on the devotees. As a result, Buddhism absorbed into its fold Hindu practices such as the worship of Vishnu, Siva, Skanda, etc., thus adapting itself to circumstances.[4] As a

1. *Culture of Ceylon in Medieval Times* by Geiger, p. 159
2. *Mahavamsa* 70, 56–58
3. *Mahavamsa* 58, 3; *Kautiliya* 2–10 (Shama Sastri's Ed.) p. 74, translation p. 84.
4. *Society in Medieval Ceylon* by Ariyapala, p. 4

counter-measure, practices such as chanting of *pirith* were popularized and emphasis began to be laid on the worship of relics such as the Tooth Relic, Hair Relic and the Bo-Tree.[1]

Referring to the 13th century, Ariyapala states that about this time, Mahayanism, which was influenced by Hindu forms of worship, crept into the Island, and during the period of decline, Hinduism took greater hold in Ceylon.

In the reign of Parakramabahu IV, many religious activities were carried on. He appointed to the office of the Royal Teacher a Cholan Thera who was versed in various tongues. Significant of the spread of Hindu ideas, is his erection of a temple to Vishnu where he placed a statue of this god.[2] During this period, the Hindu gods began to be worshipped at Hindu devales which were attached to Buddhist temples.[3]

The rules of pupillary succession taken from the *Vinaya Pitaka* have their counterpart in the rules of succession peculiar to Hindu *Maths* in India. Here again, although similarities may be found, it cannot be postulated that one is derived from the other. Each might have had an independent origin in their respective periods of evolution.

A survey of the Kandyan law and its comparison with the Indian customary law and the *Dharmasastras* prove beyond all doubt that the laws of the Sinhalese were not the laws of the Aryans as enshrined in the *Dharmasastras*. As Dr. Derrett states:[4] "It seems that the Sinhalese were a people of predominantly non-Aryan descent, with a way of life substantially identifiable as akin to that common in modern South India. Aryan ideas do not seem to have passed them by, indeed that can hardly have been the case since the Indo-Aryan 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 even more clear, and though they treated the aboriginals as subject peoples, they did not for a long period disdain to mix freely with them."

1. Ariyapala, pp. 4 and 5
2. *Culavamsa*, pp. 90, 101, 102
3. Ariyapala, p. 11
4. Derrett, p. 148

Chapter VI

APPLICABILITY OF KANDYAN LAW

THE Kandyan kingdom was ceded to the British Crown in 1815. In accordance with the Kandyan Convention which was given the force of law, a Proclamation was issued by Governor Brownrigg. Section 4 of this Proclamation states: "The Dominion of the Kandian Provinces is vested in the Sovereign of the British Empire, and to be exercised thro' the Governors or Leiutt. Governors of Ceylon for the time being and their accredited agents, reserving to the Adikars, Dessavas, Mohottales, Corals, Vidaans and all other chiefs and subordinate native headmen, lawfully appointed by authority of the British Government, the rights, priviledges and powers of their respective offices and to all classes of the people, the safety of their persons and property with their civil rights and immunities, according to the Laws, Institutions and Customs established and in force amongst them."

By section 5, the Buddhist religion was declared to be inviolable and its rites, ministers, and places of worship were to be maintained and protected. By section 6, every kind of bodily torture and all mutilation of limb, member or organ was prohibited and abolished. Section 7 provided that no sentence of death should be carried into execution against any inhabitant except by the written warrant of the Governor or Lieutenant Governor after trial in the presence of an Agent of Government.

Section 8 provided that, subject to conditions stated therein, the administration of civil and criminal justice and police over the Kandyan inhabitants was to be exercised according to the established forms and by ordinary authorities, saving always the inherent right of the Government to redress grievances and reform abuses. Section 9 applies special rules to certain personnel, civil and military, who are not Kandyans.

When the terms of this Convention were reported to the Prince Regent, he declined to adopt the pre-existing laws and courts of Kandy till he was in a position to get more detailed information. Hence, a Proclamation of May 31, 1816, announced that the ancient laws of Kandy were to be administered until His Majesty's pleasure should be known on their adoption *in toto* as to all persons within the Kandyan territory, or their partial adoption as to the natives and the substitutions of new laws and tribunals for the trial and punishment of His Majesty's European subjects for the offences committed thereon.

After the historic rebellion of 1818, it was thought that the powers of the Kandyan chiefs should be considerably curtailed. Therefore the Proclamation of 1815 was amended by Proclamation of 1818

which greatly limited the powers of the Kandyan chiefs. Although it made detailed rules governing the administration of justice in cases where Kandyans were defendants either in civil or criminal cases, it did not interfere with the general administration of Kandyan law which was vested in the Agents of Government, assisted by Kandyan Assessors and by the Board of Commissioners appointed by the Governor.

The Kandyan law was a territorial law and not a personal law during the regime of the Sinhalese kings. The Sinhalese kings applied the Kandyan law to all their subjects irrespective of the question as to whether they were Kandyans or not.[1] They also applied the Kandyan law to all lands situated within the Kandyan territory.[2] Thus, the Kandyan law was applicable even to the Tamil inhabitants within the Kandyan territory.[3]

The Judges who were called upon to administer justice during the early British regime followed the practice of the Sinhalese kings and applied the Kandyan law to all persons within the Kandyan territory and to all lands situated within the Kandyan Provinces.[4] Even a Muslim woman who was married in *diga*, forfeited her rights to the parental property.[5] The Kandyan law, therefore, became applicable not only to the Kandyans but also to the low country Sinhalese, and to Tamils and Muslims who were resident within the Kandyan territories.

The Charter of 1833 repealed the previous Charters but made no changes on this matter. The decisions of the Judicial Commissioner extending over a period of 20 years, show that no distinction was made between a Kandyan and a non-Kandyan in the application of the Kandyan law within the Kandyan territories.

In 1851, the Judges of the Supreme Court recommended to the Governor that the laws of the Maritime Provinces should be made applicable in the Kandyan Provinces to all persons other than the Kandyans, but Ordinance No. 5 of 1852 did not go so far. It enacted that:—

(1) "Where there is no Kandyan Law or custom having the force of law applicable to the decision of any matter or question arising for adjudication within the Kandyan Provinces.....the Court shall in any such case have recourse to the law as to the like matter or question in force in the Maritime Provinces."

(2) "That the criminal law of the Maritime Provinces be applied to the Kandyan Provinces."

1. *Mongee v. Siarpaye* (1820) Board of Minutes, July 7th
2. *Mongee v. Siarpaye* (*supra*)
3. *Mongee v. Siarpaye* (*supra*), also *Moona Cheena & Co. v. Ponnatchy* D.C. Kurnegala 7556
4. Re *Kershaw v. Nicoll et al.* (1862) Ram. Rep. 1860-62, p. 157; B. & S. p. 87
5. also D. C. Kandy 18794 (1849) Austin's Reports, p. 99

(3) "That the inheritance and succession to the real estate, situated within the Kandyan Provinces, of Europeans and their descendants and Burghers, and the succession to the personal property of males of those classes, who at the time of their death are domiciled within the Kandyan Provinces, shall be regulated by such laws as would have applied if the property had been situated or the persons domiciled in the Maritime Provinces;"

(4) "That a marriage between parties, one of whom is a European or descendant of a European or a Burgher, shall only be valid if it would so be valid if contracted in the Maritime Provinces;"

(5) "That the code of Mohammedan Law promulgated on August 5, 1806, apply to Mohammedans in the Kandyan Provinces."

Kandyan law—a personal law

Kandyan law became a personal law as a result of a radical changes brought about by the decisions of the Supreme Court on the applicability of Kandyan law. These decisions may be examined in chronological order.

In *Kershaw v. Nicoll et al.*[1] the Supreme Court re-affirmed the view that Kandyan law was territorial in its application. It was held in that case that the wife of a Scot domiciled in the Kandyan districts, was entitled to hold property acquired by her as a separate estate in accordance with the Kandyan law, the operation of which was not limited to Kandyan natives.

The case of *William v. Robertson*[2] which over-ruled *Kershaw's* case (*supra*), became the starting point of an erroneous misconception that Kandyan law was a personal law, applicable only to the particular community of Sinhalese commonly known as the Kandyans. It is submitted, with respect, that the reasons given in this case are untenable and the principle established by this decision is not only in conflict with the previous decisions on this matter but also opposed to the spirit of the Kandyan law. Clarence, J., with whom Dias, J., agreed, held the view that when the British took over the Maritime Provinces, the Roman-Dutch Law applied to all the inhabitants, whereas the Charter of 1801 said exactly the opposite. He also stated that the Kandyan law applied only to the Kandyan Sinhalese which statement is not correct. Burnside, C. J., rested his judgment on the ground that there was no Kandyan domicile apart from a Ceylon domicile; an assumption which has no foundation.

As stated earlier, the low country Sinhalese were governed by their own customary laws and only when these were silent or not

1. (1862) Ram. Rep. 1860-62, pp. 157, 164
2. (1886) 8 S. C. C. p. 36

clear, was the Roman-Dutch Law applied by the Dutch. Further, questions of domicile do not have any application where different systems of law apply to a particular country. There are a number of countries where each territorial division is governed by a particular system of law and in such places, to determine the applicability of the laws, each part where a system obtains is regarded as a separate unit and the laws of domicile are applied. Hence, it was to be inferred that for the purpose of the application of Kandyan law, the Legislature distinguished between a Kandyan domicile and a domicile outside the Kandyan territory.

The principle laid down in *Kershaw's* case formed the starting point of a series of subsequent rulings. Ordinance No. 5 of 1852 expressly refers to Europeans and Burghers domiciled in the Kandyan Provinces.

In *Kapuruhamy et al. v. Appuhamy*,[1] the Supreme Court took the view that a child of a low country Sinhalese who had permanently settled in the district of Kandy and who had a child by a legally married Kandyan wife, was not a Kandyan and was governed by Roman-Dutch Law.

In *Mudiyanse v. Appuhamy*,[2] the Court even went to the extent of holding that a Sinhalese man whose father was a Kandyan and whose mother was a low country Sinhalese, and who had settled in Kandy, owning property in Kandy, was not a Kandyan to whom Kandyan law became applicable.

In *Bandaranayake v. Bandaranayake*,[3] it was held that the marital rights of a Kandyan Sinhalese woman who was married to a low country Sinhalese man, were governed by Kandyan law. The principle that she acquired the status of her husband on marriage in view of the express provisions of the Matrimonial Rights and Inheritance Ordinance which invested the wife with the status of her husband, was not applied on the ground that the low country Sinhalese and Kandyan Sinhalese did not belong to different races but the same race. For this purpose, the Court relied on the earlier decisions of *Manikka v. Peter*,[4] and *Wijesinghe v. Wijesinghe*.[5] In the latter case, it was held that in respect of succession to immovable property in the Kandyan district a low country Sinhalese was subject to Roman-Dutch Law.

It is submitted that the proposition that the Kandyan Sinhalese and the low country Sinhalese belong to the same race is erroneous. In the first place, as pointed out at the beginning of this book, the concept of racial purity is indefensible. Secondly, historical researches show that at various times many people came from India

1. (1910) 13 N. L. R. p. 321
2. (1913) 16 N. L. R. p. 117
3. (1922) 24 N. L. R. p. 245
4. (1899) 4 N. L. R. p. 243
5. (1891) 9 S. C. C. p. 199

and settled in this country, so that it cannot be said that the low country Sinhalese and the Kandyan Sinhalese belong to one and the same race. There is also a difference in linguistic and racial groups.

The theory that Kandyan law was solely applicable to those Sinhalese who could claim to be Kandyans, led the Courts to hold that Moor residents in the Kandyan Districts were not governed by the Kandyan law.[1]

After the series of decisions referred to above, the earlier view that the low country Sinhalese who were settled in the Kandyan Districts were governed by Kandyan law,[2] was rejected and it became settled law that Kandyan law applied only to "Kandyan Sinhalese" and their descendants and not to others.[3] The child of a low country Sinhalese man who was permanently settled in the Kandyan Provinces and married in *binna* to a Kandyan Sinhalese under the Kandyan Marriages Ordinance, was held not to be governed by Kandyan law.[4] Even the daughter of a Kandyan Sinhalese man married to a low country Sinhalese woman was held not to be a Kandyan.[5]

The conflicting decisions of the Supreme Court on the question of the applicability of the Kandyan law and the confusion which resulted in consequence of the decisions which obscured the settled view that Kandyan law was territorial and not personal, led to an agitation which resulted in the appointment of a Royal Commission to determine the applicability of Kandyan law. The Commission, in its Report,[6] drew attention to the frequency of marriages between Kandyan Sinhalese and low country Sinhalese and stated that the principle embodied in the case of *Mudiyanse v. Appuhamy*,[7] was contrary to the custom of the Kandyans and the generally accepted principle on this matter. Effect was given to this Report, and the Kandyan Succession Ordinance, No. 23 of 1917 enacted that a person is governed by the Kandyan law if he is the issue of

(a) "a marriage contracted between a man subject to Kandyan Law and a woman not subject to Kandyan Law,"

or (b) "a marriage contracted in *binna* between a woman subject to Kandyan Law and domiciled in the Kandyan provinces, and a man not subject to the Kandyan Law."

Section 4(3) enacts that the term "domiciled" should be interpreted in the same manner as if the Kandyan Provinces constituted a separate country. Applying this construction, the children of a

1. *Saiboo Tamby v. Alamet* (1851) 2 Ram. Reps. p. 163 D. C. Kandy 23519; also Austin's Reports, p. 150; re Europeans settled in the Kandyan Districts, *vide Williams v. Robertson* (1886) 8 S. C. C. p. 36
2. In *Re Juanis Gomes* D. C. Testy Kandy 390—1 B. & S. p. 33 (1862)
3. *Mathes Appu v. Habibu Marikar* D.C. Kandy 4213; (1891) 2 C.L.R. p. 46
4. *Kapuruhamy v. Appuhamy* (1910) 13 N. L. R. p. 321
5. *Punchihamy v. Punchihamy* (1915) 18 N. L. R. pp. 294, 297
6. Sessional Paper 1 of 1917
7. (1913) 16 N. L. R. p. 117

Kandyan woman married in *diga* to a low country Sinhalese man, were held not governed by the Kandyan law.[1] As this Ordinance does not apply to the issue of irregular unions, the child of a Burgher and a Kandyan woman, by such a union, is not governed by Kandyan law, although it became legitimate by subsequent marriage of the parents.[2]

This piece of legislation, although it effected a partial solution to the vexed question as to whether the Kandyan law was applicable to a particular person or not, did not settle the difficult and knotty point as to who a Kandyan is. It leaves the definition of the word "Kandyan" still at large. The definition of a Kandyan as set out by this Ordinance, may be regarded as an *illustrio obscuri obscurio*. The correct approach to this difficult question is to find out whether the Sinhalese parent in question, who is a Kandyan, is a descendant from the Sinhalese who had settled permanently within the Kandyan territories at the time of the annexation of the Kandyan territories by the British. If they were so settled, then, applying the provisions of the Kandyan Succession Ordinance, one may determine the status of the child. But this process, in practice, is extremely difficult.

No legislation has been enacted to declare the status of a spouse who married a Kandyan under Section 2 of Ordinance No. 15 of 1876. If the wife is taken to be of the same race and nationality as the husband for certain purposes, in view of the judicial dicta that Kandyan Sinhalese and low country Sinhalese are not persons of a different race or nationality, Ordinance No. 15 of 1876 does not make a low country woman married to a Kandyan, a Kandyan, and vice versa; a low country man who marries a Kandyan woman does not become a Kandyan. The property of spouses of such marriages will be governed by the system of law applicable to them individually and, on death, the law of intestate succession will be Kandyan law in the case of a Kandyan, and the law applicable to the other spouse.

Muslims are governed by their personal and religious law. Hence, when a Kandyan, after conversion to Islam, marries a Kandyan, both spouses will be governed by the Muslim law on all matters governed by that system. But when a Kandyan marries a Muslim and each spouse adheres to his or her religious practices, the wife will take the status of the husband since Muslim and Kandyan customs apply to two different races although they may have the Ceylonese nationality. The same observations will apply to marriages between Kandyans and people who belong to other races or nationalities.

The subjects governed by Kandyan law

In the absence of statutory provisions, the Kandyan law only applies to personal relations such as marriage, guardianship, minority,

1. *Punchimenike v. Peeris Sinno* (1923) 1 Times p. 148
2. *Ran Banda v. Kawamma* (1924) 6 Cey. Law. Rec. p. 40

adoption, legitimacy, parent and child, law governing gifts, intestate succession and service tenures.[1] The rest of the civil rights of the Kandyans are governed by the general law of the Island. In mercantile matters, the English law as adopted in Ceylon, is applicable. In matters governed by Kandyan law, when Kandyan law is silent, the Courts have heard evidence of custom.[2] This practice was soon abandoned in view of the unreliability of experts and when the Kandyan law was silent on any matter, the Roman-Dutch Law came to be applied. This principle received statutory recognition.[3]

In the early British period, the Kandyan law was consistently applied to the Kandyans. Hence the view was taken that Kandyan law does not cease to apply by the adoption of non-Kandyan practices in giving a Kandyan in marriage by adding an additional solemnity such as the solemnization of marriage by a Catholic priest, etc.[4] But after the option was given to a Kandyan to marry under the Kandyan Marriages Ordinance or the General Marriages Ordinance, he could elect and the marriage will be governed by his selection.

Many examples may be given to show that the principles of Roman-Dutch Law have been adopted in deciding the proprietary rights between Kandyans in the absence of provisions in the Kandyan law. In *Kiry Menika v. Kiry Menika*,[5] the Court, while dealing with a possessory action, held that the Roman-Dutch Law requirement of possession for one year and one day applied. In *Lindsay v. Oriental Bank Corporation*,[6] the Court adopted the principle of Roman-Dutch Law and held that where there is a judgment against several defendants, each of them is only liable for his share and cannot be called upon to pay the whole judgement debt. Before one can apply the principles of Roman-Dutch Law, one must however exhaust the Kandyan law and the statutory law on that particular matter.

The Courts have applied the rule of Roman-Dutch Law that even in the absence of a clause to warrant and defend title, the vendor must perform his obligation by delivering possession of the property which was sold to the vendee.[7] The obligation of the husband to support his wife, a principle recognized by the Roman-Dutch Law and embodied in the provisions of the Maintenance Ordinance, was applied to Kandyans, as Kandyan law is silent on this matter.[8]

1. *Siman Appu v. Kalloo Ettana* 1863–1868 Ram. Reports, p. 130
2. (1837) Morg. p. 147
3. Section 5 of Ordinance No. 5 of 1851, provides that where the Kandyan law is silent on any matter, the law of the Maritime Provinces shall apply.
4. *Siman Appu v. Kalloo Ettana* 1863-1868 Ram. Reps. p. 130, C. R. Dambool 3079
5. (1855) Ram. Reps. p. 62
6. (1860) Ram. Reps. p. 54
7. *Mohammadu Lebbe v. Dingiralle Aratchy* (1857) 2 Lorensz, p. 120
8. *Menike Hamy v. Loku Appu* D. C. Kegalle 916 (1898) 1 Bal. Reps. p. 161

Although independent traces of *jus retentionis* are found in Kandyan Law, yet the Roman-Dutch Law was applied to develop this concept.[1]

In the Kandyan territory many new servitudes which were in use among the Kandyans were later recognized by the Courts (as for example, the right to thresh paddy on the threshing floor) on the principle that the Roman-Dutch Law recognized new kinds of servitudes, provided sufficient use was proved.[2]

In applying the principles of Roman-Dutch Law, only those portions of it which were received became applicable. Our Courts have adopted the eclectic attitude of adopting the principles of Roman-Dutch Law to suit the local social conditions.[3] A view has been taken that only so much of the Roman-Dutch Law as suits our circumstances should be adopted. Hence the Roman-Dutch remedy known as Namptissment—a provisional decree by which a defendant was ordered to pay the plaintiff's claim on documents which disclose liability[4]—was not enforced as it was either never adopted or was obsolete.[5]

As the Roman-Dutch Law is only to be resorted to in the case of *casus omissus*, it cannot be applied where there is a specific provision of the Kandyan law governing the particular matter. Hence, the Roman-Dutch Law was not applied to the question whether marriage conferred majority on Kandyans.[6] It is to be further noted that although it would not be justifiable to apply the concepts of the Roman-Dutch Law relating to *fidei-commissum* in construing a Kandyan deed of gift,[7] yet, as the law of *fidei-commissum* has become deeply rooted in the legal system of Ceylon, it is possible to apply the principles of Roman-Dutch Law relating to *fidei-commissum* where in fact the Kandyan deed of gift creates a valid *fidei-commissum*.[8] This view has been firmly entrenched though it was disapproved of in *Dantuwa v. Setuwa*.[9]

Thus, it is permissible to apply the Roman-Dutch Law to determine whether a deed creates a *fidei-commissum* and to apply the Kandyan law to determine the fidei-commissary heirs.[10]

Many principles of Kandyan law have been abrogated by statute either impliedly or expressly. Hence meticulous care must be taken to find out whether any rule of Kandyan law has ceased to exist as a result of legislation before it could be applied. Thus,

1. *Appuhamy v. Silva* (1891) 1 S. C. R. p. 71
2. *Kawrala v. Kirihamy* (1917) 4 C. W. R. p. 187; cf. 14 N. L. R. p. 167
3. *Neate v. De Abrew Hamine (Maria)* (1883) 5 S. C. C. p. 126
4. *M. Mathes Pieris v. Perera Haminey* (1880) 4 S. C. C. p. 24
5. *Gibson v. Rodney* (1830) 1820–33 Ram. Reps. p. 160
6. *Mutiah Chetty v. Dingiria* (1907) 10 N. L. R. p. 371
7. *Dantuwa v. Sethuwa* (1907) 11 N. L. R. p. 39
8. *A. G. A. Kandy v. Kalu Banda* (1921) 23 N. L. R. p. 26
9. (1907) 11 N. L. R. p. 39
10. *Menika v. Banda* (1923) 25 N. L. R. p. 207

although in Kandyan law there is no limitation of interest on monies lent, yet, in view of the specific provisions of the Civil Law Ordinance, in no event can a person who lends money[1] recover interest more than the amount which is equivalent to the capital.[2]

In construing preference among judgment debtors in a case among Kandyans before the salutary provisions of the Civil Procedure Code came into operation, the Courts applied principles of equity in the absence of Roman-Dutch Law on the subject. This shows that in the absence of Roman-Dutch Law, Kandyan law and English law, principles of natural equity have been resorted to in Ceylon.[3] On the law of evidence matters, the early British Courts administered the English law[4] till the Evidence Ordinance was enacted.

The early British Courts also applied principles of natural law in trying to formulate the general principles governing Defamation by Slander among Kandyans, despite the provisions of the Legislature to apply the law of the Maritime Provinces in the Kandyan Districts.[5] It is respectfully submitted that resort should not be had to English equity where the Roman-Dutch Law, the residuary law of Ceylon, enshrines the principles of *aequitas* adumbrated by the praetors and developed by the jurists.

1. Section 6 of Ordinance No. 5 of 1856
2. (1858) Austin's Reports, p. 191; Marshall's Judgments, p. 358
3. D. C. Kandy 8142 per Carr, J. (1836) Austin's Reps. p. 5
4. *Fernando v. Laxa Mudiyanse* (1839) D. C. Colombo 1164, Morgan, p. 279
5. *Perera v. Morris and Smedley* (1847) 2 Ram. Reps. p. 92

THE LAW OF PERSONS

CHAPTER VII

SLAVERY

The origin of slavery

Slavery was an ancient institution among the Sinhalese.[1] The *Mahavamsa* records that when Prince Pandukabhaya (436-367 B.C.) was in hiding to escape the machinations of his uncles, his foster-father gave him a slave.[2] The *Nīti Nighanḍuwa* attributes the introduction of slavery to the Tamil princesses of Madura who married Sinhalese chieftains.[3]

Whatever theory may exist as to the origin of slavery, it was a well-established institution in Kandyan law and its rigour was mitigated only by the humane treatment accorded to the slaves by their masters.[4]

Methods of enslavement

The *Nīti Nighanḍuwa* mentions the following ways by which a person may become a slave under Kandyan law:[5]

(1) by birth (*antojato*)—being the offspring of a slave woman, born and bred in the same family for generations;

(2) by purchase from the parents or masters (*dhanakkito*), in satisfaction of a debt or liability created or incurred by them;

(3) by being kidnapped, or stolen from a foreign country or captured in war or by being expelled from their families for losing caste (*karamaranito*);

(4) by self-sale or seizure for a debt or being given as compensation in fulfilment of a tortious liability (*saaman dasaviopagato*).

Slaves by birth

Under the Kandyan law, the child followed the status of the mother[6]—the children of a female slave were the slaves of the master[7] although born to a free man;[8] but the children of a slave

1. S. p. 32
2. *Mahavamsa* X, 19; Geiger, p. 69
3. *Nīti* p. 7
4. Hayley, p. 135
5. *Nīti*, ch. 1, p. 7
6. Knox R. pp. 163, 164; also *Unambuwe Basnaike Nilame v. Kirria and his wife Tene* (1823) Hayley, Appendix II, Note 64
7. *Nīti*, p. 10
8. *Kosgolle Naide v. Kehelwatte Hene Koralle* (1825) Hayley, Appendix II, Note 70

by a free woman were not slaves and did not belong to the master of the slave.[1] Although a man may be free, children born to him of a female slave were the slaves of her master and though the father was a free man, he could not emancipate such a child.[2]

When a free man cohabited with a female slave, the owner of the slave was entitled to his services while she remained the property of the master—his position was comparable to that of a *binna*-married husband; but a free woman who married a slave, retained her free status and the children consequently were free.[3]

The master of a slave woman had the option to refuse to give her in marriage to a free man and had even the power to force her children, born of a free man, to work as slaves without receiving the husband in the household.[4]

Sale or surrender by parents

Parents had the right to sell their children as slaves or to give them as slaves in satisfaction of a debt or liability created or incurred by them. Sometimes children were sold for a small consideration (Henry Wright, Judicial Commissioner says that children were sold for a *bulat sourooloo*[5]) but when a person was given over as a slave without valuable consideration, since the days of King Kirtisri, a written deed (*ketta sakie*) was necessary for the claimant to establish his title. Persons who sold themselves and their children into slavery could not redeem themselves, unless such a stipulation was made in the deed of sale or surrender.[6]

The right of a parent to sell his child into slavery was gradually curtailed. In course of time the consent of both parents became necessary to sell their children.[7] If the mother was dead, and her relations were given the opportunity of supporting the children and did not take the burden, the father could sell the child.[8] Later, the sale was only permitted on the ground of the parent's inability to maintain the child, so that a child who was willing to support himself even by begging or who had sufficient property for sustenance, could not be sold into slavery against his will.[9] The right of sale was available only to the natural parents and not to the adoptive

1. D'Oyly, p. 126; *Niti*, p. 10

2. *Kosgolle Naide v. Kehelwatte Hene Koralle* (1825) Hayley, Appendix II, Notes 70 and 71

3. S. p. 33; Hayley, Appendix II, p.32; *vide* also *Maligawa v. Wavam Etana and Kalumenike*, 1 Pridham, p. 23, 15/6/1830; Lawrie's MS. p. 126

4. See letter of Forbes of 15th September, 1829, in Lawrie's MS. Vol. 3 under 'Slavery' and the reply dated 17th September, 1829

5. D'Oyly, p. 125—*bulat sourooloo* means a bundle of betel leaves inside which a small amount of money is placed

6. S. p. 32

7. *Niti*, p. 8

8. *Niti*, pp. 8-9.

9. *Niti*, p. 9

parents.[1] The right of persons, other than parents, to condemn the children to slavery was seldom recognized. A foster-parent had no right to sell a child into slavery.[2]

Lawrie refers to a case where according to the Disava of Nuwara Kalawiya, a person who plundered the property of his family during the confused period of the British war, on being called upon to account for the objects of his pillage, discharged the claim by the sale of his *diga*-married sister and her child to the Disava's family.[3] This shows the dire straits into which the Kandyan peasantry were driven after the revolution.

Capture in war

On capture, prisoners of war became slaves and they remained so at the king's pleasure. However, in actual practice only persons of low caste were so enslaved.[4]

Condemnation for crimes

Prisoners were seldom condemned into slavery for the commission of crimes, but as no crime was more heinous to Kandyan society than for a high caste woman to cohabit with a man of low caste, she received condign punishment by being condemned as a slave. The severity of the punishment meted out to her was later mitigated by her becoming a slave of the king who sent her to a distant place and kept her under his tutelage.[5]

Another heinous crime which reduced a person to slavery was robbery. Unless the convicted person made amends by restoring the property stolen or by paying the damages, he was condemned a slave,[6] but as this mode of slavery was frequently asserted, the Judicial Commissioners insisted on a written deed if the master claimed a free man as a slave on this ground.[7]

Self-sale

For the payment of a debt, or for obtaining money for the needs of a family, parents were allowed to sell their children, but the servile status in such cases was only temporary and capable of redemption by the payment of the debt, unless the intention to enter into permanent bondage was discernible by the clearest evidence.[8] But these practices ceased since the insurrection of

1. *Niti*, p. 8; P. A. p. 127
2. P. A. p. 127
3. Lawrie's MS. Vol. 3, p. 292 under 'Slavery'; also S. p. 32
4. Hayley, p. 138
5. Lawrie's MS. Vol. 3, p. 290 under 'Slavery'
6. *Unambuwe Basnayake Nilame v. Yaalegoda Vidhane* (1823) Hayley, Appendix II, Note 69
7. (1824) Hayley, Appendix II, p. 68, Note 66
8. *Unambuwe Basnaike Nilame v. Kirria and his wife Tene* (1823) Hayley, Appendix II, Note 64; *Galagoda Kassakara Lekam v. Dingitti* (1824) Hayley, Appendix II, Note 66

1818.[1] Although earlier, there was no formal document necessary to effect a sale, later a formal deed (*kaerrae pota* or *ketta sakie*) was insisted upon, particularly when there was no valuable consideration.[2]

Seizure for debt

Indebtedness amongst the ancient Sinhalese had dire consequences. All debts doubled in two years.[3] A creditor had the right to seize a person or his children for non-payment of his debt. If the debt was not paid to the creditor, the debtor became the creditor's slave on an application made to the Disava and the claim being substantiated. Sawers says that by this method it was not unusual for a person of high caste to become a slave of a low caste man. No caste was exempt from this liability except the rodiyas whose vileness would render them useless as slaves.[4] But in practice, creditors of inferior caste were not allowed to seize debtors of a high caste as slaves. If such seizures were effected, the king intervened and paid the debt from the Royal Treasury or the debt was liquidated by voluntary contributions of the people.[5] The only people of inferior caste who were given the concessions to own slaves were the goldsmiths to whom gifts of such slaves were made by the petty chiefs or the king.[6] Lawrie remarks that such slaves were impatient of their status.[7] Not only the creditor but also a person who suffered damage in tort was allowed to seize the delinquent and hold him as a slave till his damages were paid. The creditors had the right not only to seize their debtors but the latter's children also, but this right was granted only to persons of high caste.[8] A creditor of low caste was given only the right to proceed against the debtor's estate.[9] A creditor who seized his debtor was bound to release him on payment of the debt. Children could not be sold into slavery by the parents against their will. The parents could not threaten to sell their children who had property if the latter refused to sell their properties to discharge their parents' debts.

Termination of Slavery

Slavery was terminated by emancipation, effluxion of a period of limitation or by acquisition of high office by the enslaved person.

1. Extracts from the proceedings of the Board of Commissioners, July 1829
2. S. p. 32; Hayley, Appendix I, p. 30 and Appendix II, Note 66
3. Philalethes, p. 241; Lawrie's MS.
4. S. p. 33
5. ibid.
6. ibid.
7. Lawrie's MS. Vol. 3
8. S. p. 32
9. *Daagaswatte v. Ukkua Wahumpureya* (1827) Hayley, Appendix II, Note 68

A person who wished to emancipate his slave had to do so by issuing a certificate of freedom (*ittamkeraya*), or by public declaration of freedom, followed by the ceremony of pouring water on the hands of the slave in the presence of witnesses.[1]

Emancipation can not only be express but also tacit. Thus an intention to emancipate was presumed when a man allowed his female slave to marry a free man and allowed them to live away from the master.[2] If no labour was exacted from a slave for the period of limitation (in 1837, the period was held to be six years[3]) the slave became free. The *Nīti Nighanduwa* mentions the period of limitation as the same as that necessary to acquire ownership of lands.[4] A slave also became free by the attainment of high office.[5]

During the early British regime, failure to observe certain provisions of statute law pertaining to slaves made the latter free.[6] One such provision required a notification by the owner who acquired a slave; failure to do so made the slave free.[7]

Slavery and caste

Slavery was not conterminous with caste. When caste and slavery came into conflict, the former was regarded as paramount. Thus Knox says:[8] "Slaves that are born of Honoured parents retain the Honour of their degree." As a majority of slaves in Sinhalese society belonged to the higher castes, slavery among them was not bondage in chains, but a humane institution: "it was of the same type of household slavery as in ancient Greece and Rome, not the bondage of the West Indian Plantations."[9] Most of the slaves in the Kandyan kingdom were persons of high caste and retained their caste.[10]

The right to exact services

There were several duties owed by the slave to his master. The master had the right to exact labour from his slave, provided he maintained the slave.[11] The master, however, was under a reciprocal duty to offer shelter and maintain the slaves who were in his possession but he could drive them out even if the slaves were destitute.

1. *Nīti*, p. 10
2. S. p. 32; Lawrie's MS. Vol. 3
3. Lawrie's *Gazetteer*, p. 764
4. *Nīti*, p. 11
5. Lawrie's MS. p. 296
6. Emancipation of Slave Trade Ordinance (No. 3 of 1837)
7. Section 5 Clause 3 of Ordinance No. 3 of 1837. See also decision of 13th September, 1841 per No. 3680 July 24 of 1841, D. C. Kandy South
8. R. Knox, p. 111
9. Hayley, p. 135
10. Proceedings of the Judicial Commission 28. 10. 1824; Lawrie's MS. Vol. 3 under 'Slavery'
11. S. p. 33

However it was not considered proper to do so unless the slaves gave their master "great and notorious cause of offence".[1]

Slaves, whatever might be their caste, were liable to perform all types of services, however menial the services might be.[2] Thus they carried water and hewed firewood. But a free *ratta* person, although a hired dependent, could not be compelled to carry palanquins or corpses.[3] A *ratta* female slave could not be compelled to marry a person of low caste.[4] Degrading forms of service such as burning the dead and preparing the funeral ablutions at the grave were assigned to the slaves. The most important duty of a slave was to bury his master.[5] Free men also buried their close relatives, but this was not considered a menial duty and they could not be compelled to perform these services to strangers. Persons who are not slaves cannot be compelled to bury the dead. Hence even a *vellala nilakariya* (service tenant) cannot be compelled to bury his master.[6] Female slaves were not compelled to carry corpses[7] but were expected to perform any other services pertaining to their sex, which they might have been called upon to do by their masters. Some slaves were retained for domestic service, but others were settled on lands and were employed as *nilakariyas*. Frequently, they were promoted to responsible positions in life.[8]

Right to inflict punishment

In early times, the master had absolute powers of life and death over his slave, so that he could even kill or maim the slave or his children.[9] Later, the rigour of the law was mitigated, and modified punishments, short of maiming or killing, were inflicted on the slaves.[10] The master had the power to inflict corporal punishment which included barbarous modes of chastisement such as flogging, confining in stocks, and cutting off the slave's hair. Such powers, although absolute in law, were yet tempered with mercy. If a person died intestate leaving a slave, the latter could choose to live with one of the heirs, in which event the others were compensated.[11]

Referring to slavery in Sinhalese society, the Board of Commissioners said:[12] "But in no part of the world is slavery in a milder

1. S. p. 34
3. ibid.
3. ibid.
4. ibid.
5. Pridham 1, p. 226
6. Judicial Commissioner's Diary, 28. 10. 1824
7. Judicial Commissioner's Diary, 12. 2. 1831
8. Proceedings of the Board of Commissioners, 25th July, 1829; Lawrie's MS. Vol. 3, p. 304
9. Lawrie's MS. Vol. 3, p. 298; Board of Commissioners, 29th July, 1829
10. Hayley, p. 142
11. *Niti*, p. 53
12. Proceedings of the Board of Commissioners, 29th July, 1829; Lawrie's MS. Vol. 3, p. 298

form than here. Cruelty to a slave is scarcely known and in general they are treated more as adopted dependants of the family than menials. Indeed, there was no object for ill-using slaves. The owners were the principal landed proprietors of the country who confined their agricultural pursuits merely to the supply of grain for the use of their families and dependants and there was therefore no inducement for over-working or otherwise ill-treating them."

The right of disposal

The master had absolute powers of disposition over his slaves. He could gift, give by way of dowry, or even sell a slave.[1] In theory he could ignore the pangs of conscience and dictates of humanity, and could separate close relations by selling them to different persons.[2] Yet in practice, this was seldom done.[3] The master's right in this matter was restricted in two respects: he could not sell or transfer a male or female slave to a person of an inferior caste to that of the slave, and a female slave could not be given in marriage to a man of inferior caste against her will.[4]

The right to abandon

The master had the right to abandon his slave even though the slave was in abject poverty and in a state of destitution.[5]

The right of chastisement

The master did not have the power to put to death, or inflict loss of limb to his slave; such a power was reserved only to kings who sometimes delegated their powers to the Adigars and Disavas in times of war. These inhuman practices were not countenanced by the British.

The right of noxal surrender

If a slave committed robbery, the master could effect a noxal surrender of the slave to the person who had suffered the loss, or alternatively, make good the loss.[6]

Rights of slaves

A slave from whom the master exacted services had the following rights:

1. the right to be supported during the period such services were rendered;

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1. Lawrie's *Gazetteer*, p. 764
2. *Niti*, p. 10; also Buckland's *Textbook of Roman Law* for similar provisions in Roman Law which were later altered.
3. Proceedings of the Board of Commissioners, 29th July, 1829; Lawrie's MS. p. 299
4. *Niti*, p. 10
5. S. p. 30
6. S. p. 34; Hayley, Appendix I, p. 33

2. the right to his acquired property: a slave was the owner of the acquired property which on his death, passed to his children, provided the children also remained slaves under the same owners. The slave was competent to bequeath such property by will.[1] In the absence of children, if a slave died intestate, the property devolved on his master, but the master could not acquire title to a slave's property by prescription.[2]

Status in Court

The suits of slaves were not heard by superior tribunals, except when claims for freedom were made. Such claims were heard by the king who generally referred them to the Maha Adigar. There was no disability for slaves to testify in a Court.[3]

Methods of acquisition of freedom

A slave acquired his freedom in many ways. If sold for a debt, he might buy his freedom provided he had not disabled himself by stipulating with his master that he could not acquire his freedom. If a female slave was married to a free man and no work was exacted from her and she was allowed to live apart, she could acquire her freedom.[4] In the absence of any agreement to the contrary, an intention to emancipate was presumed.[5] In 1837, a slave gained liberty after 6 years.[6]

Emancipation

The usual mode of freeing a slave was express emancipation which took different forms. The master may issue a certificate of freedom, or may grant freedom by a public declaration, or may perform the ceremony of liberation by pouring water over the slave's hands, or make a verbal bequest of liberty at his death-bed.[7]

Emancipation by statute

During the early British regime, a slave was freed if the master did not observe certain statutory provisions. Thus, Ordinance No. 3 of 1837 enforced the compulsory registration of slaves; failure to observe these provisions made the slaves free.[8] Some statutes were

1. S. pp. 29–30; Proceedings of the Board of Commissioners, 25. 7. 1829; Lawrie's MS. p. 304
2. S. pp. 29–30
3. Proceedings of the Board of Commissioners 29. 7 1829; Lawrie's MS. p. 307
4. *Niti*, pp. 10–11; P. A. p. 128
5. *Niti*, p. 11
6. Lawrie's *Gazetteer*, p. 764, MS. p. 312
7. *Niti*, pp. 10–11; P. A. p. 128
8. Clause 3 of Ordinance No. 3 of 1837—*vide* case No. 3705, August 11/41, D. C. South, Lawrie's MS. p. 313; see also Case No. 3680, July 24/41, D. C. K. South

enacted to ameliorate the conditions of slaves and to discourage this servile institution.

Abolition of slavery

In the British period a series of legislative measures led the slave along the path of freedom. Regulation No. 13 of 1806 and No. 3 of 1808, required the registration of Tamil slaves. In 1816, the majority of the slaves in the Maritime Provinces, except Jaffna, were liberated. In the Kandyan Provinces, Government slaves were liberated on annexation of the Kandyan territory. Although many attempts were made by the British to free slaves, the Kandyan aristocracy with vested interests opposed measures to emancipate slaves under the pretext that in the absence of their slaves they could not maintain the pomp and dignity of their rank.[1] Hence the measures taken by the British to put an end to slavery were gradual.

Ordinance No. 3 of 1837 made it obligatory for the master to register the slaves. A failure to do this duty gave freedom to the slave. In 1844, a revision of the register showed that due to the neglect of registration, the majority of slaves throughout the Island became free. Finally, Ordinance No. 20 of 1844 gave the *coup de grace* to this ancient degrading servile institution. This notable achievement is chiefly attributed to the indefatigable energy and enterprise of Sir Alexander Johnstone.[2]

1. Hayley, p. 144
2. *Vide* Johnstone's MS. in the Colombo Museum

CHAPTER VIII

MINORITY AND LEGITIMACY

Minority

The Kandyan customary law recognized three degress of minority, with corresponding degrees of disabilities in law. Till the age of ten a child was incapable of performing any legal act. At ten he was competent to make a will and to change his guardian, provided it was affirmatively proved that he had sufficient understanding and intellect to do these acts.[1] The Kandyan customary law regarded 16 as the age of majority for both sexes. The age of 16 often coincided with the age of puberty of women. At this age a person was presumed to be competent to contract debts and was answerable in law for all his juristic acts.[2] The *Nīti Nighanduwa* states however, as an exception, that females were not free from the control of the guardian until they are married or have attained the age of twenty.[3]

According to the opinion of the chiefs, a person is said to have attained reason at the age of twelve.[4] This view however, is not supported by the works of the institutional writers on Kandyan law. The *Nīti Nighanduwa* makes a distinction between *nocents* and *innocents*. According to this work *nocents* or majors are those who are 16 years of age and upwards; *innocents* or minors are those who have not reached this age.[5] Armour also makes a similar distinction: *danna aya* are those who have attained the age of 16 years and *nodanna aya* are infants and those under the age of 16.[6] There is no distinction between males and females in this respect.[7] The Kandyan law also sets out the proposition that a person did not attain full majority till he has reached his fortieth year.[8] Up to that age he had the privilege of repudiating sales and transfers and reclaiming the property alienated, but sales by persons up to that age are only voidable and not void.[9] The customary laws on this topic are now obsolete as a result of statutory modifications.

By statute, various ages have been prescribed for a person to enter into legal transactions. Thus Ordinance No. 13 of 1859

1. S. p. 31; P. A. p. 94; *Nīti*, p. 46
2. S. p. 27, quoted with approval by Carr, D. J. in D. C. Matale 1712 on 26th November, 1836; Morg. pp. 105, 423; Austin Reports, p. 238
3. *Nīti*, p. 46
4. Revenue Commissioners Diary, 21st December, 1816; Lawrie's MS. p. 38
5. *Niti*, p. 7
6. P. A. pp. 1-2
7. S. p. 31
8. ibid.
9. *Siriwardane v. Loku Banda* (1892) 1 S.C.R. p. 218; *Dissanaike v. Elwes* (1909) 12 N. L.R. p. 291

enacted that no marriage could be valid to which the male party was under 16 or the female under 12.[1] Section 12 of the Kandyan Marriage Ordinance, No. 3 of 1870 enacted that no marriage could be valid to which the male party was under 16 years of age or the female under 12 years of age, but if the parties have continued to cohabit as husband and wife for one year after they attained the ages mentioned above respectively, or if a child had been born to them during the nonage of both, then the marriage ceased to be impeachable and invalid on the ground of nonage.

For the purposes of instituting or defending an action, a person is deemed to be a major on attaining the age of twenty-one years, or on marriage, or on obtaining letters of *venia aetatis*.[2]

Under the old Kandyan law the privilege of a minor to reclaim the lands which had been alienated was subject to the special reservation that the minor could only exercise his or her rights till he or she attained the age of twenty-six.[3] This provision made title to property insecure. Consequently, Proclamation of 14th July, 1821, enacted that all future sales of land in the Kandyan Provinces should be final and conclusive and that in respect of past sales no privilege of repurchase should attach to the seller, unless the seller made his claim within six months.

The Wills Ordinance, No. 21 of 1844[4] provides that no will made by any male under the age of 21 years or by any female under the age of 18 years is valid, unless such person has obtained letters of *venia aetatis* (the Governor-General has the power to issue letters of *venia aetatis*.[5]) This Ordinance makes no distinction between Kandyans and non-Kandyans.

The Kandyan Law of Majority at Puberty was abolished by statute[6] which fixed the age of majority for all persons in Ceylon at twenty-one years. Interpreting the provisions of this statute, it was held that a person governed by the Roman-Dutch Law attains majority not only by attaining the age of 21, but also by being granted letters of *venia aetatis* and by marriage.[7] However it was held in D.C. Kandy 53972[8] that there was no rule in Kandyan law which conferred majority on a person who married. This ruling has been followed in later cases.[9] It is a matter of regret

1. Sec. 3 of Ordinance No. 13 of 1859
2. Section 502 of Civil Procedure Code, Ordinance No. 2 of 1889; Hayley, p. 210
3. Proclamation of 18th September, 1819; Lawrie's MS. p. 41—Lawrie says that this Proclamation was not printed in the quarto Edition of the Legislative Acts.
4. Cap. 49, Section 3
5. Sec. 4 of Wills Ordinance
6. Age of Majority Ordinance, No. 7 of 1865
7. *Muttiah Chetty v. Dingiria* (1907) 10 N.L.R. p. 371; 2 A.C.R. App. XI
8. (1871) Vander Straaten, p. 251
9. *Uyandena Ukku v. Yatiwila Arumedureya* S. C. Min. June 22, 1898, cited by Modder (1st Ed.) 119, 120 and *Muttiah Chetty v. Dingiria* (1907) 10 N.L.R. p. 371; *Dissanaike v. Elwes* (1909) 12 N.L.R. p. 291

that the provisions of *Nīti Nighanduwa* were not cited before the judges who heard these cases. This work states that a woman was not free from guardianship until she married or attained the age of twenty.[1] It is further stated that if a Kandyan woman marries or reaches the age of 20 she attains majority. Despite this clear statement in the writings of the institutional writers, the ruling in *Muttiah Chetty v. Dingiria* being a decision of a Full Bench of the Supreme Court, settled the law on the point to the contrary. In *Haturusinghe v. Ukku Amma*,[2] it was reiterated that marriage did not confer majority on a Kandyan minor.

Contracts by minors

A contract by a married woman who is a minor, without the consent of her husband, is voidable and not void.[3] On payment of the purchase money and the value of improvements, the contract of sale could be set aside.[4] However, if the contract is not detrimental to the minor and is not repudiated during her minority, it is binding on the estate if the minor died after attaining majority. Contracts for necessaries are however binding on the minor. A contract to marry is not enforceable against a Kandyan minor.[5]

If a minor fraudulently represents himself to be of full age, then the contracts bind him.[6]

Legitimacy

"In proportion as the rules of marriage and divorce were vague until recent legislation, so the boundary between legitimacy and illegitimacy of birth was not clearly defined," says Hayley.[7] The Kandyan law recognized three classes of offspring: the legitimate, illegitimate and the intermediate class, which Hayley terms as "semi-legitimate".[8] Legitimate children were the children of lawfully valid marriage under the conditions that have been set out earlier. The offspring of a *diga*-marriage became members of the father's family and were entitled to rights of maintenance and inheritance, but the children of a *binna*-marriage were only members of the mother's family. In either case they were entitled to acquire certain rights in the estates of both parents. The fact that the date

1. *Nīti*, p. 46
2. (1844) 45 N.L.R. p. 499
3. *Muttiah Chetty v. Dingiria* (1907) 10 N.L.R. p. 371.
4. S. p. 31; *Dissanaike v. Elwes* (1909) 12 N.L.R. p. 291; *Siriwardene v. Loku Banda* (1892) 1 S.C.R. p. 218
5. *Navaratna v. Kumarihamy* (1927) 29 N.L.R. p. 408; *Hendrick Sinno v. Harmanis Appu and Sirimalhamy* (1879) 2 S.C.C. p. 136
6. *Wijeyasooriya v. Ibrahimsa* (1910) 13 N.L.R. p. 195; also *Fernando v. Bastian* (1915) 1 C.W.R. p. 125 and *Shorter & Co. v. Mohamed* (1937) 39 N.L.R. p. 113
7. Hayley, p. 200
8. ibid.

of the marriage was not easily ascertainable was not a material factor, since legitimacy *per subsequens matrimonium* was always recognized and received legislative sanction.[1] The only children who were deprived of the benefit of legitimation were those born in adultery.

The Kandyan Marriage Ordinance, No. 3 of 1870, which only applies to Kandyans who registered their marriages under the Kandyan Marriage Ordinance, did not expressly provide that persons born in adultery cannot receive the status of legitimate children by the subsequent marriages of their parents. Therefore by implication, says Hayley, the Kandyan Marriage Ordinance recognized the legitimacy of children born even in adultery, provided their parents were subsequently married. But if a Kandyan preferred to register his marriage under the general Marriage Registration Ordinance, No. 19 of 1907, then he was bound by Section 22 of that Ordinance which excluded adulterine bastards from legitimation by the subsequent marriages of the parents.[2]

In the lax state of matrimonial relations which existed under the Kandyan Sinhalese, it is very unlikely that any rule prohibiting such legitimation existed.[3] A child *en ventre sa mere* at the time of dissolution of a marriage by death or divorce, was regarded as born immediately before such an event for the purpose of legitimation.

Semi-legitimate persons recognized by ancient custom were the issues of marriages which were irregular for want of parental consent or which offended caste rules. Hence, if a man cohabited with a woman of equal caste but without the approval of his parents,[4] or if a woman formed a connection with a man in her parents' house,[5] or if a woman had intercourse with a man lower in caste than herself,[6] the children of such unions were entitled to succeed to the estate of their parents in degrees varying according as they were or were not fully legitimate children.

Illegitimate children who were the products of incestuous unions were prevented from inheriting any part of the paternal estate.[7] The issue of a man by a low caste woman during his parents' lifetime was also considered illegitimate.[8] The Kandyan Marriage Ordinance, No. 3 of 1870 impliedly abolished the former degrees of legitimacy. After its coming into operation, persons who are governed by it are now either legitimate or illegitimate accordingly as their parents' marriage is valid or not.[9]

1. Ordinance No. 13 of 1859
2. *Punchirala v. Perera* (1919) 21 N.L.R. p. 145
3. Hayley, pp. 200, 201
4. *Nīti*, pp. 14, 19
5. S. pp. 3–4
6. *Nīti*, p. 15
7. P. A. p. 34
8. *Nīti*, p. 14; Hayley, p. 201
9. *Kuma v. Banda* (1920) 21 N. L.R. p. 294; Hayley, p. 201

Presumption of Legitimacy

Under the old Kandyan law every child born during the time of the coverture of his parents was presumed to be legitimate, unless the husband immediately expelled his wife and repudiated the child as one born in adultery.[1] The Kandyan law recognized associated marriages till polyandry was abolished. Where such marriages were recognized, each husband was presumed to be the father of all the children although non-access in fact might be proved.[2] But ever since associated marriages were declared illegal, the child is presumed to be the son or daughter of the husband whose marriage is registered.[3]

By Section 112 of the Evidence Ordinance, a birth during a valid marriage, or within two hundred and eighty days after its dissolution the mother remaining unmarried, is conclusive proof of legitimacy, unless non-access or impotency can be established.

1. *Niti*, p. 19; P. A. p. 34
2. *Niti*, p. 71
3. *Dingiri Menika v. Heena Hamy* (1907) 2 A.C.R. App. VI

Chapter IX

ADOPTION

Objects of adoption

Among the Kandyans, adoption by a childless man or woman with the object of obtaining assistance and support during life and with the intention that the adopted child should succeed to the adoptor's property, is well known.

Although adoption is not a universal practice, still it has much significance.[1] Differing from the Hindu law, the purpose of adoption under the Kandyan law is purely secular; unlike the Hindu law, the Kandyan law does not give any religious significance to the institution of adoption. Differing from the Hindu law the adoption of a daughter is as common as the adoption of a son under the Kandyan law.

The adopted child is not regarded as continuing the line of the adoptor's family; he does not usually assume the family or *patabendi* name, though he assumes the house name of his adopting father or mother. Many old Kandyan families would have become extinct if the last male heir without children did not adopt someone to continue the family succession.[2]

In respect of adoption, the Kandyan law resembles the Tamil customary law in many ways. Among the Tamils of Ceylon, adoption was a secular institution having no religious significance;[3] under both systems of law the adoptor and the adopted person may be of either sex.[4]

Persons who may adopt

Usually it is a childless person who adopts under the Kandyan law, but there are instances where the adopting parent has children of his own. A natural child is called *eti karagannawa* and an adopted child is *eti karagathdaruwa* in which event Armour states that "the adopted child must get a special grant on a written document" in order to get rights in property of the adopting parent.[5] However this view has not been followed by the Courts.[6] Differing

1. Lawrie's MS. p. 18
2. ibid. p. 19
3. For *Thesawalamai, The Laws and Customs of the Tamils of Jaffna* by H. W. Tambiah, pp. 132 et seq.; For Customary Laws of the Tamils of Cattacoculam Pattu, *Laws and Customs of Tamils of Ceylon* by H. W. Tambiah, pp. 72–74. For Chetties of Colombo, ibid. pp. 112–113; Tamils of Cottiar Pattu, ibid. p. 70; Tamils of Tambulgamam Pattu, ibid. p. 44, and for further information, ibid. *Thesawalamai* p. 44
4. P.A. p. 39
6. Armour, p. 133; P.A. p. 40; Morgan's *Digest* p. 153
7. D. C. Kandy 1307 per Oliphant, C.J., (1841)Austin Reports, p. 51

from the Hindu law, under the Kandyan law a man or a woman may adopt a child.[1]

Person who could give in adoption

There is no restriction that a person cannot give in adoption one or more of his children. The Kandyan customary law permitted anybody to give his child in adoption, provided the child was of the same caste as that of the adopting parent.

Persons adopted

Similarly there is no restriction on the number of persons who could be adopted. The old Kandyan law which laid so much emphasis on caste, required that the adopted child must be of the same caste as that of the adopting parent; otherwise the adopted child could not inherit the hereditary property of the adopting parent.[2] The *Niti Nighanduwa* speaks of equal caste as a requisite for a valid adoption.[3] Armour states that the adopted child must be of the same caste as that of the adopting parent.[4]

An attempt was made by the early English judges to ignore the taboos created by caste and to consider caste discrimination as an antiquated relict which marred the social fabric of the Kandyans. There are judicial dicta which stressed that distinction of caste between the adoptor and the adoptee was a factor that should be ignored.[5] But in *Loku Banda v. Dehigama Kumarihami*,[6] the Supreme Court veered round to the original view of the Kandyan law and held that in order that there may be a valid adoption, the adoptor and the adoptee must be of the same caste. In this respect the Kandyan law departed not only from the Hindu law which allowed the adoption of a boy from a sub-caste of each of the four principal *varnas* by a man belonging to another sub-caste of the same *varna*,[7] but also from the Tamil customary laws which permitted the adoption of a child of a different caste. (Under the laws of *Thesawalamai*, if a man adopted a child of a different caste from his own, the adopted child acquired the caste of the adoptive father, but if a woman adopted a child, the adopted child retained the same caste as that of his own parents.[8])

Under the early Kandyan law, only close relations such as nephews and nieces could be adopted. Later this restriction was relaxed. A person could ignore the male children of his brother

1. Per Dias, J. in D.C. Kandy 64536 (1877) Ram. Rep. pp. 251 and 254
2. *Nīti*, p. 41
3. ibid.
4. Armour, p. 38
5. Dictum in D.C. Kandy 64536, Lawrie's MS. p. 27
6. (1904) 10 N.L.R. p. 100
7. Kane III, p. 675
8. For *Thesawalamai* Code, Part II, Section 7, *The Laws and Customs of the Tamils of Jaffna* by H. W. Tambiah, pp. 132 et seq.

and adopt only his female children.[1] Gradually the Kandyan law tolerated even a stranger being adopted. If the adoptee is a relation, it is not clear whether an ascendant could not be adopted, but there is clear authority that a cousin may be adopted.[2] The authorities do not consider the question whether the adoptee should be of the same religion as the adoptive parent since religious tolerance was practised among the Kandyans.

Intention of adoption

The intention to adopt with a view to make the adopted person an heir to the adoptive parents' estate, is an essential requisite under the Kandyan law.[3] The question has arisen whether such an intention should be openly declared or whether it could be inferred from circumstances. In this connection it must be stated that the law is strongly opposed to attempts to prove this relationship on the part of persons who have merely received assistance or maintenance from their benefactors or were favoured as protégés. Acts of benevolence or charity should not be treated as evidence of adoption. There must be clear and unmistakable intention not only to adopt but also to make the adoptee an heir.[4] Hence, the assumption of the care of a child, even coupled with making provision for his marriage, is insufficient to constitute adoption.[5] A stepson, just because he was allowed to marry in the *mulgedera*, cannot claim to have been thereby adopted. The mere fact that a woman lives with another person in the same house and allows the latter to be married in her home, and permits the latter's children to be born in her house does not mean that the former adopts the latter.[6] A child who has been allowed to remain with a person is not impliedly adopted by that person.[7] The mere fact that two persons addressed each other as father and son, is not sufficient proof of adoption.[8] Where a man married a pregnant widow, her child born in his house and brought up there was not regarded as an adopted child, and inherited nothing.[9] A son-in-law who remained in the house after his wife's death and who was allowed to bring a second wife, was held not to be an adopted child although he proved that his father-in-law died under the same roof and he married and lived in his house and that

1. D'Oyly's Notes, p. 81.
2. *Nīti*, p. 103
3. S. p. 28; P.A. p. 38; *Nīti*, pp. 41–43; *Wedda v. Balea* (1843) Morg. p. 347 and the judgment of Ennis, J. in *Dunuwille v. Kumarihamy* (1917) 4 C. W.R. p. 99
4. Hayley, p. 203 et seq.
5. *Pusumbahamy v. Keerala* (1891) 2. C.L.R. p. 53; *Wedda v. Balea* (1843) Morg. p. 347
6. *Nīti*, p. 42
7. *Nīti*, p. 42; P.A. pp. 38, 39
8. D.C. Colombo 3569 Ram. Rep. 1845 p. 1; D.C. Kegalle 2965, 6th March 1877, Ram. Rep. p. 59
9. *Nīti*, p. 42

the children were born to him there.[1] Similarly, a son-in-law who was allowed to remain in the father-in-law's house soon after his wife's death and who was allowed to marry a second wife and continued to stay with that wife was not to be regarded as an adopted child.[2] However, Armour says that in the case of a son's widow, the relationship will warrant the conclusion that the father of the deceased had decidedly adopted his daughter-in-law, and she would inherit if he died without issue. But if the daughter-in-law remained in her mother-in-law's house she would not be recognized as adopted.[3]

If a foster-father permitted his protégé to remain in his house after the latter attained the years of discretion and even allowed him to contract a marriage and to continue to dwell with his wife in the house, and the foster-father even went to the extent of engaging his protégé to manage the cultivation of his lands and perform the *rajakariya* services, yet if he did not publicly declare that he had adopted his protégé as his child to succeed as his heir to his estate, the protégé would have no right to any portion of that estate as an adopted child.[4]

A foster-son or prótegé, being married in *binna* to his patron's daughter, would not thereby be invested with the status of a co-heir by adoption, even if he (the foster-son) happened to be a nephew (sister's son). Therefore, if the foster-father died intestate, his estate would devolve on his daughter as sole heiress, and not to her and her husband jointly.[5]

Where a person gave his lands to a young lady who was living in his house as his adopted daughter as a *ketta sakie* (a token given to prove a gift), and gave her the original *talipot* (ola leaf) and the gold ornament (which was placed on his forehead when he was appointed Mudiyanse), it was held that such acts tantamounted to a public declaration of adoption.[6]

Is open declaration of adoption necessary ?

In a series of early cases it has been held that a formal declaration before the assembled headmen or relations was necessary to constitute a valid adoption.[7]

Decisions after 1860 became confused. In D.C., Kandy 29605,[8] the Supreme Court took a view inconsistent with the trend of

1. *Nīti*, p. 42, Armour p. 134
2. *Nīti*, p. 42
3. Armour, p. 134
4. Marshall, p. 353
5. Armour, p. 133
6. Judicial Commissioners Report, 25th February 1829, Lawrie's MS. p. 24
7. South Court, Kandy, 15769 (1846) Aust. p. 74; also D.C. Ruwanwella 1220, 21st October, 1833; Marshall's Judgment p. 353; D.C.S. Kandy 13371 (1845) Per Oliphant, C.J, Austin Rep. p. 52; D.C. Kandy 15015 (1844) per Carr, J. Austin Rep. p. 64, and D.C.K. 28190, Beven and Siebel, p. 26
8. Beven and Siebel, p. 61

previous decisions. In this case adoption was held proved by a recital in a deed that the grantor had adopted one Punchiralahamy some years before, although no publicity had been given to the alleged adoption. The Courts even went to the extent of holding that an adoption was sufficiently proved by a casual conversation between two Kandyan gentlemen. Thus, where a person proposed his son as a suitable husband to a young lady living in the house of a *Basnayake Nilame*, and the *Basnayake Nilame* rejected the proposal saying that the young lady was his adopted daughter and that he wished that she should live with him and inherit his property, it was held that adoption was proved.[1] Lawrie states:[2] "It seemed to me that the old law requiring a public announcement had been superseded, and in deciding D.C. Kandy 64636, Ram. Rep. 1877 p. 251, I held on the authority of Sir R. Cayley's decision that public acknowledgment was no longer necessary and that bringing up with a view to inherit was sufficient. But that judgment was set aside by the Supreme Court. In D.C. Kandy 55778 an adoption was held by me to be proved, when a woman had stated the fact of adoption in a writing invalid under the Ordinance No. 7 of 1840, but I rested that decision not so much on the writing as on statements made by her to her neighbours."

In D.C. Kegalle 2965,[3] a statement in a deed that a person was "as if adopted" was held to be insufficient to prove an adoption. The District Judge in that case thought that the deed was inconsistent with the idea of adoption, since if the child had been adopted he said that there was no necessity for a deed.

In D.C. Kandy 55778,[4] Lawrie, J. had stated that adoption was proved by the following statements :

(1) Statement by a person who gave information to a Registrar of Marriages, stating that the bridegroom was his son;

(2) A statement to the same effect in a census paper;

(3) Verbal statement in jail (when he died) to the same effect.

In D.C. Ratnapura (Testy.) 356,[5] Clarence, J. said: "The applicant should have shown an unmistakable acknowledgment of a child having been adopted for the purpose of inheriting."

In D.C. Kandy 2781,[6] the view was taken that a public declaration was necessary to constitute a valid adoption.

The law became still more unsettled in view of some later decisions. In *Tikiri Kumarihamy* v. *Punchi Banda*,[7] Bonser, C.J.

1. Lawrie's MS. p. 25
2. ibid. p. 26
3. (1877) Ram. Rep. p. 59
4. 12th October, 1876
5. (1876) Ram. Rep. 1873–75 p. 251
6. 3rd March, 1891, 2 C. L. R. p. 53
7. (1901) 2 Br. p. 299

took the view that the preparation of deeds of gift led to an inference that the adopted child was not an adopted heir, but this argument is refuted by Hayley, who says that it was, and has always been, the commonest practice to execute deeds of gift shortly before one's death in favour of one's children who would have succeeded to the same property in any event.[1] In *Tikiri Banda v. Loku Banda*,[2] the facts pointed to a clear intention to adopt. The widow of one Medduma Banda deposed that as she and her husband had no children and wished to adopt one who would look after them in their illness and inherit their property; they went to her sister and asked her to let them adopt her child, the plaintiff; she further said that her husband said to the plaintiff's parents: "You must give us this son, because we have no one to give our lands to." To this proposal the plaintiff's parents agreed. It was further proved that the plaintiff grew up in Medduma Banda's house and that when Medduma Banda proposed a marriage to the plaintiff, the prospective father-in-law asked if the adopted child would own landed property. Medduma Banda replied that they had adopted him intending to give all their property to him. Being satisfied with this statement, the plaintiff's father-in-law gave his daughter in marriage to the plaintiff, and subsequently it was proved that Medduma Banda and his wife said: "We are adopting the child to give him all our property." Yet even with this unmistakable and clear evidence of adoption, Wood Renton, J. and Grenier, J. affirmed the judgment of the District Judge which purported to follow the decision in *Tikiri Kumarihamy v. Punchi Banda*[3], and held that an adoption had not been proved because "the intention to adopt the plaintiff's heir, if expressed, was not communicated to anybody". Hayley, after referring to these decisions says that they were based on the dictum of Solomon. Solomon states:[4] "The adoption should also be public and it must have been formally and openly declared and acknowledged. A public declaration of the adoption seems to be indispensable." Hayley contradicting this statement says: "But Solomon does not purport to speak of his own knowledge, was merely summarizing the decisions in South Court, Kandy 13371 (1845) Aust. 52, 15017 (1844) Aust. 64, and 15769 (1846) Aust. 74. The last two of these were verbatim reiterations of the principles laid down in the first, and in none of them does the report state the facts. In the first case the District Judge quoted Sawers's very brief statement, introducing it with the incorrect assertion that 'the laws of all countries which recognize adoption require some formalities'. We are left, therefore, with Sawers's statement that the adoption must be publicly

1. Hayley, p. 205; also *Pereis v. Fernando* (1915) 1 C.W.R. p. 1, in which Wood Renton, C.J. explains the statement of Bonser, C.J., as a comment on the facts of the case and not a statement of a general principle.
2. (1905) 2 Bal. p. 144
3. (1901) 2 Br. p. 299
4. Sol. p. 6

declared and acknowledged, and it must have been declared and generally understood that such child was to be an heir." One poses the question—What do Sawers and Armour mean by the words "publicly declared"? To whom is it to be declared? How? When? Armour answers these questions[1] when he tells us that there are no prescribed forms and ceremonies of adoption, and therefore it is not practicable to ascertain in every instance whether an orphan child, or a child who was removed from the parents' care in its infancy, and who was educated by another person, was merely a foster-child and protégé of that person, or whether the said child was adopted. Hayley concludes that mere declaration of the adoptor would suffice, and that intention, coupled with acts which show that the intention was carried out, are the only essential factors.

The necessity for a public declaration by the adopting parent to constitute a valid adoption has been stressed in many decisions,[2] but the Courts after a period of vacillation have now veered round to the view that a public declaration by the adopting parent is not necessary.[3]

The true principle seems to be that in the absence of an open declaration, adoption would never be implied where any other reasonable explanation of the conduct of the parties could be offered, such as benevolence, or the ties of connection by marriage. Intention is the main requirement and such intention could even be inferred even without a declaration, where no other reasonable explanation of the facts are forthcoming.[4] This principle is set out clearly by Armour and in the *Nīti Nighanduwa*.[5] The views stated by Armour and the *Nīti Nighanduwa* appear to have been adopted by the chiefs. Where an only son has died without issue and the father did not allow his daughter-in-law to return to her family, but kept her with him and married her in *binna* on his premises, she was regarded as an adopted daughter.[6] Hayley quotes a few cases in which the Courts have refused to recognize adoption although the intention to adopt had been established, as "a public declaration" was necessary. The law relating to the quantum of evidence to constitute a valid adoption is highly controversial.[7]

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1. P.A. p. 38

2. *Tikiri Kumarihamy v. Niyarapala* (1937) 44 N.L.R. p. 476; *UkkuBanda Ambahera v. Somawathie Kumarihamy* (1943) 44 N.L.R. p. 457; *Kobbekaduwa v. Seneviratne* (1951) 53 N.L.R. pp. 354, 357

3. *Dayanganie v. Somawathie* (1956) 58 N.L.R. p. 337

4. Hayley, p. 207

5. P.A. p. 39; *Nīti*, p. 41

6. *Daaswatta Kirry Menika v. Arme Mudalihamy* (1826) Hayley, Appendix II, note 59

7. Dictum of Rt. Hon. L. M. D. de Silva in *Amunugama v. Herath* (1958) 59 N.L.R. p. 505 at pp. 508–511.

Later decisions throw some light on what is meant by 'public declaration' to constitute a valid adoption. Hearne, J. said:[1] "The declaration need not be according to a particular formula as long as it is clearly understood that the adoption was for the purpose of inheritance. The declaration need not be on a 'ceremonial occasion'. The declaration need not be made when members of the public are assembled together for the purpose of hearing the declaration or that the declaration need be made in a public place.

"The adoption must be public, in the sense that it must be generally known, and that publicity must have been given to the adoption for the purpose of inheritance as the result of an open declaration and acknowledged on the part of the adoptive parent, which need not be on a ceremonial occasion and may be made in the course of conversation, but which must be proved to have been made to members of the public, as distinct from members of the adoptive parent's household or relatives or even persons interested in the question of the adoption."

This controversy appears to have been revived again in the case of *Dayanganie v. Somawathie.*[2] In this case, it was proved that the deceased adopted the 4th defendant when she was hardly a month old, as he and his wife were childless. The adopted child at all times looked upon the deceased as her father and he regarded her at all times as his daughter. He gave her his *ge* name and educated her at Musaeus College, Colombo for about ten years. After she left school, he took steps to arrange a suitable marriage for her and eventually she married one Reggie Perera, a person of equal social status as the deceased, and a person who had been at one time a Member of Parliament. He gifted certain lands valued at Rs. 30,000/- to her and in the deed of gift referred to her as his daughter. In spite of this clear indication of intention to adopt, it was contended that there was no adoption as known to the Kandyan law as there was no public declaration. The Supreme Court reviewed the writings of the institutional writers and the decision on this subject, and reiterated the principles set out by the Divisional Bench, and held that there was a valid adoption in the facts of the case.

Effect of the Kandyan Law Amendment Ordinance

From what has been said, adoption is a question of fact.[3] Perjured testimony may be secured by the fabrication of documents to prove adoption. Stress was laid on this aspect by the Kandyan Law Commission which said:[4] "To leave it where it is, is really to set a premium on perjury. We therefore feel that in the best interests of

1. *Tikiri Kumarihamy v. Niyarapala* (1937) 44 N.L.R. pp. 476, 480
2. (1957) 58 N.L.R. p. 337
3. *Dunuwille v. Kumarihamy* (1917) 4 C.W.R. p. 99
4. Report of the Kandyan Law Commission, Ceylon Sessional Paper, XXIV (1935) p. 13

those who are governed by this law the door should be closed against perjured testimony, and we recommend that an act of adoption to have any legal force, should be by a deed before a notary and two witnesses executed by the party adopting, with the consent of the party adopted, or, if the person adopted is a minor, with the consent of his guardian expressed on the deed of adoption, and that such deed should be the only evidence of the adoption."

The Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938, was enacted to implement the Kandyan Law Commission and it states as follows:

"No adoption effected after the commencement of this Ordinance shall avail in law to create any right or liability unless it be evidenced by an instrument in writing with the consent of the person adopted, expressed in the instrument and signed by both the adoptor and the person adopted, in the presence of a District Judge, or a Commissioner of Requests, or the President of a Village Tribunal or a licensed Notary and two witnesses.

"Provided that if the person adopted is a minor, such consent may be given and such instrument signed on his behalf by his parents or, if only one parent is alive, by that parent; but if there is no surviving parent, or if either of his parents cannot be found or is incapable of acting in this behalf by reason of unsoundness of mind, ill-health, or other incapacity, the District Court or Court of Requests having local jurisdiction over the place where the minor ordinarily resides, may, upon petition made to such Court by any person interested, and after such inquiry as the Court may deem necessary, appoint any person or persons to give such consent and to sign such instrument."

Consequences of adoption

A son who is adopted by another family does not lose his right to his parents' property, unless he abandoned it. The daughter in some cases loses her right to her parents' estate on adoption. These matters are more fully described later.

Ordinance No. 39 of 1938 amended the law pertaining to the rights of adopted children to inherit from their parents. Section 8 (3) of Ordinance No. 39 of 1938 enacts: "Notwithstanding the adoption, the person adopted shall continue to have such right of succession to his or her own parent or parents or any other person, as he or she would have had if the adoption had not been effected." Nothing precludes a Kandyan to adopt a child under the Adoption of Children Ordinance with the consequences set out therein.

Chapter X

MARRIAGE UNDER KANDYAN LAW

The evidence gathered from the lithic and literary records shows that certain forms of marriage were in vogue among the ancient Sinhalese.

The marriage, the essentials of which were the giving of a necklace by the bridegroom and the partaking of food by the bridegroom and bride in the presence of relations, was simple and unsophisticated with the poor, but assumed elaborate proportions among the opulent. Such informal marriages are prevalent even now among the Tamils of Jaffna[1] and the Sinhalese.

Knox states that formal 'ceremonies' were confined to the upper strata of society, and that there were no formal marriages among the lower classes of Sinhalese among whom there was a certain degree of laxity in matrimonial relations.[2]

D'Oyly gives the following account of the ceremonies which were observed among the higher rungs of society:[3] "On a choice being made of the bride, the bridegroom's kinsmen give intimation thereof to some of the bride's friends, who consult her parents or guardians and other relations, and if they approve of the proposed match, the bridegroom's friends are informed thereof, whereupon some of the latter pay a visit in form to the bride's family, and having seen the bride and received assurance that the suit was sanctioned, they return after being treated with rice and betel.

"Afterwards, a relation of the bridegroom goes to the bride's place with the presents of cake, etc., and returns thence with her nativity or horoscope—this is compared with the bridegroom's to ascertain whether the union of the two persons will be happy and fortunate—if the nativities are accordant and compatible, an auspicious day is appointed for the wedding and the bride's parents or guardians are apprised thereof.

"On the day appointed, presents of betel, cakes, fruits, etc., are forwarded to the bride's place, and then the bridegroom's father proceeds in state followed by the bridegroom's mother with proper attendance likewise, and lastly comes the bridegroom. On the party approaching the bride's residence, a brother and a sister or an uncle and aunt of the bride, go out to meet them in similar form and state, and conduct them to the house. When they arrive at the outer gate of the house, and have stepped on the cloth spread for them to walk upon into the interior of the house, a coconut is

1. *Laws and Customs of the Tamils of Ceylon* by H. W. Tambiah, pp. 111–117
2. Knox, p. 149
3. D'Oyly, p. 82

smashed to pieces in the name of Ganeswara, the god of wisdom, and on the parties entering the apartments prepared for their reception, the ceremony of invoking long life is performed and the god of wisdom again propitiated by breaking a coconut.

"Previous to the auspicious moment of solemnizing the marriages, the bridegroom's mother delivers a valuable cloth as a *killikeda hela* to the bride's mother, with another cloth and a set of jewels, and the bride's father gives a set of apparel to the bridegroom. The happy moment being arrived, the bridegroom throws a gold chain over the bride's neck and then presents her with a complete set of apparel and ornaments, and the bride being arrayed therewith steps up along with the bridegroom on the *magul poruwa* or wedding plank, which is covered with a white cloth. The bride's maternal uncle or some near relation then takes a gold chain, and therewith ties the little finger of the bride's right hand with that of the bridegroom's left, and the couple then turn round upon the plank three times from right to left, the chain is then taken off, and the bridegroom moves to a seat prepared for him. The *magul pala* or wedding plate is then brought in, from which the director of the ceremonies takes rice and cakes, and making balls of them gives the same to the bride and bridegroom, who make a reciprocal exchange thereof in token of conjugality. The guests and the rest of the company are then served with victuals, betel and sandal.

"On the couple quitting the bride's place to go to the bridegroom's house, they are accompanied by a kinsman of the former with proper attendance. On approaching the bridegroom's residence they are met by a kinsman of the latter attended with talipots, torches, etc., who greets the bride's kinsman and conducts the parties in—here also a coconut is smashed on the ground in the name of Ganeswara and the ceremony is repeated of wishing longevity.

"After suitable entertainment the bride's kinsman and other guests depart.

"On the seventh day after the last mentioned ceremony, the festival of bathing the head takes place. The young wife's uncle and aunt or other near relations proceed to the house of the new-married couple in due style, and are formally welcomed—the open space near the apartment allotted to them is enclosed on all sides and covered with clothes—a plank being placed on the ground within, the young couple stand upon the plank side by side, with their heads covered with a cloth. New earthen pots filled with water are then brought, and some person on behalf of the husband drops a rupee or a gold pagoda into each of them, and presents a gold ring to the wife's uncle, who having waited the auspicious moment, takes up the water pots and empties them upon the heads of the young couple. After this ceremony the visitors are feasted and permitted to depart. After the lapse of some days or months,

the wife's parents pay a formal visit to the young pair attended by followers, etc. On this occasion they bestow, according to their means, a dowry on their daughter consisting of goods, lands, etc., and after the lapse of some time, again the newly-married couple pay a ceremonious visit to the wife's parents.

"The washer employed to decorate the bride's house with white cloths on the wedding day, receives 5 *ridies* from the bridegroom, he also receives 5 *ridies* for spreading the cloth on the *magul poruwa*, and the person who conducted the bride to the bridegroom's house after the marriage ceremony, pays 5 *ridies* to the washer who decorated the bridegroom's house for the occasion."

The ceremonies set out by D'Oyly are very similar to those observed among the higher classes of the Tamils. In view of the constant association and intermingling of the higher classes of the Sinhalese with the royalty of Madura, it is not a matter of surprise that there is similarity between the marriage ceremonies and customs among the Kandyan Sinhalese and the Tamils.

Neville describes a traditional wedding among the higher classes of the Sinhalese, as follows:[1] "Proposals of marriage being made by mutual visits, the astrologer fixes the auspicious day for the wedding, having first compared the horoscopes. If these are pronounced adverse, the match is broken off without further ado. On the appointed day, the bridegroom's party, accompanied always by his washerman, proceeds to the bride's house, carrying presents of cloth, plantains, rice, and other food. These are carried in pingos, *kat*, usually borne by men of the *hakuru* caste. The most important of these *kat* is the one called *yeladakada* which, though spoken of as one, usually comprises more than one pingo-load for four or five men. It consists of the following : a small mat-bag called *paskulu-badu-malla*, containing the *paskulu-badu*, viz. ginger, pepper, mustard, black and white cummin; a jar of cakes; a bundle of one hundred betel leaves; a hundred arecanuts; dried fish. The *yeladakada*, which is intended to compensate the bride's people for the expenses incurred in entertaining the bridegroom's party, is omitted when the bride is a cross-cousin of the bridegroom." (These gifts were sometimes dispatched to the bride's relations, particularly if they did not participate in the wedding feast. Failure to do so once led to a dispute, which ended in assault.)

"As the procession reaches the gate of the bride's residence, her *avessa massina* (mother's brother's son, or father's sister's son), goes forward to receive a fee of forty betel leaves, known as *kadulu bulat*, without which he would refuse admittance."

It is significant that among the Parawas of Ceylon, a similar ceremony, known as *wasalpaddy sudandram* (literally meaning the wealth at the doorstep), was performed and the bridegroom had

1. Neville (1887) Davy (1821) pp. 284–268; Ralph Pieris, p. 197

to make a payment to the father's sister's son as a token of the latter being deprived of the bride. The father's sister's children in turn gave a present of a cloth to the bridegroom. If such a gift was not given, the bridegroom could deduct a sum of money equivalent to five pieces of gold (*anjupan*) and pay the balance to the bride's cousin.[1]

This custom among the Kandyans recognized the right of the cross-cousins to get married. By receiving this fee, he renounced such a right. "The son of the eldest brother has a sort of vested right to have his cousin, the eldest daughter of his father's eldest sister, for his wife."[2] On the other hand, the children of two brothers and sisters were themselves regarded as brothers and sisters both among the Sinhalese and Tamils.[3] A similar prohibition is also found among the Veddas of Ceylon.[4]

Ralph Pieris says:[5] "The bridegroom's party invited in advance by the *avessa massina*, enter the house which is highly decorated with white cloth canopies, and white cloth to walk on. A similar custom is found among the Tamils, and this cloth is called *nila-pavada*. A special shed (*magul maduwa*) is frequently constructed." (The Tamils construct a similar structure called the *manavarai*.)

"Near the entrance to the house, water is poured over the bride-groom's feet by a brother of the bride from a *koraha* and the groom drops a ring into the vessel, which becomes the property of the man who bathed his feet." (It is not a matter of mere coincidence that a similar custom is followed even now among the Tamils of Jaffna). "As the bridegroom passes over the cloth spread on the ground, the bridegroom drops one or more coins, called *pavada massa*, as fee to the bride's washerman. Having obtained leave of the visiting party they seat themselves in order of precedence, the chief of the party taking the *mul puluwa*. The pingos are now formally presented, and placed on a platform prepared for the purpose. The men and women are seated separately and the bride-groom's party are feasted, the men of the bride's party not joining the repast.

"After the evening meal the guests await the auspicious hour for the wedding proper, which is almost invariably just at dawn, spending the greater part of the night in conversation and telling stories. At the auspicious moment, the bridegroom and a few of the men of his party enter the bride's chamber, where a plank known as the *magul poruwa*, covered with white calico, has been prepared." (The highest *rate* families were allowed to spread their

1. *The Laws and Customs of the Tamils of Ceylon* by H. W. Tambiah, p. 120
2. S. p. 11; Hayley, Appendix I, p. 15
3. *Regina v. Wadunatuvakkukaria Lekam* B.J.C. 4/7/1817 C.G.A. 23/3; Hayley, p. 155; *The Laws and Customs of the Tamils of Jaffna* by H. W. Tambiah, p. 105
4. Ralph Pieris, p. 198
5. ibid.

own white cloth over that spread by the washer on the *magul poruwa*, a privilege which is absolutely forbidden to people of lower families.[1] Dr. E. R. Leach suggests that the symbolism of the *magul poruwa* may be interpreted in terms of its agricultural analogue—the wooden *poruwa* or plank used to smooth the paddy fields; the cultivator stands on the plank prior to sowing the seed.) "On the *magul poruwa*, the bride and bridegroom stand facing the lucky direction, ascertained from the astrologer. The bridegroom then hands the bride a cloth, which she folds round her waist, a ceremony called *andina dīma*, signifying the husband's obligation to provide clothes for his wife." (Among the Tamils, the present of the cloth is one of the essential requirements of marriage.) "Their two little fingers are then tied together, but they need not remain so. Two balls of rice are then exchanged between them, and they pretend to eat a little of it, the ceremony being called *bat pidi marukirima*." (A similar ceremony is performed among the Tamils.)

"The exchange of food denotes the mutual obligation of husband and wife to provide food for each other. Betel leaves are then exchanged, but not eaten, and they are allowed to fall, and become the perquisite of the bride's washer." (The presence of the washerman is an essential feature among the marriages in the higher class of Tamils just as among the Sinhalese.) "The father of the bride then pours some water upon the clasped hands of the betrothed couple.

"The bridegroom then asks the washerman what his fee is, and until this is paid to his satisfaction, no food could be eaten, and this privilege is firmly insisted on, and if the family offended him, the washerman can demand a heavy fine. The wedding feast then commences, the guests seating themselves and eating the food provided for them. Presents of a cloth, an arecanut cutter, and a chunam-box are given to the bride's mother by the bridegroom. Both parties conduct the couple to their home, and the feast ensues. This procession is formed with every possible publicity, including the inevitable tom-tom beating, and is, next to the washerman's testimony, the best evidence of the legality of the union. At the bridegroom's threshold, two men of the washerman's family hold up a white canopy and the two nearest female relations of the bridegroom stand under it on either side, each holding two lighted wicks." (A similar ceremony known as *alatti* is performed among the Tamils even today). "As the bride passes under and lifts her foot to the threshold, a young man of the bridegroom's family wields a bill-hook and 'smites asunder a husked coconut' which has been laid on the doorstep as an offering to the guardian-spirit of the house."[2] (This ceremony too is performed among the Hindus even today to invoke the blessing of Ganesha, the God of Nuptials.)

1. Ralph Pieris, p. 199, note 13
2. i.e. Ganesha—Neville (1887); Ralph Pieris, p. 200

These ceremonies are hardly observed by the common people, for whom "the meanest way of contracting a marriage is for the bridegroom to go with a few attendants, carrying with him a cloth to the bride's house, and after she has dressed herself in the cloth presented by the bridegroom, she is conducted by him and his attendants to the bridegroom's house, a lucky moment being previously ascertained".

The formalities necessary for a legal marriage vary in different districts.[1] Under the Kandyan law, if a man and woman lived together as man and wife, it was sufficient to establish a valid marriage to enable their children to inherit from them, although the parents may not have gone through the regular rituals of marriage.[2] Knox also records a peculiar form of marriage. He states :[3] "Sometimes they use this ceremony: the man is to stand with one end of the woman's cloth about his loins, and she with the other, and then they pour water on both their heads, wetting all their bodies ; which being done, they are firmly married to live together, so long as they can agree."

In Sabaragamuwa, greater attention was paid to the regularity of marriage than in the upper highlands of Ceylon.[4] It is stated that "unless a barren woman has been called with all due formality by the family and relations of the husband, she will not as a matter of right inherit any part of her husband's property".[5] (Barren woman here means a virgin. This custom stresses the requirement insisted upon among the Hindus that the formal marriage must be the gift of a virgin (*kannikai thanam*), and perhaps was insisted upon among the class of people who inhabited this locality.)

The elaborate ceremonies described above obtained only among those whose affluence and standard of living permitted them to incur heavy expenses in their marriage ceremonies. The poor and destitute, however, adopted a simple ritual.

With the passage of time, marriages became less formal. If a man and woman of the same rank lived together it was sufficient to establish a valid marriage giving their children right to inherit from them, although the parents may not have gone through the regular rituals of marriage.[6] The penury of the people and the laxity of the marriage-tie habitually dispensed with any form of ceremony among the poor classes, especially where the bride had

1. Statement of Counsel for the defendant in *Kistna Amma v. Kandewille Appuhamy* B.J.C. 18.12.1818, C.G.A. 23/4

2. *Karandeniya Gamage Punchi Appuhami v. Karandeniya Gamage Kaluhamy* (Appeal) B.J.C. 16.11.1827, C.G.A. 23/21

3. Knox (1681) p. 149

4. *Baddehelgoddey Jalenty Lekam v. Baddehelgoddey Mohanamone Rala* B.J.C. 21.8.1822, C.G.A. 23/4

5. ibid.

6. *Karandeniya Gamage Punchi Appuhami v. Karandeniya Gamage Kaluhamy* (*supra*); also Knox (1681) p. 149

been married earlier. Knox says:[1] "Both women and men do commonly wed four or five times before they can settle themselves to their contention."

Such formal marriages, comparable to the Brahminical ceremonies of the *Grahya sutras*, might be traceable to the indigenous customs of the medieval Sinhalese,[2] or may be due to the influence from the sub-continent of India. Parental control was so strong that there were occasions, when after the matching of horoscopes and the conclusion of the wedding feast, and after the marriage appeared to have been finally contracted, the parents of the girl had withdrawn their consent and put an end to the marriage.[3]

Trial marriages were frequent among the Sinhalese. Davy states that the first fortnight of the bride's cohabitation with her husband was a period of trial, at the end of which the marriage was either annulled or confirmed.[4]

Presumption of marriage by habit and repute

In cases where a marriage according to custom would be valid, continued cohabitation of spouses of equal rank and caste, even without proof of the necessary marriage ceremonies, led to the presumption of marriage among the Kandyans before the Kandyan Marriages Ordinance came into force.[5] However, the presumption of marriage did not arise if the spouses did not belong to the same caste. Indeed, proof of the lower caste of the woman raised a presumption against a valid marriage.[6] Before the necessity to register Kandyan marriages was imposed in marriage by statute, customary marriages were valid among the Kandyans.[7] But subsequent to the passing of the Kandyan Marriages Ordinance, a Kandyan marriage is only valid if it is duly registered. Customary forms of marriage are not recognized.[8]

The essentials of a valid marriage

The essentials of a valid marriage are as follows :

1. The parties must have connubium.
2. They must not be related within the prohibited degrees of relationship.

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1. Knox (1681) p. 149
2. Geiger, pp. 37, 38
3. *Galwadde Hangadene v. Galwadde Duriya Lianne Waduwa* B.J.C. 14. 12. 1818, C.G.A. 23/4
4. Davy (1821) p. 286
5. Re *Mahara Ratemahatmei* (1859) 3 Lor. p. 287; *Appuhami v. Ran Menika* (1885) 1 S.C.R. p. 125; *Tisselhamy v. Nonnohamy* (1897) 2 N.L.R. p. 352
6. *Dingiri Amma v. Dingiri Menika* (1847) Morg. Dig. p. 429; Austin, p. 108
7. S. pp. 36, 37
8. *Kuma v. Banda* (1920) 21 N.L.R. p. 294 D.B.

3. They must have cohabited with the intention of forming a definite alliance.
4. They must act with the consent of parents or relations. In the case of chiefs of high rank, the king's consent was necessary.
5. After the Kandyan Marriages Ordinance came into force, the marriage should be duly registered.

(a) Connubium

The term 'connubium' has a peculiar connotation in Roman law. Hayley adopts this convenient term of Roman law in order to avoid the usual statement that the parties must be of the same caste.[1] Generally speaking, there was a rule of exogamy that people of different castes or even of different ranks within the caste could not intermarry.[2] Such marriages were prohibited and void. This general rule is, however, subject to certain exceptions. In some districts, men of a particular caste regularly took their wives from another caste.[3]

In Indian customary law, marriages between a man of high caste and a woman of low caste were regarded as *prataloma* and a marriage vice versa was regarded as *anuloma* and the issue of such marriages were sometimes given a different status; but in Kandyan law, they were not regarded as belonging to a separate caste.

According to the *Nīti Nighanduwa*, if a man without any relations married a woman of a lower caste, his children by her are at his death, entitled to succeed to the paternal inheritance absolutely, although they did not attain the rank of their father.[4] The *Nīti Nighanduwa* also states that there being no caste in Ceylon higher than the *goiya*, if a man of yet higher caste, such as raja, brahmin, or a merchant came to the Island, he might properly marry a *goiya* woman. The children did not succeed to their father's caste, but were considered legitimate, and entitled to inherit his *paraveni* property, even if their father should have other children by a wife of his own caste in Ceylon. There was, however, a curious rule that the child did not take the caste of his father.[5] Although unions between males of higher caste and females of lower caste were not penalized, a union legally or otherwise between a female of a higher caste and a male of a lower caste was not only invalid but also severely penalized. Knox states:[6] "It is not accounted any shame or fault for a man of the highest sort to lay with a woman

1. Hayley, p. 175
2. P.A. p. 6; *Nīti*, pp. 13–14,
3. Hayley, p. 177, Note h–Hayley states that he is indebted to Mr. H. W. Codrington for this information.
4. *Nīti*, p. 14
5. ibid. p. 15
6. Knox, R. p. 105

far inferior to himself, nay of the very lowest degree; provided he neither eats nor drinks with her, nor takes her home to his house as his wife. But if he should, which I never knew done, he is punished by the magistrate, either by fine or imprisonment, or both, and also he is utterly excluded from his family and accounted thenceforward of the same rank and quality, that the woman is of, whom he hath taken." When the man of a higher caste lives with a woman of a lower caste and has issue, such children, although legitimate, could not according to Kandyan custom, inherit their father's ancestral property (*paraveni*) as a matter of course, unless the father had gifted the property by a writing, deed, or made a formal gift or bequest duly authenticated by respectable witnesses. (The chiefs enunciated this rule in *Serabalatenagey Don Hendrick de Silva v. Pamoone Mohottale.*[1]) If a man, after his parent's death, marries a woman of unequal rank but of the same caste, his children will not be considered illegitimate, even though the marriage was contracted against the wish of his kinsmen and is contrary to the custom of the country. An exception was made when a man who had no relations married a woman of a lower caste. His children would inherit his property at his death, although they would not attain their father's rank.[2]

A man of a higher caste could not keep a lower caste woman as a concubine. In such cases, the man was reprimanded and the woman was punished. Sawers records the case of Migastenne, Jr., Second Adigar, who was reprimanded for keeping a concubine of the *berawaya* caste. The woman was flogged and sent across the river and thus banished from Kandy. There seems to be no case in which a woman was permitted to marry a man of even slightly lower caste than herself. Such conduct was a penal offence.[3]

The British did not encourage caste distinctions and were reluctant to enforce caste rules. This attitude of the new rulers led to the relaxation of the well-rooted rule in Kandyan law that marriages outside the caste were null and void. When the validity of a marriage between a man and a woman of lower caste came up before the Supreme Court and there was clear proof of intention to marry, the marriage was declared valid. It would have been anomalous to declare such marriages void "when such legal disabilities as caste are virtually abrogated and obsolete in the Colony". It was held that lawful wedlock could not be presumed from long cohabitation and acquiescence by the family in the absence of a wedding ceremony or other definite proof of marriage.[4]

The requirement of connubium between the parties was impliedly abolished by the Kandyan Marriages Ordinance, No. 13 of 1859, which makes no mention of caste or similar impediment with

1. B.J.C. 6.12.1821; C.G.A. 23/8
2. *Niti*, p. 14
3. Hayley, p. 176
4. D.C. Kandy 20098 1848–1849 Austin, p. 235

respect to future marriages; but marriages then existing were declared valid "if contracted according to the laws, institutions and customs in force amongst the Kandyans at the time of the contract".[1] In practice, however, breaches of the caste regulations were rare in any part of the Island.[2]

(b) The parties and the prohibited degrees of relationship

Hayley, after discussing the classificatory system of kinship among the Sinhalese, sets out succinctly the rules of prohibition as follows:[3] "To sum up the matter with reference to the table— a man can never marry his *duwa* (daughter), *sahodari* (sister) or his *nanda* (aunt). He may marry his *yeli* (niece), his *nena* (sister-in-law), his *lokuamma* (mother's eldest sister), and *kudamma* (mother's youngest sister), except when these terms are applied to his full aunt or full niece." It is matter of coincidence that among the Tamils of Ceylon, an identical classificatory system and rules of exogamy exist. The Tables prepared by Hayley will equally apply to the Tamils with the insertion of appropriate words in the Tamil languages.

The Ordinances No. 13 of 1859 and No. 3 of 1870 which enumerate the degrees of consanguinity within which a marriage may not be contracted, do not follow the Sinhalese custom but adopt the restrictions of the English law of that period, with the exception of those relating to a deceased wife's sister and a deceased husband's brother.[4]

(c) The intention of forming a definite alliance

The parties must have lived as man and wife with the intention of forming a definite matrimonial alliance. The intention could be inferred from circumstances.[5]

Observance of the usual ceremonies was sufficient proof of marriage. Without the ceremonies, continued cohabitation between persons of equal caste "if not stigmatized by some decisive act on the part of the man's family or by the man himself," was sufficient.[6] If a man and woman of the same rank had lived together as man and wife, the Kandyan law regarded such a union as a valid marriage which entitled the children to inherit the parents' property, although the rituals of marriage had not been gone through.[7]

Polygamy, polyandry and concubinage, all being lawful, there was a considerable amount of vagueness as to when a connection

1. Hayley, pp. 177–178
2. ibid. p. 178
3. ibid. p. 184
4. ibid. pp. 184–185
5. *Niti*, p. 19; Hayley, p. 185
6. S. p. 41
7. *Carandeniya Gamage Punchi Appoo v. Caloohamy* (1827) Hayley, Appendix II, note 84

could be regarded as a marriage, particularly if the ceremony was omitted, and when such unions were free.[1]

(d) Consent of parents and relations; in the case of chiefs, the consent of the King

Cupid's arrows seldom found their mark among the Kandyans. Marriages were often arranged by the parents and in all cases, the consent of parents and relations up to the third or fourth degree was considered necessary. Sawers states :[2] "The consent of the respective heads of the families; the countenance and sanction of the relations to the third or fourth degree on both sides, to the union of the parties; that they must be of the same caste and of equal family respectability and rank, which is chiefly ascertained by the families having previously intermarried, and where this has not been the case, they are particularly scrupulous, and affluence and prosperity for the time being on one side, will hardly induce an ancient family to deviate from this rule."

The importance of consent differed somewhat in the case of a woman from that of a man. The woman was regarded as being entirely at the disposal of her parents, and after their death, her nearest male relations. Even after the termination of the first marriage by death or divorce, the parents or nearest relations could remove her from any marriage of which they did not approve.[3] But if the brothers or relations, after the death of the parents, neglected to find her a husband, she was given the choice to select a suitable husband provided he was worthy of alliance.[4] The requirement that the consent of the parents and close relations was necessary for a valid marriage of a woman was so rigidly observed that even marriages contracted with full ceremonies have been set aside when this requisite was not observed, despite the threat of the bride to commit suicide.[5]

Subsequent acquiescence would sufficiently legitimize an alliance which lacked parental consent and, among persons of humble position, the consent of relations other than parents, was sometimes disregarded. Where parents and relations attend the wedding, the necessary consent is implied.[6] The maternal uncle played an important part in the nuptial ceremony. The tying of the little fingers of the couple by the bride's maternal uncle is a relinquishment by him of his right to have the bride as wife for his son.[7]

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1. Hayley, p. 185
2. S. p. 36
3. *Nīti*, p. 20
4. P.A. p. 42
5. The King on the prosecution of *Angammena Appuhamy v. Kempitiya Koralle and another* (1828) Hayley, Appendix II, note 82
6. *Dodangwela Palleywalauwe Banda v. Ehelepola Kumarihamy* (1822) Hayley, Appendix II, note 75
7. Hayley, p. 187

Even among the Sinhalese Christians of the low country, Hayley records cases where the maternal uncle presented the bride.

A man was allowed greater freedom to contract a marriage with a woman of equal caste despite the protests of his kinsfolk.[1]

When chiefs of high rank married, the consent of the king was necessary. This requirement was insisted upon in order to ensure the purity of the ruling classes. (In 1819, the First Adigar presented a written petition to the Judicial Commissioner, in which he stated that the chiefs were not allowed to marry without the King's approval in order that the best families might be kept pure, and suggested that the British Government should make a similar regulation.[2] However, the Government did not approve of this suggestion.)

(e) Registration of marriages

Section 13 of Ordinance No. 3 of 1870, which, following No. 13 of 1859, requires the consent of parents or guardians when minors enter wedlock, and provides that no marriage duly registered is subsequently invalidated by proof of absence of such consent.

Polyandry

Among the ancient Kandyans, polyandry was practised freely. "In this country," says Knox, "even the greatest hath but one wife. But a woman often has two husbands."[3] The antiquity of the custom of polyandry must however remain an open question on account of the paucity of historical data.[4] Ivers states that polyandry was absent in the families of the Dry Zone villages.[5] The *Rājāvaliya* records the case of King Kelanitissa (*circa* 200 B.C.), whose younger brother cohabited with his queen. On certain occasions the King showed his displeasure by making a *rodiya* declare to a royal assembly that "a younger brother who lives in the same house (with his elder brother) is of lower caste than I am".[6] Such royal disapprobation shows that polyandry was not in favour at that period.

The practice of polyandry was universal in the hill country (*uda rata*) and appears to have persisted in the littoral even after a century and a half of cultural contact with the Europeans. Baldaeus referring to Kandyan husbands, states: "They recommend the conjugal duty to be performed by their own brothers," and gives the instance of a woman of Galle who "had confidence enough to complain of the want of duty in her husband's brother on that account".

1. *Nīti*, p. 14
2. Board Minutes, August 17, 1819
3. Knox R. p. 150
4. Ralph Pieris, p. 204
5. ibid.
6. ibid.
7. Baldaeus, Philip, *Ceylon* (Amsterdam 1672–English Edition Churchill's Voyages Vol. 3, London 1752)

Ribeiro refers to fraternal polyandry among the Sinhalese at the time of the Portuguese occupation, as follows :[1]

"A girl makes a contract to marry a man of her own caste (for she cannot marry outside it), and if the relatives are agreeable they give a banquet and unite the betrothed couple. The next day a brother of the husband takes his place, and if there are seven brothers, she is the wife of all of them, distributing the nights by turns, without the husband having a greater right than any of his brothers. If during the day any of them finds the chamber unoccupied, he can retire with the woman if he thinks fit, and while he is within, no one else can enter. She can refuse herself to none of them; whichever brother it may be that contracts the marriage, the woman is the wife of all; only if the youngest marry, none of the other brothers has any right over her, but he can claim access to the wives of all of them whenever he likes. If it chances that there are more brothers than seven, those who exceed that number have no right over her; but if there are two up to five, they are satisfied with one woman, and the woman who is married to a husband with a large number of brothers is considered very fortunate, for all toil and cultivate for her and bring whatever they earn to the house, and she lives much honoured and well supported, and for this reason the children call all of the brothers their fathers."

The practice of polyandry was never frowned upon in Kandyan times even by the higher strata of society. There is evidence that some of the Sinhalese kings even before the Kandyan period practised polyandry.[2] It was prevalent not only among the poor but even among the headmen of the country.[3]

The *Niti Nighanduwa* states that fraternal polyandry became so common that whenever brothers owning lands in common, live together, and one of them marries, there was a presumption that the children are regarded as the issues of all the brothers.[4] Knox[5] and Ribeiro[6] state that polyandry was usual and common in their times. Frequent reference to polyandry is also made in the works of D'Oyly, Sawers, Armour and the *Niti Nighanduwa*. Lawrie also makes reference to the practice of polyandry.[7] Mr. Ivers found this custom almost widespread in Kegalle. In 1819, when the Judicial Commissioner suggested that chiefs who entered into associated marriages should not be employed by Government, the Board declared that it would be "impolitic and an interference with

1. Ribeiro (1685)
2. *Rajawaliya*; *Culavamsa* 64, 33, 55
3. *vide* Agent's Diary, Kegalla, C.G.A. 30/6 where Mapitigama Korala is warned by the Government Agent for living with his brother's wife in polyandry
4. *Niti*, p. 82
5. Knox, p. 150
6. Pieris, p. 205
7. Paper on the Custom of Polyandry as practised in Ceylon, by Archibald Lawrie

the universal custom of Kandyans, contrary to the agreement".[1] Despite the wealth of evidence to prove that polyandry was practised amongst the Kandyans, the priests who answered the queries of Falck, however stated that the practice of polyandry was held as "extremely unclean by the Sinhalese" and such a practice was not found among the *goivamsa* or any other caste.[2] This statement is not supported by evidence. The views of these priests appear to be more personal than factual.

Joint husbands who practised polyandry were not only brothers but all who came within the description of brothers under the classificatory system among the Kandyans, such as the children of two brothers or two sisters. Fraternal polyandry was allowed without any limitations as to the number of husbands although seven was considered to be the upper limit, but the wife had to obtain the consent of her husband before she lived with an associated husband who was not her husband's brother. If the second husband was not a brother of the first, even the wife's family had to be consulted. Even in a family of many brothers, two may arrange to have a joint wife and a third brother may marry another wife and live separately.[3] Some of the brothers may choose to marry separate wives.

The children of a polyandrous marriage were considered the offspring of all the husbands without regard to any physical conditions, such as impossibility of access on the part of one or more of them.[4] Despite this authoritative statement of Kandyan law which is found in the *Nīti Nighanduwa* on this point, an interesting lawsuit is recorded in the proceedings of the Judicial Commissioner where two associated brothers, one of whom was dark-skinned and the other fair-skinned were married to one wife, and the fair-skinned one refused to accept the sunkissed children as his progeny and claimed the fair ones, and the wife, endowed with Solomon's wisdom, agreed to the assignment of the children by their colour to their respective claimants and the Judicial Commissioner gave his blessings to this arrangement.[5]

The question as to whether the number of brothers living in a particular house with a woman are associated husbands of that woman, is one of fact. Evidence of familiarity as would exist between the man and woman may be sufficient to establish this relationship. (According to the Kandyan chiefs, if a sister-in-law should be seen combing the hair of her full-grown brother-in-law, she would be taken to be his wife.[6]) The children of such an asso-

1. Board Minutes, August 17, 1819
2. *Lok Raj Lo Sirita, The Ceylon Daily News*, Aug. 2, 1930
3. *Payagoda Puspa v. Alapolla Kiri Puncha* B.J.C. 1825, C.G.A. 23/16
4. *Nīti*, p. 71
5. *Payagoda Puspa v. his brother* B.J C 13.5.1825, C.G.A. 23/15
6. Case No. 4141, District Court Matale, 14.12.1843 in Lawrie's MS. Vol. III

ciated marriage were regarded as the legitimate children of all the associated husbands. There are recorded instances where the polyandrous situation changed imperceptibly into one of group-marriage when one of the brothers brought another wife into the *mulgedera* and the brothers shared the wife.[1] Since cross-cousin marriages were frequent the wives may be sisters.[2] Hence in Kandyan society there is evidence of group-marriages where brothers of one family married the sisters of another family.

The practice of polyandry is attributed to many factors. Polyandry often compelled brothers to marry one wife. This practice was a convenient arrangement to cultivate *chena* lands situated far away. When one of the brothers went to the *chena* the other brother remained in the house.

Pieris seem to think that the custom of killing female children who were unlucky to the parents might have led to a paucity of females which resulted in polyandry.[3] Polyandry minimized fragmentation of property.

Polygamy

Polygamy, although permitted, was rare. The practice of polygamy, particularly amongst royalty, is recorded in historical books. It was known among humbler persons, among whom it sometimes took the form of an associated marriage between several brothers of one family with two or more sisters from another family. The number of joint wives or husbands was not limited, but the wives seldom exceeded two in number and joint husbands almost invariably, though not necessarily brothers or cousins, were not often more than three. The consent of the wife was required if the second husband happened to be a stranger. In such a case, the consent of the parents of the wife also had to be obtained.

The *Niti Nighanduwa* states:[4] "It is also a frequent custom for two or three men to have two or three wives in common." According to Ralph Pieris, in a household where some brothers shared a spouse while others had wives of their own, fraternal amity might be such that a brother would not regard his wife as exclusive property and would extend his rights to his brothers by tacit consent.[5] Ivers records a number of cases, even in the latter half of the last century, where it was frequently discovered in the course of divorce proceedings under the Kandyan Marriage Ordinance, No. 13 of 1859, that although a marriage was registered in the name of one brother, the others had access to his wife.[6] After the Kandyan

1. *Woomullea Durealagey Ungaja v. Nilpolluagey Dinga* B.J.C. 22.2.1822, C.G.A. 23/6
2. Ralph Pieris, p. 211
3. Ralph Pieris, pp. 205, 206, 207
4. *Niti*, p. 22
5. Ralph Pieris, pp. 204, 205
6. Ivers's Official Diary, Ruwanvalla, 1884 C.G.A. 30/6

Marriage Ordinance, No. 13 of 1859 came into operation, when two or more brothers formed an associated connection and the woman is sometimes registered as the wife of one, then the others had no uxorial status in law.[1]

Polyandry and polygamy were not countenanced by the British, and statute law penalized such practices. According to the *Lok Raj Lo Sirita*, a husband was permitted to marry another woman during the subsistence of his marriage, only with the consent of his wife and in the event of his being childless. Asked whether a man was permitted to have additional wives, the priests said to Falck:[2] "He is and he is not. In the case of a man with great ancestral wealth, where the legal wife has no children, she being a woman of virtue, wisdom and compassion, if she requests the husband to marry a second wife to prevent the extinction of an ancient family, it is laid down in our books that in the circumstances, he may take another wife, but though the legal wife be barren, if she withholds her consent, the husband may not do so." As stated earlier, this view is not declaratory of the existing custom.

Binna and Diga-marriages

The Kandyan law distinguishes between two forms of marriage, namely, the *binna*-marriage and the *diga*-marriage.

Binna-marriage

Binna is derived from the Sanskrit '*bhinna*' which means broken or separated,[3] and *binna*-marriage is "one in which the husband contracts to go and live in the wife's house or in any family residence of hers".

Marriage in *binna* was an established institution in India and played a part complementary to that of the Brahma and Asura marriages, in both of which the bride went to the husband's family. The *binna*-marriage among the Kandyans may have been an institution borrowed from the Indian customary law or may have had an independent origin in Ceylon. The theory that *binna*-marriages originated from a state of society where there was promiscuous living is highly speculative. In a *binna*-marriage the husband is brought to the house of the wife or her relations and resides on the property belonging to the wife's ancestral home (*mulgedera*), although the house where he resides need not necessarily be that of his bride's father.[4]

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1. *Hetuwa v. Gotia* (1900) 4 N.L.R. p. 93; *Dingiri Menika v. Heena Hamy* (1907) 2 A.C.R. Appendix VI; *Unga v. Menika* (1914) 18 N.L.R. p. 182

2. *Lok Raj Lo Sirita—The Ceylon Daily News*, Aug. 2, 1930, Malalasekera's translation

3. *Nīti*, p. 17; also Peiris's Kandyan Armour Glossary

4. *Gonigoda v. Dunuwila* (1827) Hayley, App. II, note 76, Bd. Mns. decision

In a *binna* association, the husband continues throughout the marriage in a subordinate position. "There is a saying that the *binna* husband should take care to have constantly ready at the door of his wife's room, a walking stick, a *talpot* (a palm leaf used as an umbrella) and a torch, so that he may be prepared at any hour of the day or night, and whatever may be the state of the weather or of his own health, to quit her house on being ordered."[1] Such a form of marriage is peculiar not only to this country; it appears to have been in existence in Biblical times.[2] It is a "marriage contracted with a wink and ended by a kick". The *binna*-married husband is liable to expulsion at any time by his wife or her parents, and after the death of the parents, by the brothers if he was brought in by them. But if the marriage was arranged by the bride's parents, their consent for the dissolution was necessary. The children of a *binna* marriage may take the family name of their mother's father.[3]

A subdivision of the *binna*-marriage must also be noticed and is made use of with a view to controlling the devolution of property. Where the parents have separate estates of some magnitude and a husband is brought and settled on the bride's father's or mother's property, the marriage is regarded as a *binna*-marriage in respect of that parent's property alone on which the bridegroom is settled. With regard to the property of the other parent, it has the effect of a *diga* union.[4]

The question whether a low country Sinhalese could marry a Kandyan woman in *binna* was raised in the case of *Natchiappa Chetty v. Pesonahamy*,[5] and was answered in the affirmative. Since Section 2 of the Kandyan Marriages Ordinance, No.3 of 1870 provides that the expression "marriage contracted in *binna*" shall include any marriage contracted in such circumstances that if both parties were subject to Kandyan law, such marriage would be in *binna*, Fernando, A.J. (as he then was) stated:[6] "The Ordinance had in view the fact that men who were not subject to Kandyan Law had contracted marriages with Kandyan women in such circumstances as would constitute a *binna* marriage if both parties had been Kandyans."

Diga-marriages

The word '*diga*' is derived from the root, *dā* 'to give', and is according to some scholars, a derivative from *dīrga* (long), thereby signifying that the bride is sent some distance away—that is to her husband's house.

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1. D'Oyly (1929) p. 129
2. Citation from the Chambers's *Encyclopaedia Britannica*, pp. 232, 233
3. Hayley, p. 194
4. P. A. p. 81
5. (1937) 39 N.L.R. p. 377
6. (1937) 39 N.L.R. p. 384

The *Nīti Nighanduwa* defines a *diga*-marriage as follows:[1] "The conducting of the wife to, and living in the husband's house, or in any family residence of his—or if he does not own a house or land, the taking her as his wife and the conducting her away from her family to a place of lodging, constitute a *diga* marriage."

The *diga*-marriage is the usual form of marriage among the Kandyans. To constitute a *diga*-marriage the wife should according to the terms of the contract, be removed from her parents' abode and settled in the house of the husband.[2]

The predominant idea in a *diga*-marriage is the departure or removal of the wife from her family or ancestral home and her entry into the house of the husband.[3]

Who could give a woman in diga-marriage?

A woman can be given in *diga*-marriage by her father, and after her father's death, by her mother,[4] and after her mother's death, by her brothers and uncles.[5] Neither the guardian nor her cousin have however, the right to give the girl in *diga*-marriage.[6]

If a parent was unable to bring up a minor daughter and she was given in charge of a friend, and a marriage was subsequently arranged in accordance with the father's wish and the young couple remained in the same place, it could not be said that she was married in *diga*. Hence, on the father's death, she along with the other children would inherit the property of her father as if she had been married in *binna* in the father's house.[7]

On a *diga*-marriage, the wife ceases to be a member of her own family and is bound to go to her husband's house and live with him there. In fact she abandons her own family and becomes a member of her husband's family, and the husband is bound to support her so long as she is his wife. The severance is so effectual that the *diga*-married daughter not only leaves her parents' family but also forfeits her right of inheritance to her father's estate in favour of her brothers and *binna*-married and unmarried sisters.[8]

The separation from the father's family is the essence of a *diga*-marriage. The fact that the husband and wife leave the residence of the wife without leaving any child behind, is sufficient to render it subject to all the incidents of the *diga* form of marriage,

1. *Nīti*, p. 17
2. Modder, p. 229, section 127
3. *Kawwaumma v. David Singho* (1945) 46 N.L.R. p. 54, also *Punchi Menike v. Appuhamy* (1917) 19 N.L.R. p. 353, at p. 358 per Sampayo, J.; see also Solomons, p. 7
4. Armour, pp. 54, 55
5. *Nīti*, pp. 36, 37; S. p. 3, also Austin's Report, pp. 64–114
6. S. p. 74; *Nīti*, p. 74
7. *Nīti*, p. 40; Lawrie's MS.
8. *Jayasingedara Naide Appu v. Palingurala* (1879) 2 S.C.C. p. 176

even though the marriage itself was in *binna*.[1] But a woman who leaves her father's home to live with a married man in concubinage does not forfeit her right to inheritance in her parental estate.[2]

Onus of proof

In establishing marriages contracted before the Kandyan Marriages Ordinance, No. 3 of 1870 came into operation, there are dicta to the effect that the Courts will presume that the marriage which was contracted was a *binna*-marriage,[3] but later, the Courts veered round to the view that in such marriages there was no presumption that a marriage was either *diga* or *binna* and it was for the party who alleged that a marriage was of a particular type to prove that fact.[4]

In the absence of a certificate of marriage, under the provisions of the Kandyan Marriages Ordinance, No. 3 of 1870 there is no scope for the application of any presumptions and therefore the burden of proof is on the party which asserts that a particular marriage is either *diga* or *binna*.[5]

Section 39 of the Kandyan Marriages Ordinance, No. 3 of 1870 enacts that in the absence of any entry in the certificate to the contrary, a Kandyan marriage is presumed to be a *diga*-marriage. In interpreting the provisions of this section, different views have been expressed by the Courts regarding the nature and force of this presumption. Pereira, J., in *Sinno Appu v. Appuhamy*,[6] said: "It would be almost conclusive evidence that the marriage had been contracted at the time it was registered." Sansoni, J., adopting the words of Lord Denning said that this was a "compelling presumption".[7] But this "compelling presumption" may wear away if there is a time-lag between the date of the *de facto* marriage and the time it was registered. In such cases, the marriage, upon its registration, becomes valid as from the date of the original *de facto* association. Gratiaen, J., said:[8] "It was a sensible way of reconciling the statutory requirements of the Ordinance with the habits of the people whom it governs."

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1. *Lame Natchire v. Ahamedia Meera* (1870) D.C. Kandy 51219, Van. Rep. pp. 92, 93

2. *Bandu Menika v. Mudiyanse* C.R. Kegalle 2394, March 22, 1898; Modder's MS. Vol. 3, Sec. 6, para. 40

3. D.C. Kandy 22692 reported in (1853–1850) Austin, p. 141

4. D.C. Kandy 51219 (1860–1871) Vanderstraaten Rep. p. 92, *Punchi Nilame and another v. Dingiri Etana* (1909) 1 Cur. L.R. p. 239; *Doratiyawa v. Ukku Banda Korale and others* (1909) 1 Cur. L.R. p. 259

5. *Manelhamy v. Silinduhamy* (1951) 53 N.L.R. p. 137 at 138 per Pulle, J.

6. (1913) 1 B.N.C. p. 80

7. *James v. Medduma Kumarihamy* (1957) 58 N.L.R. p. 563

8. *Dissanayake v. Punchi Menika* (1953) 55 N.L.R. pp. 108, 110; also Pereira, J., in *Dingirihamy v. Mudalihamy* (1912) 16 N.L.R. p. 104; Ennis, J. (with diffidence) in *Ukku v. Kirihonda* (1901) 6 N.L.R. p. 104

The presumption created by Section 39 of the Kandyan Marriages Ordinance not only applies to the form of marriage but also to the terms of the contract. Thus Ennis, J., said in *Mampitiya v. Wegodapola*:[1] "In the absence of evidence to the contrary there would be a presumption that the terms of the contract relating to residence had been carried out." This view subsequently received further judicial confirmation,[2] but the presumption is rebuttable by evidence. Thus, although the entry in the marriage certificate may show that a marriage was in *diga*, yet it may be established by evidence that the marriage was in fact a *binna* association,[3] or it may be shown that the terms of the contract were not carried out and the parties continued to reside in the *mulgedera* in *binna* association.[4]

However, Bertram, C.J., stated that as between or against the parties and their representatives, the entry in the register is conclusive of the intention with which the marriage was celebrated unless the case is shown to be one of mistake or fraud or can otherwise be brought under Section 92 of the Evidence Ordinance, but persons who are not parties are not bound by the register but are entitled to show the true character of the marriage.[5] This appears to be a more correct view.

In dealing with questions of forfeiture, as will be shown later it is not the ceremony of marriage but the severance from the *mulgedera* which had this consequence.

The legal effects of diga and binna-marriages

By *diga*-marriage the wife becomes a member of the husband's household and forfeits her right to succeed to her parental property unless she re-acquires *binna* rights, not merely by returning to her *mulgedera* but by proving that those parents whose property is the subject-matter in question, or if they are dead those who inherited her parental property, agreed to share such property with her.[6]

By re-acquiring *binna* rights, a marriage which was originally in *diga* did not become a *binna*-marriage but retained its original characteristics. Similarly, if there was a severance from the *mulgedera* by a *binna*-married couple, they lost their rights to the wife's parental property but the marriage remained a *binna*-marriage for other purposes.

The Kandyan Marriages Ordinance

In view of the uncertainty of the law pertaining to Kandyan marriages, Regulation No. 9 of 1822 was enacted to remove doubts.

1. (1922) 24 N.L.R. p. 129
2. *James v. Medduma Kumarihamy* (1957) 58 N.L.R. p. 563; in *Dingiri Amma v. Ratnatilake* (1961) 64 N.L.R. p. 163, this presumption was applied to a *binna*-marriage per Tambiah, J.
3. *Dissanayake v. Punchi Menikke* (1953) 55 N.L.R. p. 108
4. *Mampitiya v. Wegodapola* (1922) 24 N.L.R. p. 129
5. (1922) 24 N.L.R. at p. 131
6. *Perera v. Aslin Nona* (1958) 60 N.L.R. p. 73

Ordinance No. 6 of 1847 did not limit its application to the Maritime Provinces (Section 31 of Ordinance No. 3 of 1870 declared that nothing in the former Ordinance should be deemed to have extended at any time to marriages contracted in the Kandyan Provinces by residents thereof according to the laws, etc., in force amongst the Kandyans). This attempt to clear the uncertainties of the law did did not have the desired effect. Subsequently, Ordinance No. 13 of 1859 was passed to meet the difficulties which arose from time to time as to the validity of certain alliances. (For a discussion of the general scope and effect of these enactments, see the judgment of Berwick, D.J.[1]) Later a special enactment applicable to the Kandyan Provinces was passed.

Ordinance No. 13 of 1859

Ordinance No. 13 of 1859 was enacted to regulate Kandyan marriages. This Ordinance declared all polygamous marriages illegal and provided for a system of registration of marriages. By Section 2 it declared that no future marriages should be valid unless registered in the manner provided for, and in the presence of the Registrar. By Section 28 it validated all existing marriages contracted according to the customary laws of the Kandyans.

Ordinance No. 13 of 1859 was a piece of legislation in advance of the times. Even after it came into force, the Kandyans still married according to their customary laws since a large section of the Kandyans were ignorant of its provisions. This Ordinance made illegal the customary marriages solemnly made, and bastardized a number of children who would have been legitimate under the customary laws.

Ordinance No. 3 of 1870

In 1870, the law was again amended by Ordinance No. 3 which re-enacted some of the main provisions of Ordinance No. 13 of 1859. It validated all marriages contracted before and after Ordinance No. 13 of 1859 if they were contracted according to the laws, institutions and customs in force among Kandyans (Sections 8 and 25).

Sections 4 and 31 of Ordinance No. 3 of 1870 following No. 13 of 1859, applies to all marriages between "residents in the Kandyan Provinces" except

(1) marriages under the Ordinances in force in the Maritime Provinces (General Marriages Ordinance),

or (2) where either party is a European or Burgher,

or (3) in marriages between persons professing the Mohammedan faith.

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1. D.C. Colombo 59572, 1 Br. App. A, Hayley, p. 189

It is significant to note that Europeans, Burghers and Mohammedans are persons excluded from the scope of the Ordinance. The question arose whether persons who belonged to other categories came within the ambit of this Ordinance. It was held in the case of *Narayanee v. Muttuswamy*[1] that the Ordinance did not apply to the immigrant Tamils, on the ground that the Kandyan law was only applicable to Kandyans. Lawrie, A.C.J., did not give any authority for this proposition. It is regrettable that the case of *Mongee v. Siarpaye*[2] was not brought to the notice of their Lordships. In that case, the Board of Commissioners in an appeal from the Judicial Commissioner, held, following the unanimous opinion of the *Maha Gabada Nilame* and four other chiefs, that under the 'King's Government' it had always been customary to decide cases which arose between Hindu Malabars according to the laws of the Kandyan Provinces and not according to their own laws. However, the decision in *Narayanee v. Muttuswamy*[3] can be supported on the ground that the parties to this case had not contracted their marriage according to the Kandyan customs.[4] If however, a Tamil marries a Kandyan Sinhalese according to Kandyan customary law, the question is still an open one.

The marriage of Kandyan Christians, in accordance with the provisions of Ordinance No. 6 of 1847 and the subsequent amending enactments, is not in any way governed by the Kandyan Marriages Ordinance. In *Karunaratne v. Andrewewe*[5] where a Kandyan married a European woman according to the rites of the Christian faith, it was held by Lawrie, D.J., that the marriage was valid and must be governed by Ordinance No. 6 of 1847. When the matter went up in appeal, the Supreme Court affirmed the judgment on other grounds, but did not express any dissent from the view taken by the District Judge. It was always open to the Kandyan Christians to take advantage of the provisions of Ordinance No. 6 of 1847 and the subsequent statutes, and to contract a marriage outside the purview of the Kandyan Marriage Ordinance. In view of certain doubts which existed regarding the validity of such marriages, Ordinance No. 14 of 1909 declared that it was not lawful to solemnize or register a marriage between Kandyans under the Marriage Ordinance, No. 19 of 1907, which was applicable to the marriages contracted in the Maritime Provinces. The marriages previously solemnized or registered under that Ordinance, or any enactment for which it was substituted, were declared valid provided that they conformed entirely to the requirements of Ordinance No. 19 of 1907. But, in so far as the rights of property under the Kandyan

1. (1894) 3 S.C.R. p. 125
2. Bd. Min. July 7, 1820
3. *supra*
4. Hayley, p. 191, footnote (o)
5. (1883) Wendt, p. 285

law were concerned, such a marriage was in effect the same as a marriage contracted under the Kandyan Marriages Ordinance.

The Kandyan Marriages Ordinance, No. 3 of 1870 which came into operation on the 1st of January 1871, provides in Sections 8 and 25 that all marriages previously contracted under the Kandyan laws and customs are deemed to be valid. Such marriages are valid although not duly registered under Ordinance No. 13 of 1859. In *Anagia v. Sada*,[1] a Full Bench of the Supreme Court held that lack of registration did not invalidate a marriage in the low country, conducted according to custom. (The same view was taken by the Privy Council, in a later case.) However, the Ordinance does not contain any provision for the registration of customary marriages which have been declared valid. It is difficult to say from what date such a marriage, if subsequently registered, is to take effect.[2]

Some difficulty is caused as to the effect of later registration of such marriages. In *Ukku v. Kirihonda*,[3] it was held with a certain amount of diffidence, that registration dated back to the actual commencement of the marriage, but in the case of *Dingirihamy v. Mudalihamy et al.*,[4] Ennis, J., was of opinion that the Ordinance contained no provision for validating earlier marriages but only governed new marriages. In both these cases however, the actual alliance was entered into after 1871. In the case of a marriage validly contracted before 1871, subsequent registration is a mere surplusage. "In cases where a marriage according to custom is valid, a presumption that such marriage was duly contracted may be raised from long cohabitation, habit and repute,"[5] but such a presumption may be rebutted by evidence that in fact there was no marriage.[6] In *Gunaratne v. Punchihamy*,[7] positive proof that there was no ceremony was held to be sufficient to rebut the presumption. Dr. Hayley says: "The absence of a ceremony should not constitute a sufficient rebuttal," as Kandyan customary marriages recognized marriages without ceremonies.

Can marriage be established by cohabitaton and repute?

In *Mohothihamy et al. v. Menika et al.*,[8] De Sampayo, J., drawing a distinction between marriages to which Ordinance No. 3 of 1870 apply, and others, was of opinion that in order to enable a party to take advantage of Section 25 of the Kandyan Marriage Ordinance, No. 3 of 1870, some proof, however slight, must be given of the

1. 1872–1876 Ram. Reps. p. 32, also *Babina v. Dingy Baba* (1882) 5 S.C.C. p. 9
2. Hayley, p. 192
3. (1902) 6 N.L.R. p. 104
4. (1912) 16 N.L.R. p. 61
5. *Mahara Ratemahatmeia* (1859) 3 Lor. p. 287; *Appuhamy v. Ranmenika* (1885) 1 S.C.R. p. 125; *Tisselhamy v. Nonnohamy* (1897) 2 N.L.R. p. 352
6. *Gunaratna v. Punchihamy* (1912) 15 N.L.R. p. 501; and *Vairamuttu v Seethampulle* (1885) 7 S.C.C. p. 56
7. (1912) 15 N.L.R. p. 501
8. (1919) 21 N.L.R. p. 449; 7 C.W.R. p. 16

observance of "the laws, institutions and customs in force in Kandy" at the time of the marriage. His view, however, is in this respect *obiter*, as it was held that there was not sufficient proof of cohabitation.

The Kandyan Marriage and Divorce Act, No. 44 of 1952

The Kandyan Marriage and Divorce Act, No. 44 of 1952, has now replaced Ordinance No. 3 of 1870. It provides for the registration and divorces of Kandyan marriages.

The object of the Act is to bring the procedure relating to the registration of Kandyan marriages into line with marriages under the General Marriage Registration Ordinance, No. 19 of 1907 (Ch. 59), which is now applicable to all persons except Muslims.

Marriages between Kandyans could be lawfully registered or solemnized according to the provisions of the General Marriage Registration Ordinance, No. 19 of 1907 (Ch. 59) in which event the capacity to contract a marriage, the formalities of the marriage and the grounds on which the marriage could be dissolved, are all governed by the provisions of the General Marriage Registration Ordinance. But the mere circumstance that a marriage between Kandyans has been solemnized or registered under the General Marriage Registration Ordinance will not effect the right of parties to succeed according to Kandyan Laws of Succession (Section 2 of General Marriage Registration Ordinance). It is the intention of the Legislature that the special Kandyan Marriage Law and the General Law of Marriages in Ceylon should exist side by side in the Kandyan Provinces.[1]

A summary of the Kandyan Marriage and Divorce Act, No. 44 of 1952 (as amended by Act No. 34 of 1954)

The main provisions of this Act may be now summarized:

Lawful age of marriage—Section 4

(1) Section 4 (1) declares that no Kandyan marriage is valid if at the time of the marriage, either party or both parties are under lawful age of marriage.

(2) Section 4 (2), however, validates marriages where one of the parties is under lawful age, if

(*a*) both parties cohabited as husband and wife for a period of one year after the party aforesaid has attained the lawful age of marriage, or

(*b*) a child is born of the marriage before the party aforesaid has attained the lawful age of marriage.

1. *Sophia Hamine v. Appuhamy* (1922) 23 N.L.R. p. 353 (D.B.)

(3) Section 4 (3) validates marriages where both parties are under lawful age, if

(*a*) both such parties cohabit as husband and wife for a period of one year after both have attained the lawful age of marriage; or

(*b*) a child is born of the marriage before both or either of them have attained the lawful age of marriage.

Prohibited degree of relationship—Section 5

No Kandyan marriage is declared valid between

(*a*) ascendants and descendants and their respective spouses;

(*b*) collaterals of the 1st degree, whether of full or half-blood, and their descendants; and

(*c*) the descendants of a spouse.

Any marriage between such parties is void by Section 5 (1) and cohabitation is prohibited, and in the event of any marriage or cohabitation between such persons, each such person is guilty of an offence under Section 5(2) of this Act.

Second marriage invalid without legal dissolution of first marriage—Section 6

No Kandyan marriage is valid

(*a*) if one party thereto has contracted a prior marriage and

(*b*) if the other party to such prior marriage is still living unless such prior marriage has been lawfully dissolved or declared void.

Legitimation of illegitimate children—Section 7

All illegitimate children become legitimized by the subsequent marriage of the parents and the disability of the adulterine bastards in Roman-Dutch Law to become legitimate by the subsequent marriage of their parents is not preserved.

Consent to marriage—Section 8

The consent of a competent authority is required to contract a marriage under Section 8 (1) of this Act.

The expression "competent authority" in relation to a minor is defined in Section 8(2) as follows

(*a*) *the father of the minor,*

(*b*) if the father is dead, or is under any legal incapacity or is unable to give or refuse his consent by reason of absence from Ceylon, *the mother of the minor;*

(*c*) if both the father and mother of the minor are dead, or are under any legal incapacity, or unable to give or refuse consent by reason of absence from Ceylon, *the guardian or guardians of the minor* appointed by the father or, if the father is dead, or is under any legal incapacity, by the mother or, if the mother is dead, or is under any legal incapacity, by a competent Court;

(*d*) if both the father and mother of the minor are dead or under any legal incapacity, or unable to give or refuse by reason of absence from Ceylon, and if further:

(*i*) no guardian or guardians of the minor has or have been appointed by the father, mother or a competent Court; or

(*ii*) the guardian or guardians so appointed is or are dead, or is or are under any legal incapacity,or is or are unable to give or refuse consent by reason of absence from Ceylon,

the *District Registrar* for the district in which the minor resides.

Authority to give or refuse consent—Section 9

A competent authority whose consent to the marriage is required, may give or refuse such consent as it may seem fit.

Consent of the District Registrar—Section 10

Section 10 prescribes the procedure to be adopted to get the consent of the District Registrar when he is the competent authority.

Appeals—Section 11

An appeal against the refusal of the competent authority to give his consent to the marriage, lies to the District Court within whose jurisdiction the minor resides.

Powers of District Court—Section 12

The District Court is given the power to set aside or confirm the order of the District Registrar.

Notice of prospective Kandyan marriage, registration, etc.

Provision is also made for giving notice of marriage (Section 16), its registration (Section 17), the issue of certificates in respect of Kandyan marriages (Section 18) and for the granting of special

licences of marriage (Section 19). Objections to the issue of marriage notice certificates could be made (Sections 20 and 21).

Solemnization of a Kandyan marriage

The marriage must be solemnized and registered within three months of the date of the marriage notice entry (Section 22).

A Kandyan marriage is solemnized (Section 22 (2)) by the Registrar in the presence of both parties to the marriage and two witnesses, in any authorized place at any time between the authorized hours (for authorized hours—*vide* Section 24 (1) (*i*)), in accordance with the procedure set out in Section 22 (3).

Registration of a Kandyan marriage

After the solemnization, the Registrar is required to register the marriage in the prescribed manner (Section 23) and to transmit the duplicate to the Registrar-General (Section 25).

Registration to constitute best evidence of marriage

Registration under the Act constitutes best evidence of marriage (Section 28).

Proof of certain matters not required once Kandyan marriage is registered

Once the marriage is registered, it is not necessary to prove in support of the marriage, that any party thereto resided in any division or district specified in the notice of marriage for any specified period, or the consent of any person required by law was given, or that the marriage was solemnized or registered in any authorized place and at the authorized time and no evidence can be led to prove these matters (Section 29).

Rectification of failure to register, and errors

Provision is also made for rectifying failures to register, and errors in registration of Kandyan marriages (Section 30).

Divorce

Under the early Kandyan customary law, since the institution of formal marriage was not established on a firm footing and marital unions were associated with a certain degree of looseness, the attitude towards divorce, which was frequent, was not attended by any formality.

Knox says:[1] "But their marriages are but of little force or validity. Or if they disagree and mislike one the other, they part without disgrace. Yet it stands firmer for the man than for the woman; howbeit they do leave one the other at their pleasure." He adds:

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[1] Knox, p. 149

"Both women and men do commonly wed four or five times before they can settle themselves to their contention."

The answers given by some of the "best informed Candian priests" to questions put to them by Governor Falck in the year 1769 respecting the ancient laws and customs of their country are recorded in the *Lok Raj Lo Sirita*. To questions whether divorce was allowed among the Ceylonese, the answer was in the negative. The priests said: "They cannot dissolve their marriage by mutual consent. If the husband wishes to obtain a divorce from his wife he must prove that the woman does not pay him due attention, that she uses insubordinate language to his face, that she is lacking in devotion to her husband, that her heart is set upon another towards whom she displays the affection and reverence that are the husband's due, and that she spends her husband's wealth to please her paramour, that she lives in association with others and is guilty of similar acts of misdemeanour. This plea must be held before the High Tribunal before he can separate from his wife."

The grounds on which the wife can ask for divorce are stated as follows:

"The grounds on which the wife can ask for divorce are that he is wanting in affection towards her, does not provide her with clothes and ornaments suitable to her conditions in life, that he does not strive to acquire wealth by agriculture, trade or similar respectable occupation, that he deviates himself to the company of strange women and wastes her substance, that he is addicted to such vices as thefts, falsehood and drunkenness, that he treats his wife as a slave and pays court to other women. Charge of such conduct on her husband's part, she must make before the High Tribunal if she desires to obtain a divorce."

The consequences of the divorce on the proprietary rights of the spouses and the custody of the children were determined on a fault basis. The guilty spouse had to return a half of what he or she obtained as dowry on marriage gift and also the property acquired by that spouse during coverture. The guilty spouse also lost the custody of the children. A defaulting husband was also ordered to maintain his wife for six months.[1]

Some are of the view that the priests who gave these answers to Governor Falck were stating the customary usages of the low country Sinhalese. It is more likely that the priests were setting out the conditions under which the Kandyan spouses were motivated to disrupt the marital tie by mutual consent or it may be that they were stating a reformative view of the law. Their statement is not in accord with the customary practices. By customary law a Kandyan could obtain a divorce.

1. *Lok Raj Lo Sirita*—Dr. Malalasekera's translation—*The Ceylon Daily News*, Aug. 2, 1930

The usual method by which a man repudiated his wife was "by taking her back to her village".[1] There is much similarity between the Kandyan and the Indian customary law on this aspect.

The *Dharmasastras* of medieval times has followed the texts of Manu which apparently deny the validity of divorce. Derrett observes that it is generally believed that the Hindu law as such, knew no such thing as divorce until it was introduced by statute, but this is a distorted view.[2] Derrett says: "A careful perusal of Manu himself and of Narada and the legal portions of Kautiliya reveals that the wildest liberty prevailed in classical times, and that the *Dharmasastras* was shouldering a heavy task in attempting to reform society."

Kane observes[3] that divorce in the ordinary sense of the word (*i.e.* divorce *a vinculo matrimonii*) was unknown to the *Dharmasastras* and to Hindu society for about two thousand years (except on the ground of custom among the lower castes). But as Derrett says, this view of the *Dharmasastras* is a later refinement and appears to have been interpreted by Manu who said "let mutual fidelity between husband and wife continue till death".[4]

Kautiliya states:[5] "A wife, hating her husband, cannot be released from the husband if he is unwilling (to let her go), nor can the husband release himself from the wife (if she is unwilling); but if there is mutual hatred, then release is possible." Hence according to Kautiliya there can be no dissolution of the marriage tie if the marriage was celebrated in one of the first four recognized forms unless there is mutual hatred. Such a strict view was never recognized by the customary laws of India or Ceylon. Here again, Kandyan law has no Aryan element but has striking similarities to the customary laws as prevalent among the pure non-Aryan races of India.

The only essential condition for a valid divorce under the customary laws of the Kandyans was the intention on the part of the husband or wife to separate for good. Consequently, separation due to domestic quarrels or from fear of infection, did not put an end to the marriage.[6] But Sawers states that the wife cannot leave her husband without cause, except with the consent of the parents.[7] Commenting on this statement, Dr. Hayley observes that when Sawers made this statement he was "apparently regarding the matter from the point of view of her subsequent claim upon

1. *R. v. Puncha* B.J.C. 23. 10. 1816, C.G.A. 23/1
2. See the Origins of the Laws of the Kandyans, Reprinted from the University of Ceylon Review Vol. XIV Nos. 3 and 4 p. 117
3. *History of Dharmasastras*, Kane, Vol. II, Part I, p. 620
4. Manu XI, pp. 89, 92, 101, 105–106
5. *History of Dharmasastras*, Kane, Vol. II Part I, p. 621
6. P.A. pp. 15–16; *Nīti*, pp. 30–31; Marsh, p. 343
7. S. pp. 38–39

them, for she could not marry again nor could she presumably claim any further maintenance or dowry from them. But so far as the husband and his property were concerned, desertion by the wife could certainly constitute a dissolution of marriage, and there is no trace of any proceedings in the nature of a suit to restore conjugal rights".[1]

An action for restitution of conjugal rights is unknown to Kandyan law. In *Galagoda Menika of Weragoda v. Golahela Banda*,[2] the Assessors stated that there existed no law to compel a woman to remain with her husband, or vice versa.[3]

Dissolution of a binna-marriage

In discussing divorce under the Kandyan law, a distinction has to be made between *binna* and *diga*-marriages. The circumstances under which divorce can be obtained under each of these marriages, differ.

The stability of the *binna* form of marriage depends on the goodwill and generosity of the parents of the bride who provide a dwelling-house for the couple. It was always in the power of the parent who provides the house to put an end to such a union, even without the consent of the daughter. The father could dissolve such a marriage if the couple were settled on his property, and the mother had a similar power if the couple were settled on her property. After the parents' death, if the brothers were responsible for the *binna*-marriage, they had the right to dissolve it even against the will of the woman. Thus it is clear that the power of dissolving a *binna*-marriage effected by a parent was given only to the parent who had settled the couple in *binna* on his or her property and not to the other parent. After the death of such a parent, no other persons could effect a divorce without the wife's consent unless the husband had been guilty of conduct which would bring disgrace on the family.[4] Thus the father had no power to dissolve a *binna*-marriage arranged by the mother on her separate property and vice versa, nor could the widow expel her son-in-law even if she had become the owner of the dwelling-house by gift or bequest from her deceased husband. She could insist, however, on the departure of both the daughter and her husband, without prejudice to their rights or those of their children.[5] For a similar reason, brothers and other relations could not expel their sister's

1. Hayley p. 196

2. (1826) Hayley, Appendix II, No. 81

3. also *Kepitipola Menika v. Kempitiya Banda* (1826) Hayley, App. II, Note 83

4. *Nīti*, p. 21

5. P.A. p. 36; *Nīti*, p. 21

husband brought to her by their parents,[1] but a wife cannot be compelled to live with her husband against her will.[2]

Dissolution of a diga-marriage

A *diga*-marriage stands on a firmer footing. It was not possible for the parents or relations of either spouse to effect a divorce against the will of the parties, except for good cause such as conduct calculated to disgrace the family. The Kandyans paid great attention to caste, and any conduct on the part of the woman which degraded her by her union with a male of a lower caste was considered so revolting that even relations who had suffered disgrace as a result of such an act, were given the right to put an end to such a union even against the wishes of the woman. If a woman was married to a man of a lower caste with the consent of her parents, her brothers and uncles could interfere and remove her and put an end to the degrading alliance, provided they were willing to support her until a suitable husband was found.[3]

Divorce under the Kandyan Marriages Ordinance, No. 3 of 1870

The Kandyan Marriages Ordinance placed the law of divorce on a firm, statutory basis. Under Ordinance No. 3 of 1870, divorce may be obtained on any of the following grounds :

1. Adultery by the wife after marriage.
2. Adultery by the husband, coupled with incest or gross cruelty.
3. Complete and continued desertion for two years.
4. Inability to live happily together, of which actual separation from bed and board for a year shall be the test.
5. Mutual consent.

The power of the parents to bring about a divorce has been, by implication, abolished, except in so far as their influence may instigate one or the other of the spouses to seek a divorce on one of these grounds.

The order for dissolution of marriage on the grounds set out above is obtained not in a Court of Law but before a Provincial Registrar or Assistant Provincial Registrar, who must be satisfied that one of the statutory grounds set out has been proved. For the divorce to be valid, there should be an entry by the Registrar dissolving the marriage. The order takes effect immediately but without prejudice to the rights of children born subsequently.

1. S. p. 39
2. *Golahella Banda v. Weeragoda Mohotalle* (1826) Hayley, App. II, note 81; *Kepitipola Menika v. Kempitiya Banda* (1826) Hayley, App. II, note 83
3. *Niti*, p. 20

If a Kandyan had elected to get married under the General Marriages Ordinance, then such a marriage could be dissolved only on the grounds of adultery, malicious desertion, or impotency at the time of marriage as stated in the General Marriages Ordinance.

Provision was made by the Kandyan Marriages Ordinance, No. 3 of 1870, to grant maintenance to a child of a marriage which is the subject matter of dissolution by the Provincial Registrar. If no order for maintenance of a child is made in such proceedings, an application under the Maintenance Ordinance could be made for such an order and the previous proceedings do not operate as *res judicata*.[1] An order for maintenance in favour of a wife ceases to have effect from the date of divorce, as in *Premawansa v. Somalatha*.[2]

The better view is that divorce proceedings started under Section 20 of the Kandyan Marriages and Divorce Ordinance did not terminate with the repeal of the Ordinance by Act 44 of 1952 and could be heard and concluded even after the date of the repeal. By virtue of the provisions of Section 6 (3) of the Interpretation Ordinance, the order of maintenance made is enforceable by the Magistrate acting under Section 20 (5) of the repealed Ordinance. The position would not be different if the order for maintenance had been made before the date of repeal of the Ordinance.[3]

The Kandyan Marriages and Divorce Act, No. 44 of 1952, amended and consolidated the law relating to Kandyan marriages and divorces and other matters connected and incidental to marriage and divorce.

The grounds for divorce

The dissolution of a Kandyan marriage is granted under the Act under Section 32 on the same grounds as provided by Ordinance No. 3 of 1870. The husband could ask for dissolution on grounds specified in Section 32 (*a*), (*c*) or (*e*), and the wife could ask for divorce on grounds set out in Section 32 (*b*), (*d*) or (*e*). Such application should be made according to Section 33 to the District Registrar of the district in which the applicant resides.

By Section 32 (2) both parties may jointly apply for the dissolution of the marriage to the District Registrar of the district in which either party resides. The application should be in writing and should state the name of the parties, the nature of the marriage (i.e. whether in *diga* or in *binna*), the grounds of the application, and the signature of the applicants (Section 32 (3)).

1. *Sanchi v. Allisa* (1926) 28 N.L.R. p. 199
2. (1961) 63 N.L.R. p. 551, see dictum of Tambiah, J.
3. *A. P. M. Kiri Banda v. P. D. M. Biso Menika* (1957) 60 N.L.R. p. 94 per H. N. G. Fernando, J.; *Contra, Abeysekera v. Somawathie Abeysekara* (1957) 60 N.L.R. p. 66

On receipt of the application, by Section 32 (4) the District Registrar should cause a notice to be served upon each party to the marriage in which he should state the grounds on which the application is made and also indicate the time and date specified, and the place at which the application would be heard.

At the inquiry, the Registrar is empowered to embody the terms of any agreement entered into between the parties regarding any compensation in his order. Further, he could at his discretion order a sum of money to be paid periodically to the wife, or make any other provision for the maintenance of the wife [Section 33 (7) (*ii*)] or children [Section 33 (7) (*iii*)]. From the order of the District Registrar, an appeal lies to the District Court (Sections 33, 34).

No order granting dissolution of a Kandyan marriage made by a Registrar could be entered till the time limit for an appeal expires, or where an appeal is preferred, until the District Court makes order. Registration of the dissolution of marriage constitutes the best evidence of divorce (Section 36).

The proprietary rights and liabilities of spouses

The looseness of the marriage tie and the laxity of the rules governing divorce under the Kandyan customary law had their repercussions on the proprietary rights of spouses.[1] There was no permanent community of property between a husband and wife under the Kandyan customary law and this was one of the natural consequences of the looseness of the marriage tie.[2]

Under neither modes of marriage known to the Kandyan law can there be said to be a community of goods between the husband and wife. In a *diga*-marriage, whatever property the wife brings with her in the shape of dowry and even what she acquires independently of the husband after marriage, is regarded as her separate property over which the husband has no control.[3] The properties of the husband and wife remain distinct.[4] The property of the wife is separate and entirely at her own disposal and her husband has no power over it. He could neither sell it nor dispose of it.[5] Even the wife's acquired property is at her own disposal during her lifetime over which the husband has no power of alienation.[6]

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1. Modder (2nd Ed.) Cap. 4
2. *Sketch of the Constitution of the Kandyan Kingdom* (Ceylon) by Sir John D'Oyly (1929) p. 128
3. ibid.
4. *Niti*, p. 23; P.A. p 19. also D.C. Matale 3388, Judgement of the Supreme Court, 22 August 1942, *Kivry Ettena v. Heteregedera Appu* (1847) Ram. Rep. (1843–55), Morg. p. 946; Austin, p. 109
5. *Niti*, p. 23
6 Modder (1914 Ed.) Sections 154, 157. For fraudulent transfers between spouses *vide Kershaw* (1860-62) Ram. Rep. p.157; *Komali v.Rodrigo* (1885) 7 S. C.C. p. 73

The wife is not liable for the debts of her husband except such as have been contracted with her consent and which she has sanctioned by making herself a surety for the payment of the same or which she has contracted jointly with her husband,[1] or where she had traded in partnership.[2]

The wife's goods are not subject to seizure on account of the husband's debts, whether such debts were contracted previous to the marriage or during coverture. But if the wife has authorized her husband to contract a debt and she becomes a surety to her husband, the wife will then be equally bound with her husband to discharge the debts, and the wife's estate shall accordingly be subject to seizure.[3] The wife's property will not be liable for debts, fines inflicted, or damages caused by a tort or crime committed by the husband.[4]

Under the Kandyan kings, the ancestral property of the wife or lands purchased by her during her coverture with her husband, or property purchased for her by him, or any other property movable or immovable belonging to her, could not be forfeited by the Crown for any high treason or misdemeanour on the part of the husband.[5] When a Kandyan dies leaving his widow and children, although the widow has the chief control and management of the landed property she has only a life interest in the same.[6] She has no right to dispose of her husband's lands contrary to law.[7] The debts of the deceased are payable by his heirs proportionately according to the shares they receive.[8]

A wife married in *diga* is liable to pay her husband's debts irrespective of her inheriting any property through her husband.[9]

A Kandyan widow could sell her husband's lands to pay off his debts. As the law of administration in the modern sense was then known in the Kandyan period, she was given the rights of a legal representative.[10] Her claim to the right was further strengthened by the fact that she was in charge of her minor children. She is liable as

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1. S. p. 38
2. D.C. Matale (1833) Morg. p. 223
3. P.A. p. 10; Marshall, p. 224
4. *Niti*, p. 23; *Pittawela Mahatmeyo's claim v. Government* (1819) Hayley, App. II, p. 70, Note 77
5. Marshall, p. 225; *Niti*, p. 23; P.A. p. 11; *Pittawela Mahatmeyo's claim v. Government* (1819,) Hayley, App. II, p. 70, Note 77; Also *Punchy Menika v. Govt. of Ceylon* (1819) Hayley, App. II, p 70, Note 77; and *Kaloo Etena v. Government of Ceylon* (1823) Hayley, App. II, p. 70, and Note 77
6. Hayley, p 348; *Niti*, pp. 27–28
7. *Ambegasweva Ukkuwa v. Ilukupitiya* (1827) Hayley, App. II, Note 55
8. S. p. 21
9. S. p. 24
10. *Appuhamy v. Kiriheneya* (1896) 2 N.L.R. p. 155

administrator *de son tort* for debts incurred by her.[1] The widow's right to sell her husband's ancestral property during the minority of her children for payment of debts without sanction of Court is recognized in a series of decisions,[2] but she has no right to sell her husband's property for debts if she has no children. She cannot also lease her husband's property.[3] She owed a duty to the collateral heirs not to fritter away their rights in such properties.[4]

A Kandyan widow who has children has the right to mortgage her husband's lands to pay off her debts or to satisfy the most urgent needs of the family,[5] but if the children are grown up, their consent is necessary.[6] If she has no children, she has no right to mortgage her husband's lands.

Since administration of a deceased person's estate has been introduced from early British period, the rationale of these decisions is no longer valid. It is submitted that these decisions should be reviewed and the anomaly between the Kandyan law and the general law on this topic should be removed.

If the wife dies without disposing of her property and without children, her ancestral property devolves on her heirs, but those acquired after marriage devolves on her husband.[7] Subject to the power of the wife to sell her husband's properties in the circumstances set out earlier, the property of the husband is regarded solely as his property over which the wife has no power to effect a transfer or to create a mortgage, nor could she dispose of his property by sale.[8] But this rule is subject to further exceptions. In the absence of the husband, the wife is considered to be the manager of her husband's affairs, and, therefore, she may make use of his property for the maintenance and benefit of the family. She has authority to spend her husband's money, and she has even the power to sell his movable property to maintain his family.[9] In the exercise of such power she may sell the produce for this purpose, and even mortgage the lands if necessary in order to procure subsistence, but she has no power to sell the immovable property.[10]

The husband is not answerable for any debt or claim which may be preferred against his wife, since the wife's estate is separate from his estate and he has no control over the same.[11] He is not

1. *Suppen Chetty v. Kumarihamy* (1905) 3 Bal. p. 96
2. *Punchirala v. Banda* (1948) 50 N.L.R. p. 488 and the cases cited therein. But in view of statutory provisions in the Civil Procedure Code, the validity of these decisions can be questioned
3. *Lebbe v. Christie* (1915) 18 N.L.R. 353 F.B.
4. *Babi v. Dantuwa* (1961) 63 N.L.R. p. 139
5. *Bandara Menika v. Imbuldeniya* (1949) 50 N.L.R. p. 478
6. S. p. 24
7. *Niti*, p. 23
8. ibid.
9. ibid.
10. S. p. 37
11. P.A. p. 11

bound to discharge debts which had been contracted by his wife previous to their marriage, nor is he even bound to pay any debt which the wife contracts during the coverture even on her own account,[1] except debts contracted by her for the maintenance of his family or in the interests of her husband during the husband's absence from the village. After separation, the husband is not liable for any debts contracted by the wife.[2] Both the husband and wife are liable for any debt contracted by them while trading or engaged in joint ventures, or if one becomes the surety of the other.[3]

Just as the husband has no power over he wife's property, the wife has no power to dispose of the husband's estate, subject to the exceptions stated above. She could only do this if she was especially authorized by her husband to make any such disposal thereof.[4]

Effect of divorce on property

Since the estate of the husband and wife is regarded as separate, the divorced wife is entitled to retain her dowry and separate property.[5] Property acquired jointly during coverture is divided between the husband and wife when divorce takes place.[6]

Any property settled by the wife's parents on the husband as a marriage portion, although in other respects the absolute property of the husband, continues to bear the stamp of dowry to the extent that if the wife is divorced by her husband, she could claim such property for herself.[7]

Status of a Kandyan wife in Court

After a forensic battle that raged for some time the Kandyan wife ultimately won her rights as a feme-sole to sue in a Court of law without being assisted by her husband, unlike her low country sister who was governed by the Roman-Dutch Law.[8] In *Mohiti-appu v. Kiribanda*,[9] she was allowed to sue a stranger for damages without joining her husband. Now she can sue and be sued without the husband being joined.

The right to maintenance and alimony

The right to alimony depends on the conduct of the wife. If the wife quits her husband of her own accord, against his wish, or is ex-

1. ibid.
2. Judicial Commissioner Kandy, No. 4569—1893 p. 10
3. *Niti*, p. 23
4. P.A. p. 11
5. S. p. 37
6. ibid., *Niti*, pp. 23–24
7. P.A. p. 32; *Hanguranketa Hamy Gammahe v. Seeralle Kapuralle* (1823) Hayley, App. II, Note 78
8. D. C. Kandy 8825, Austin, p. 40
9. (1923) 25 N.L.R. p. 221

pelled for bad conduct, she has no claim upon him or his estate, nor is she even entitled to wearing apparel supplied by him for her use.[1] If the marriage is dissolved by the husband without the wife's consent, and for no fault on her part, she is entitled to a "suitable award of clothing", which she could recover in former times by an action in the Gansabhawa.[2] For her subsequent support she must depend on her relations, but if she becomes entirely destitute, she could claim to be maintained by her former husband's estate.[3] In D.C. Ratnapura 64,[4] the Supreme Court allowed a deserted wife maintenance from her husband's property. The question whether desertion amounted to a divorce was not discussed in this case. This decision could be supported on the ground that where there are children left with his wife, the husband is liable to maintain his wife under the Kandyan law.[5] A temporary separation is not regarded as a divorce. The wife is expected to put up with her husband's moments of irritation and cannot desert the husband for that reason.[6]

Under the Kandyan law a husband should support his wife and children and allow them to reside in his home. If he refused to perform this obligation they were given a reasonable portion of his property.[7]

The wife has the right to sue a husband for maintenance. In modern law, the liability to support his wife and children applies both to *dīga*[8] and *binna*-marriages.[9] In the case of associated marriages only the registered husband is liable to support his wife.[10]

The effect of the Kandyan Marriages Ordinance, No. 3 of 1870, on maintenance

Under the Kandyan Marriages Ordinance, No. 3 of 1870, a marriage is dissolved only by an entry in the register, and evidence of desertion without any such entry is insufficient for dissolution (Section 23). This raises a question as to what extent a deserted wife could claim maintenance after the Ordinance came into operation. In an earlier case,[11] the view was taken that she could institute an action for maintenance. This view was dissented from, however, by a Bench of two judges, on the ground that there was no Kandyan law which made the husband responsible for the

1. S. p. 37; *Nīti*, pp. 24, 30; P.A. p. 14; *Ukku v. Tambya* (1863) 4 Ram. Rep. (1863–1868) p. 70
2. *Nīti*, p. 24; S. p. 37–38; P.A. p. 14
3. *Nīti*, p. 30
4. (1834) Morgan's *Digest*, p. 22
5. Hayley, pp. 227-228; *Horatalhamy v. Rang Appu* (1856) 1 Lor. p. 252
6. Case 514 1st August 1834, B.J.C. referred to in Lawrie's MS.
7. D. C. Ratnapura 64 (1834) Morgan's *Digest*, p. 22
8. *Ukku v. Tambya* (1863) 4 Ram. Rep. (1863-1868). p. 70
9. *Vide* Section 3 of Maintenance Ordinance
10. *Ran Menika v. Kalu Banda* (1869) 2 B. & V. p. 129
11. *Yadalagoda et al. v. Herat* (1879) 2 S.C.C. p. 33

maintenance of his wife, and that therefore the wife should seek the remedy under the provisions of the Maintenance Ordinance, No. 19 of 1889.[1] It is submitted with respect that this view is not only *non sequitur* but is not tenable. If under the Kandyan law the husband is not liable to maintain his wife, then the wife cannot claim any maintenance under the Maintenance Ordinance which imposes the liability on husbands who refuse to fulfil the obligation cast on them by law to maintain their wives. But in *Menika v. Dissanayake*,[2] Grenier, J. following the earlier case referred to, granted maintenance in a civil suit without making any reference to the decision in *Menikhamy v. Loku Appu*.[3]

Under the Kandyan customary law, if the marriage was in *diga* and the wife was pregnant at the time of the divorce, she could claim alimony "according to the circumstances of the husband until the child was delivered" or until she married again, in which event her right ceased after six months.[4] A similar allowance had to be paid in respect of infants not yet weaned who had to remain with the mother. The mother was bound to support her older children whom she kept with her. If the husband handed over some of the children to his wife, he was liable for the support until they were old enough to maintain themselves.[5] In the Kandyan period the husband was ordered to give four *amunams* for each child. This liability attached even to joint husbands. If one of them separated from the household he had to provide his proportionate share.[6] Now the quantum of maintenance is determined by the Court according to the means of the husband.

A *binna*-married husband has no obligation to support his wife and children,[7] unless of course he deserts them and leaves the house of his own accord, in which event he is bound to supply his children with the necessities of life.[8] Hayley adds:[9] "Presumably this was so only in the event of their becoming destitute, for he could not claim the custody of them as of right."

Statutory provisions governing alimony

Ordinance No. 3 of 1870 only provides for the registration of any voluntary settlement at the time of divorce, but makes no provision for the enforcement of an award of alimony.

By an amendment to Ordinance No. 1 of 1919, the Provincial Registrar was empowered to order the payment of alimony and maintenance for the children, and such an order is enforced as

1. *Menikhamy v. Loku Appu* (1898) 1 Bal. p. 161
2. (1903) 7 N.L.R. p. 8
3. *supra*
4. S. p. 38; *Nīti*, p. 25
5. *Nīti*, p. 26
6. Hayley, p. 289
7. *Nīti*, p. 26; P.A. p. 15, but see D.C. Kandy 12848 (1899) Koch, p. 54
8. *Nīti*, p. 26
9. Hayley, p. 289

if it was an order for maintenance made by a Magistrate.[1] But this provision did not prevent the Magistrate from exercising his powers under the provisions of the Maintenance Ordinance, No. 19 of 1899.[2]

The expression "his children" in Section 20 (2) (*b*) (*ii*) of the Kandyan Marriage Ordinance was construed in *Sanche v. Allisa*[3] as children admitted by the father. Therefore Jayawardene, A.J., held that the Provincial Registrar has no power to order maintenance to a child if the father denies paternity. It is submitted that such a construction is not warranted by the provisions of the Kandyan Marriage Ordinance. The provisions of the Maintenance Ordinance (Ch. 67) may be utilized where the Provincial Registrar omits or refuses to make an order for maintenance of a child.[4]

Where a marriage is dissolved by a Provincial Registrar under Section 20 of the Kandyan Marriages Ordinance and the husband is ordered to pay a monthly sum as maintenance, it is competent for the Magistrate to vary the order by enhancing or reducing the sum to be paid.[5]

Where a wife obtains an order for maintenance against her husband on dissolution of their marriage under the provisions of the Kandyan Marriages Ordinance, a temporary reunion does not amount to a waiver of her rights for future maintenance, if the parties do not remarry.[6] Under the Kandyan Marriage and Divorce Act, No. 44 of 1952, as amended by No. 34 of 1954 and No. 22 of 1955 (Ch. 116) a District Registrar in granting dissolution of marriage should embody terms of any compensation agreed upon by the parties in an order and may at his discretion order maintenance to the wife or children. Such an order cannot be enforced in the Magistrate's Court[7] but could be enforced in the District Court as if it is an order made by that Court under Chapter XLII of the Civil Procedure Code.[8] Any order for maintenance under the Maintenance Ordinance in favour of a wife ceases to have any effect from the date of divorce.[9]

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1. *Punchi Amma v. Mudiyanse* (1920) 21 N.L.R. p. 477; also *Menika v. Naide* (1916) 19 N.L.R. p. 351
2. ibid.
3. P.C. Kegalla 5272 (1926) 28 N.L.R. p. 199
4. ibid.
5. *Surana v. Heen Ukku* (1944) 45 N.L.R. p. 196
6. *Wimalawathie Kumarihamy v. Imbuldeniya* (1953) 55 N.L.R. p. 13
7. *Abeysekera v. Abeysekera* (1957) 60 N.L.R. p. 66; Section 33 (7); *Abeysekera v. Bisso Menika* (1961) 64 N.L.R. pp. 260 and 263
8. Dictum of Tambiah, J. in *Premawansa v. Somalatha* (1961) 63 N. L.R. pp. 551 and 552
9. *Premawansa v. Somalatha* (1961) 63 N.L.R. p. 551

CHAPTER XI

GUARDIANSHIP

Indian customary law and Kandyan law

On the topic of guardianship there is a gap between Indian customary law and the *Dharmasastras*. Dr. Derrett observes that a few points of similarity could be discerned between Kandyan law and Indian customary law on this subject.[1]

Guardianship arising out of marriage which makes the husband the guardian of the wife, is well known in Indian customary law.[2] A similar idea prevails among the customary laws of the Tamils of Ceylon.[3] The Kandyan law considered the wife as a feme-sole and did not recognize any type of guardianship by the husband over her. Thus in this respect Kandyan law differs from the Indian customary law and the customary law of the Tamils of Ceylon.

The Law of Guardianship of infants and minors is shrouded in obscurity when one examines the *Dharmasastras*. As Derrett observes, in a joint family this topic is not likely to be a subject of litigation and therefore was not developed by the *Dharmasastras*,[4] but when the joint family property suffered disintegration by splitting up and the infant's rights crystallized in respect of property, the ancient customary law regarded either the maternal relations or the eldest of the village as the proper guardians of the minor's property.[5] In giving his reasons for the preferential treatment given to the maternal relations, Derrett says:[6] "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 separate rights and prevent deliberate or accidental embezzlements of his property."

The same reason may have prompted the *Thesawalamai* to adopt a similar rule whereby the maternal grandparents were regarded as the guardians of the minor children when the father of the minors married a second time after the death of his first wife.[7] It is likely that the preference to maternal relations as

1. Derrett, p. 123
2. ibid.
3. ibid., and *The Laws and Customs of the Tamils of Jaffna* by H. W. Tambiah, p. 147 et seq.
4. Derrett, p. 123
5. Kane's Edition of the *Katiyana Smrti* (Bombay 1933) verse 845, p. 297; also Derrett, p. 123
6. Commentary of Medhatithion *Manu* VIII, 27th Edition, Jha Vol. 2 (Calcutta, 1939); Nandana Jha's *Hindu Law in its sources*, Vol. 2 (Allahabad, 1933) p. 524 cited by Derrett p. 124
7. *The Laws and Customs of the Tamils of Jaffna* by H. W. Tambiah, pp. 148-152

guardians of the minor children in the Kandyan law was prompted by the same motives.[1]

The Kandyan law recognized the ultimate guardianship of the king just as the Indian customary law did.[2] The Kandyan rule of customary law that the guardian is responsible for the maintenance of the minor and has the right to enjoy the usufruct during his minority, has its parallel in the law of *Thesawalamai*.[3] The Indian customary law appears to have no counterpart.[4]

The principle of the Kandyan customary law that the guardian has preferential rights over other relations in the matter of succession of his ward in the event of the latter dying without descendants or close relations, is not found in Indian customary law. Apart from the Guru succeeding to the disciple as under customary law of Punjab and where the brothel keeper was allowed to succeed to the prostitute's property, no other rule existed in the Indian customary law on this matter.[5] Derrett says the absence of such a parallel in Indian customary law is due to the fact that upon this subject little or no material on customary law now exists. The *Dharmasastras* has no counterpart.[6]

Father, the natural guardian

Under the Kandyan law, as under many systems of law, the father is by nature and nurture the guardian of his children. The father is the custodian of his minor child, and his paramount claim is admitted[7] even after the death of a mother married in *binna*. Since this right is based on the natural relationship, a widower had however no right of guardianship over his deceased wife's child by another husband.[8]

Mother as the guardian

On the death of the father, the *diga*-married mother became the natural guardian of his minor child.[9] The mother is preferred to the brothers and cousins of the father. The *Nīti Nighanduwa* sets out the law as follows:[10] "If a man dies leaving a child, a brother, or an elder or younger cousin born to an elder or younger paternal uncle, his lands and all his other property should be given over into

1. Derrett, p. 124
2. Kane, Vol. III, p. 574
3. For a discussion of the mother's right to enjoy the usufruct during the minority of her children after the husband's death, see *The Laws and Customs of the Tamils of Jaffna* by H. W. Tambiah, p. 142
4. Derrett, p. 124
5. ibid.
6. ibid.
7. *Nīti*, p. 45; Hayley, p. 211
8. *Nīti*, p. 45
9. *Ampitiya Menik Etena v. Appoo Naide* (1819) Hayley, App. II. Note 51
10. *Nīti*, p. 211

the charge of the mother; and the brother of the deceased or his elder or younger cousin, has no right to exercise any authority over them on the plea that, as the child is descended from their family and the inheritance of the child is their ancestral land, they should be the guardians."

As guardian of the minor children, a Kandyan widow has the right to mortgage the estate of her deceased husband for the payment of his debts.[1] She has even the right to sell her deceased husband's *paraveni* property during the minority of her children for the purpose of paying off the debts of her husband, without even the sanction of the Court. It is not necessary for her to obtain letters of curatorship to effect such a sale.[2] The fact that the estate is less than Rs. 2,500/- in value does not cast on her the duty of obtaining letters of curatorship.[3]

The right of the mother to the guardianship of her minor child is forfeited however, if by her conduct she brings disgrace to the relations. Nothing was considered a greater calamity to the family than where a woman contracts a marriage with a man of lower caste.[4] Hence if she contracts such a union, whether legal or illegal, or commits theft or some other crime, the custody of the children will be taken over from her and handed over to the relations on the ground that the children will contract the same evil habits.[5]

In a *binna*-marriage, during the lifetime of the mother the father is not the guardian of the minor children. The children would live under the protection and guardianship of the maternal grandparents if they happen to live in the *mulgedera*, but if the maternal grandparents are dead the children will be under the guardianship of their mother. But if the mother dies, the father of the children becomes the guardian in preference to a maternal uncle. If the father leaves the wife's ancestral house with the children, the latter do not lose their rights to the maternal inheritance.[6]

Guardian

Under the Kandyan law, as under many systems of law, the parents have the right to nominate a guardian. The nomination has to be by deed or writing, but under the Kandyan customary law the writing is not essential.[7] Not only a layman but even a priest could be appointed as guardian.[8]

1. *Bandara Menika v. Imbuldeniya* (1949) 50 N. L. R. p. 478
2. *Punchirala v. Banda* (1948) 50 N. L. R. p. 488
3. *Punchirala v. Banda* (*supra*) at p. 490 per Dias, J.
4. *Nīti*, pp. 44–45
5. ibid.
6. *Nīti*, p. 45
7. *Nīti*, p. 44
8. ibid.

The *diga*-married husband is given the right in preference to his wife, to appoint a guardian over his minor children. A *binna*-married wife has a similar right. Even a *diga*-married widow is given the right to appoint a guardian over her minor child. But such a guardian cannot inherit the property of the ward which the latter has inherited through his or her father.

Guardianship after the death of both parents

After the death of both parents, the guardian appointed by the father or the mother will be the lawful guardian of the minor children. In the absence of such an appointment, the *Niti Nighanduwa* states that the child should be given over to the charge of "the most affectionate and loving of its relations". Sawers is however specific on this point and prefers the mother's relations to those of the father. According to Sawers the order is as follows:[1]

(1) Maternal grandfather or grandmother.
(2) Maternal uncles or aunts.
(3) Paternal grandfather or grandmother.
(4) Paternal uncles or aunts.
(5) An adult brother or sister.

Thus, the general trend is to prefer the maternal to the paternal relations, the ascendants to the collaterals, and the collaterals to the descendants. Armour is silent on this matter.

The *Niti Nighanduwa* sets out the rule that the maternal relations have preference as guardians over the children of a *binna*-marriage. In several cases which came before the Tribunals between 1820 and 1830, the principle was recognized that minors were under the guardianship of the maternal relations.[2] Since on the death of her husband or dissolution of marriage the *diga*-married widow invariably returns to her own relations who would naturally take charge of her child or children on her death, Sawers's statement seems to be the more correct one.

The further question whether the grandfather or the grandmother had priority when both survived, also arises. Hayley states that as inheritance involves the management of property, possibly on the analogy of the father's precedence over the mother, the grandfather has the better claim. In the absence of authority, the point must remain uncertain. It is submitted that this view finds no support in the works of the institutional writers on Kandyan law or in the early decisions. The extension of the same principle

1. S. p. 22
2. Wadoogedera Mohandiram on behalf of his daughter's son in *Ran Naide v. Narayana Mulachariya* (1820) Hayley, App. II, Note 53; also *Gedamunnare Punchy Menika v. Govt. of Ceylon* (1824) ibid., and *Hewapedigedera Appoowa v. Hapee* (1828) ibid.

by Hayley to uncles and aunts appears to be an unwarranted assumption.

Guardians appointed by the king

As stated earlier, both in the Indian customary law and the Kandyan law, the king was regarded as the ultimate guardian of minor children. Hence the *Nīti Nighanduwa* mentions the power of the Crown to appoint a guardian.[1] The king was in theory the guardian of all minors, as in the Indian customary law.[2] In default of relations who according to customary law became the guardians, the king made an appointment.

The question is also mooted by Hayley whether the king as overlord claimed a right of wardship over the minor children of the chiefs. Hayley states that in view of the king's interference in marriages and the general superintendence of the affairs of the chief families, it is not unlikely that the sovereign did not exercise the right of wardship over the children of the chiefs.

Termination of guardianship

The relationship of guardian and ward terminates in the following ways: by the death of either party; by the attainment of majority by the ward; and by an order of Court removing the guardian.

Guardianship comes to an end by the misconduct of the guardian. If the guardian squanders the property, or is guilty of gross misconduct in committing a criminal offence, or if as stated earlier, a woman who is the guardian contracts a regular union or has illicit connections with a man of a lower caste, the guardianship ceases and the relations could take over the child and hand them over to another.[3]

At the option of the ward, guardianship could be terminated after a minor reaches the years of discretion if the minor could not live happily with his or her guardian. According to the *Nīti Nighanduwa*, such understanding was presumed to be present when the child could understand the distinction between "the six heavens and the four hells".[4]

Rights and duties of guardians

Under the old Kandyan law the guardian had not only the custody and control of the ward's person but also of the usufruct

1. *Nīti*, p. 46
2. Mayne's *Hindu Law and Usage* (7th Ed) p. 273—Derrett, pp. 123-124
3. In Wadoogedera Mohandiram on behalf of his daughter's son in *Ran Naide v. Narayana Mulachariya* (1820) Hayley, App. II, Note 53 the paternal grandfather claimed the custody of the minor on the ground that the maternal grandparents, in whose custody he was, had ill-used him.
4. Hayley, p. 216

of his property during the time of his minority.[1] But now, by statute he has to account to Court.[2] However this right does not enable him to alienate the ward's land even with the ward's consent.

The customary law allowed the guardian to sue and be sued on behalf of the ward and gave him the power to compromise any action for the benefit of the ward.

He was personally liable for the support and maintenance of the ward, and could not, in the event of the minor having no property, call upon other relations to contribute towards the maintenance of the minor unless he gave up his guardianship. Even after the ward attained majority he could not ask for a refund of the monies that he spent on him.[3] If the property inherited by the ward was subject to encumbrance which could be freed, it was the guardian's duty to pay the debts from the profits of the estate. If necessary, he could even use the capital or sell the corpus for this purpose.[4] The guardian also had right of succession to the ward's property under certain circumstances.

Modern law governing guardianship

Principles of Kandyan customary law pertaining to guardianship have been stated. Some of these principles have only a historical interest due to the impact of Statute Law which has modified the customary law. Chapter XI of the Civil Procedure Code, which applies to all persons, provides for the appointment of a guardian over a minor and a curator over his property by a District Court within whose jurisdiction the minor is resident, or by the Court in which this jurisdiction had been conferred by an order of the Supreme Court when a minor resides outside Ceylon. In the appointment of a guardian as well as a curator, a discretion is given to the Court. Section 582 however contemplates the issue of a certificate of curatorship to a person who claims "a right to have charge of property in trust for a minor by reason of nearness of kin or otherwise". Hence in considering the choice of two or more applicants, the rules of Kandyan customary law will have to be resorted to if the ward is a Kandyan. Elaborate provisions are found in the Civil Procedure Code which impose duties on the guardian to prepare an inventory and to file proper accounts. It is submitted that this provision has impliedly abolished Kandyan customary law which granted the usufruct of the ward's property to the guardian. Adopting the principles of English equity, the modern curator who is appointed to look after the property of the minor is a trustee by the operation of law and has to duly account to a Court.

1. *Juwan Appu v. Helena Hamy* (1901) 2 Br. p. 19
2. See Civil Procedure Code, Section 588
3. *Niti*, p. 46
4. *Niti*, p. 47

THE LAW OF PROPERTY

CHAPTER XII

OWNERSHIP

The dictum of Sir Henry Mayne, that communal ownership precedes individual ownership, becomes apparent when the Sinhalese system of law is examined. In ancient and medieval Ceylon, the economy of the country was mainly agricultural. The village was the primary unit of settlement of the peasants and the village assembly was an association of the landed gentry. The village and later the household (*gedera*), and not the individual, was the owner of lands. Families (*gedera*) were allotted lands which were cultivated in common. A portion of the land belonged to the village and was held in common and used for pasture and other common purposes.

The existence of communal ownership in ancient Ceylon could be gleaned from the vestiges of practices which are soon dying off in Ceylon. During the Chola regime, in South India, there appears to have been a periodical distribution of land among the villagers, showing the existence of communal ownership. In Ceylon, the system of tenure known as *karaiyadu* (which means shore of the sea, bank or bund) which prevailed in certain districts of South India (e.g. Tanjore), was in existence as late as the 17th century as evidenced in the Portuguese *tombos*. In this form of tenure, the joint responsibility of cultivation fell on the village and there was periodical distribution of lands on an equitable basis to the different families which jointly inherited that village. The existence of communal ownership is also to be inferred from the joint responsibility of the village for serious crimes such as murder, and also by the prevalence of a mode of cultivation in ancient Ceylon known as *betma* (which means division) in which the joint cultivators in a village got the proportionate share of the produce which was the result of their common labour according to the shares they owned in the soil.

Ownership of *panguwa*, which has survived up to the modern times, also tends to show the prevalence of communal ownership in ancient days.[1] *Chena* cultivation also affords evidence of communal ownership. It is the practice of *chena* cultivators to cultivate chenas jointly. Each cultivator being a shareholder (a *pangu-karaya*), is entitled to his share of the crop. These cultivators would go to a forest, select a spot in the middle of it and send out a number of persons to a calling distance (*hoo* distance) to demar-

1. Codrington's *Ancient Land Tenure and Revenue in Ceylon*, p. 3.

cate a circular area for cultivation, and each *pangu-karaya* took the produce of a segment of the wheel so formed. This portion was cultivated in communal ownership during the period of *chena* cultivation.

The growth of the idea of individual ownership of particular plots of land is of comparatively recent origin in Ceylon. In some parts of Ceylon, as Codrington remarks,[1] the process of communal ownership is still going on before one's own eyes and lands are being claimed by individuals, which a century ago were claimed by the *pangu-karaya* or the shareholder.

Individual ownership arose as a result of both economic pressure and political changes. The practice of the kings of granting lands to individuals for valour, or in return for services to be rendered, the separate acquisitions of individuals during their lifetime and the convenience of individual ownership as compared with joint ownership, have all accelerated the growth of the concept of individual ownership.

Both in South India[2] and in Ceylon, individual ownership over movables, and even immovables such as caves, was recognized, and sales or gifts of immovables by individuals are recorded in the ancient inscriptions. Thus, in Ceylon, the Brahmi Inscriptions, which nestle in sylvan surroundings in the south-east, bear ample evidence of the recognition of individual ownership of caves even during the distant and dim periods of Ceylon's history.[3]

Besides the landowners, both great and small, there were a number of landless labourers, an agrarian proletariat, who assisted in the cultivation and shared in the produce of agriculture of their masters. Some of them were serfs who eked out a precarious existence, and were in a state of abject poverty and servility. Some of these were the servants of the village and performed menial jobs not worthy of performance by the *élite*. Such were the *pariahs* of the Tamil community and the *chandalas* of the Sinhalese. Evidence is forthcoming that these labourers were settled often in the outskirts of the village or city in isolated communal holdings (places named, such as Paracheri in Jaffna, and similar names in the Sinhalese areas, support this proposition).

Communal ownership naturally existed in lands which produced grain, and therefore was chiefly confined to fields; but high lands, known as *vannata* or *pillawa*, which were appurtenances to fields, were owned either communally or individually. Even in modern times, the *pillawas* are communally owned paddy threshing floors.

The forest was in theory owned by the king, but the Sinhalese kings not only tolerated but also permitted and even encouraged

1. Codrington's *Ancient Land Tenure and Revenue in Ceylon*, p. 4
2. *The Colas* by Nilakanta Sastri, p. 577
3. Article by C. W. Nicholas, JCBRAS New Series Vol. VI, p. 21 et seq.

chena cultivation with a view to stepping up food production. Sometimes the king permitted the forest adjoining a village to be used in common as an appurtenance to the village for pasturage or for collecting forest produce such as honey, timber, etc.[1]

In the Kandyan period, or perhaps even before, in every province there were certain parts of the forests which were forbidden to the public and were the exclusive preserves of the royalty.[2] Subject to the concessions granted by the king, the forests and wilderness and unclaimed and untenanted lands were the property of the king.[3] Here again, Ceylon followed the Indian practice.[4]

The peasant proprietor, whether he owned property individually or communally, was the backbone of the ancient and medieval Sinhalese society. The heads of these families represented the Village Council. The *goiyavamsa*, like their Tamil counterparts the *vellalas*, formed an important section of the body politic. They ranked only next in importance to the royal clan, the Shatrias, but often claimed equal rights with them. Marriages among the Shatrias and the *goigamas* were frequent. The heads of these *goigama* families constituted the Village Assemblies which were scattered through the length and breadth of Ceylon and wielded considerable powers which are now enjoyed by the Crown.

In ancient and medieval Sinhala society, the system of land tenure was on a feudal basis; the South Indian pattern was closely followed. Both in the Chola[5] and Pandyan kingdoms,[6] the granting of villages and counties and service tenures were on a similar basis. The king was virtually the owner of all lands, and for the services performed by public servants, lands were assigned to them as remuneration. In some cases, the king gave direct grants of lands to individuals for meritorious services performed, or in lieu of the services to be performed by the grantee. Such services were either of a military or civil nature.

The *viharas* and *devales* of Ceylon also received benefactions from the king and from individuals. Such benefactions were considered to bring the highest merit to the grantor and kings vied with each other in donating villages and vast tracts of land to ecclesiastical bodies. Some of these benefactions were so large that the grantees could not cultivate them themselves. Then, like the Roman *latifundia*, these lands were given to families and individuals in the form of feudal tenure. The service tenants to whom such lands were parcelled out, were bound to perform various services to the temple or *vihara* in consideration for their possession.

1. Codrington's *Ancient Land Tenure and Revenue in Ceylon* p. 5
2. For example, Bd. of Comm. Minutes Vol. 12—Letter of the Agent of Ceylon, Sabaragamuwa, July 31st 1821; Bd. of Comm. Minutes April 16th, 1621
3. *Mahavamsa*, XXXVII, p. 8
4. Ch. I, p. 197
5. *The Colas* by K. A. Nilakanta Sastri, p. 574 et seq.
6. *The Pandias* by K. A. Nilakanta Sastri (1929) pp. 237, 238

Some of the services were onerous in nature, while others were trivial. This mode of tenure appears to be similar to the practice which prevailed in South India when large tracts of land were given by the kings to the Hindu temples.[1]

In lands which were thus granted the temples often wrested extensive privileges from the king and exercised them. Inscriptions show that in respect of certain lands given to *vihares* and temples, the kings virtually abandoned all control. Some of them became sanctuaries for criminals who sought asylum. There were edicts which prohibited royal officers from entering such lands for the purpose of even apprehending persons who had committed public crimes.[2] As these privileges were abused, in later grants they were omitted.

Just as in the *devanastanams* of South India where service tenants were given lands for the performance of certain services during their lifetime for the benefit of the temple, so in Ceylon too, one finds analogous forms of tenures such as *jivita* (corresponding Tamil term *jivitam*) and *kani* (corresponding Tamil term *kani*) given to holders who were under an obligation to perform services to the temple during their lives. *Jivita* (later corrupted to *divel*) and *kani* tenures were confined not only to temple lands but also to lands owned by royalty and were often granted to soldiers for the performance of military services to the State.

Despite some grants which purported to transfer absolute ownership, the king, as paramount lord of the soil, collected taxes from the village and levied dues for the use of the land, such as the fee for burning dead bodies, etc. Here again, following the South Indian practice, the taxes were sometimes collected by the village and were paid in a lump sum to the king. The *chatturveda mangalams*—villages given to the Brahmins in India—adopted this mode of paying taxes to the king, and in medieval Ceylon the practice in villages given to Brahmins was the same.

A grant of a large tract of land to an individual who had performed some outstanding service to the State was based on the Indian practice. In South India, this was known as *akaphoja*. Similar grants by the Sinhalese kings are recorded in the inscriptions.

The king demanded taxes from his subjects in return for the protection he offered them.[3] He claimed to be not only protector but also sole lord. In this capacity he recovered death duties (*marāla*) and even charged a fee for burning the body of a dead person. This again closely followed the Indian practice. In India, the *Dharmasastras*, following the Indian customary law, postulated

1. For the types of services to be performed in South India during the Chola period, see *The Colas* by Nilakanta Sastri, p. 575
2. *History of Ceylon*, Vol. I, Part I, p. 68
3. Narada XVIII; XLVIII; Vishnusmrithi XI, XII

that none but the king was the owner of the land. Thus *Satpatha Brahmana* states:[1] "The Earth also sang the stanza, no mortal can give me away." Both Indian and Ceylon customary laws laid emphasis on authority over land rather than rights over the soil as the basis of ownership.[3] In Ceylon,[2] the Dondra and the Demalatuwa *sannas* of the Kotte period gave only the usufruct (*prayojana*) of such lands to the grantee. This emphasizes the sovereign's ownership of the soil, who aways claimed the right to dispose of the land at his will and pleasure, despite any grant. This view of the customary law sometimes worked hardships. Therefore the *Dharmasastras* insisted as a reformative measure, that the king was bound by law, and any disposal of land through anger or avarice passed no title to the later transferee.[3]

Despite these injunctions contained in the *Dharmasastras*, in actual practice, the king, as sovereign, had absolute power of disposal over land and could get rid of any tenant cultivator on any ground, such as failure to cultivate it during a season. The king, being both the accuser and the judge, had absolute power to act according to his arbitrary will and caprice.

When the king gave a grant of a land to a *ninda* lord, the latter acquired the rights of the former and therefore could eject a tenant under the pretext that the tenant did not perform his services. Hence, the tenant often had a precarious perch. In lands belonging to the king, the tenant was at the tender mercies of the headman, who on some pretext or other, could get rid of the tenants by reporting them to the royal authorities.

Hence, ownership and possession as understood in Anglo-American systems of law and the civil law, had no place in ancient Sinhalese society till the influence of Roman-Dutch Law gradually developed these concepts. With the influx of legal notions and concepts of ownership familiar to the Anglo-Saxon system of law and the Roman-Dutch Law, the rights of the service tenant became stabilized on a firmer footing and he was given the *jus utendi, fruendi* and heritable rights in the land, subject to his obligation to perform his services to his overlord.

Possession in ancient and medieval Ceylon

Possessio civilis of immovables as understood in the civil law, had no place in ancient and medieval Ceylon. However, possession of movables was recognized. Possession of *chena* land also became the basis of temporary ownership of such lands during the period of cultivation.

Possession as a method of acquiring ownership had a limited application in the system of land tenure prevalent in ancient and

1. *Sacred Books of the East* by Max Muller, XLIV, p. 421
2. For Indian practice, see Logan's *Malabar Manual*, p. 629
3. *Brahaspati* XXIX, p. 22; SPE XXXIII, p. 354

medieval Ceylon. As there was a hierarchy of overlords it was difficult to apply the concept of *possessio civilis* to such tenures. It may therefore be said that *possessio civilis* was only confined to movables. There are however recorded instances of individuals acquiring vested interests in immovables through possession. To encourage agriculture, the Sinhalese kings permitted the restoration of abandoned tanks and bestowed certain rights over them and on those who restored them. Thus, those who restored such tanks were permitted to claim irrigation dues from the peasants whose lands were irrigated from such tanks.

Similarly, the Sovereign gave grants of abandoned lands to tenants who cultivated them and paid taxes to the Government. Such a course not only filled the coffers of the State but also sustained the economy of the country during periods of internal stress and external aggression.

Division of property

Every system of law has its own classification of the division of property. The Kandyan law divided property (*vastuwa*) into movables (*chanchala*) and immovables (*nischala*); animate (*suwiññaka*) and inanimate (*awiññaka*), material (*drawyawat*) and non-material (*adrawyawat*).[1]

Movables are slaves, cattle, gold, silver, clothes, money, grain; immovables are lands, and fixtures which are permanently attached to the land. Animate things are those with life and inanimate things are those which do not have life. Material things are those which could be perceived by our senses, and non-material things are a collection of rights, privileges and immunities such as rights accorded to a particular caste, titles, honours, offices, which carried with them certain perquisites.

Property is also classified according to the mode of acquisition. Thus, gem mines, pearl banks and metals, occupied territory and treasures found in it, belong to the king. The sacred Tooth Relic (the sacred tooth of Lord Buddha kept in the Temple of the Tooth —the *Dalada Maligawa*) was regarded as the property of the king and the people. The inhabitants of certain districts and provinces to whom standards of insignia were given, were considered the owners of such articles. Public streams, tanks constructed by the king for the benefit of the public, natural ponds, watersheds, public places of worship such as *viharas* and *devales*, and aqueducts constructed by the inhabitants of a village, belonged to them collectively.

Offices which carry with them certain perquisites or emoluments enjoyed by particular classes belong to them collectively. Heirlooms such as guns, swords and daggers presented by the king for acts of great valour, belonged to the family of the recipient. Royal

1. Hayley, p. 218; *Niti*, p. 12

grants of property to a family belonged to the members of that family.

Property was also divided for purposes of inheritance, into acquired property and inherited property. Inherited property may be derived from the mother's side or the father's side. Hence, we have the familiar division of property in Kandyan law as acquired property (*lathimiya*), paternal property (*dahimiya*) and maternal property (*watahimiya*).

The term *'paraveni'* or ancestral property means property inherited from a direct ancestor by way of intestate or testate succession. It is a relative term. Thus, a gift of an ancestral property to a daughter becomes acquired property in her hands.[1] The acquired property of the grandparents may be *paraveni* in the hands of the grandson, if it devolved on the latter's father and ultimately passed to the grandson. But if the grandfather gifted the property to his grandson, it became acquired property in the hands of the latter.[2] Where a Kandyan gifted his *paraveni* land to his son and in a partition action a divided lot was given to the donor on the ground of prescription, it was regarded as the acquired property of the donor.[3]

Similarly, the term 'acquired property' is a relative term. Thus, ancestral property gifted by a father to his children, becomes the acquired property of such children whatever may be its previous nature.[4] The distinction between ancestral (*paraveni*) and acquired property looms large in the field of intestate succession and is discussed later.

Methods of acquisition

The modes of acquiring ownership to land vary according to the different systems of law. In Ceylon, the Kandyans are governed by the Roman-Dutch Law in matters where the Kandyan law is silent. Modes of acquisition peculiar to the Roman-Dutch Law, such as *accessio*, *specificatio*, etc., are governed naturally by the Roman-Dutch Law. Acquisition by prescription and other statutory modes is governed by statute. Only such modes of acquisition which are peculiar to the Kandyan law are discussed in this work.

Methods of acquisition under the Kandyan law

Methods of acquisition of movables under the Kandyan law differ from those applicable to immovables. The Kandyan law recognized the acquisition of immovables by gifts, inheritance,

1. *Menike v. Banda* (1923) 25 N.L.R. p. 207
2. *Lebbe v. Banda* (1929) 31 N.L.R. p. 28; also *Dingiri Banda v. Madduma Banda* (1914) 17 N.L.R. p. 201
3. *Kalu Banda v. Mudiyanse* (1926) 28 N.L.R. p. 463
4. *Tennekoongedera Ukkurala v. Samarasinghe William Tillekeratne* (1882) 5 S.C.C.p. 46; *Mudalihamy v. Bandurala* (1898) 3 N.L.R. p. 209; *Kirimenike v. Muthumenike* (1899) 3 N.L.R. p. 376

purchases and transfers of lands with an agreement to render assistance and support to the previous owner.[2]

During the time of the ancient Sinhalese kings, land-hungry peasants encroached on Crown lands and with a view to encouraging agriculture and stepping up food production, the kings regularized the titles of such squatters by entering their names in the Land Rolls (*lekam-miti*). A person who converted another's high land into a paddy field (*asweddumized*) was placed on the same footing as a tenant who held it under the *ottu* tenure. Such a tenant could not be ejected by the overlord.[3]

These methods of acquisition, although admirably suited to an agricultural society where land was plentiful and where every inducement had to be given to step up agriculture, are neither feasible in modern times nor recognized in law.

Prescription

In Kandyan law, acquisition by long-continued possession appears to have been recognized only during the early British period. This principle that no particular length of time was necessary for one to become an owner by this method of acquisition has been established in several cases before the Judicial Commissioners.[3] (In *Mulhamy v. Suhendu Rala*,[4] 78 years of possession was held to be sufficient; in *Kuruli Maddumma Gedera Kiri Etana v. Kekelledenia Sieuralle*[5] and *Heda Appu v. Heda Appu*,[6] fifty years was held to be sufficient.) The Prescription Ordinance now regulates the law governing prescription. Through undisturbed and uninterrupted adverse possession for a period of ten years, title passes by prescription to the new possessor.

Purchase

In Kandyan law, exchange was the usual mode of transferring movables but sale was recognized and there are recorded grants for valuable considerations even to royal personages.

Grants by the kings

There are many recorded instances of grants by royalty to individuals. Some of these grants were motivated by sentimental reasons which appealed to the whim and fancy of the king. Some grants were made for heroic acts. Thus, it is recorded that the king gave a piece of land for a woman's valour in shooting at the top

1. See the views expressed by Dodanwela Atapattu Lekam in *Wellawatte Lekam Mahatmaya v. Fittawelle Ralle* 22. 12.1821 (22/8)
2. *Adhikaragedera Appu Etana v. Gampola Gedera Lekam* 31.12.1829 (23/25)
3. *Kukulepanne Niketrale v. Kukulepanne Mohandiram* 24.5.1819 (23/5)
4. 6.9.1819 (23/30)
5. 7.10.1822 (23/7)
6. 28.10.1822 (23/7)

of a kitul tree with a bow and arrow.[1] Another instance is recorded where a minstrel who pleased the king by a violin recital, was rewarded with a grant of land.[2] Large grants, sometimes including entire villages, were given by the king to military commanders for valour or loyal services (as for example the Kondavettan Grant to the *Dandanayaka*). Grants of land were also given to peasants who performed various services in the king's household. Such services ranged from onerous, such as the supply of paddy, salt and other requirements of the royal kitchen, to trivial and menial services such as the drawing of water for the king's bath. Lands were also granted for services rendered by guilds such as the corporations which manufactured caps.[3]

Some of these services could only be performed by males whereas others could only be performed by women. Thus, the service of attending the queen's bath (*pallavahala ulpange*),[4] or the performance of *alatti* ceremony (a service performed with lighted camphor over the image of a deity or distinguished persons) were only performed by women.

The grants were sometimes evidenced by written deeds but such deeds were not known before the time of King Kirti Sri Rajasinha.[5] Royal grants were often engraved on copper plates called *sannas*. Some of these grants were by the Adigars and were contained in a decree of Court known as *sittus*. The *sittus* were written on palm leaves and the Adigars often signed using their village names. Thus, Migastanne Udigar signed as 'Dumbara'.[6] The Kandyan kings seldom signed their grants, but caused their seals to be affixed.[7] In all these matters the Indian practice was followed.[8]

The lesser chiefs, such as the Governors of the Provinces and disavas, were not given the power to make grants of land except in times of war.[9] Such grants could never override a royal decree.[10]

The grants were read to the king after they were written out by the *lekams* but were never delivered in his presence. The king's orders were carried out by judicial officers such as the disavas, who communicated them by appropriate ceremonies. It is recorded that Wattarantenne Disava sent a person to the *ulpange* and made him prostrate himself in the direction of the palace where the king was and asked the witnesses to publish this ceremony in a

1. *Tennekone Gedera Arachilla v. Hettigedera Kankalme* 20.12.1821 (23/8)
2. *Attaragama Basnaiake Nilame v. Kanceppuralle* 3.7.1822 (23,6)
3. J. C. 13.11.1823; Lawrie's MS. p. 259
4. J. C. 28.7.1817; Lawrie's MS. III
5. S. p. 25
6. J.C. 16.11.1921; Lawrie's MS. IV
7. *Vide* the remarks of the Assessor in *Oegoere Kiri Etana v. Mohottigedera Ranhamy* 25.1.1821 (23/32)
8. Kane, Vol. III, pp. 308–314
9. *Weebiddagedera Aratchi v. Horaige Koralle* 25.5.1819 (23/5)
10. *Pulanasooriya Lokuhamy v. Heenhamy* 1.12.1823 (23/11) Pt. II

village in pursuance of the king's order.[1] Here again, Indian practice appears to have been followed.

The king's seal conferred the authority to the grant. The contents of the grant often followed the Indian pattern which was couched in ornate language.[2] The usual practice was to publish the royal grant through messengers known as *attapattus*, who went to the site of the land and proclaimed the contents of the grant.[3] The unauthorized publication of royal edicts and documents was an offence punishable with the extreme penalty.[4]

Verbal grants by the king were not uncommon, but as proof of such a grant an object given by the king had to be produced. Thus, in *Dedigama Lekam v. Dedigama Mohotalle*,[5] a quayman who possessed land on a grant made in King Kirti Sri's time, stated that it was not usual during that time to grant a decree to respectable families and produced a ring granted by the king to his father to seal up the rice bags. In another case, a chank given by the king was produced to prove as a token for the grant of land.[6] A knife with the inscription 'ශ්' was also produced to prove the grant of lands.

Whenever royal grants were made to goldsmiths and smiths, they were effected by the delivery of the appropriate tools.[7] These objects, which were the symbols of delivery, were known as *ketta sakkiya*. (The Sinhalese and Tamil equivalents mean literally 'evidence produced by an object'.)

The formalities of sale are set out in *Dukgannaralle Appuhamy v. Amunugama Lekam*.[8] The vendee gave 100 pieces of silver (*ridi*), the deed of sale was written on a talipot leaf; thereafter, the vendor, pointing to the money counted, said in the presence of witnesses: "For this money be all witnesses, that I hereby transfer the land at Vattapattaya."

In some instances, no deed of sale was executed but the original *sannas* (original grant in a copper plate) granted by the king was handed over to the vendee after it had been placed in the hands of the witnesses.[9]

These formalities, although they have a historical value, are no more observed. The Prevention of Frauds and Perjuries Ordinance (Cap. 70) makes it obligatory that the transfer of land should be entered in notarial deed in the presence of two witnesses. Under

1. J. C. 28.6.1825; Lawrie's MS. Vol. III
2. Kane, Vol. III; pp. 309 & 314
3. *Angumela Lekam v. Gallehella Lekam* 24.4.1823 (23/10); *The Government of Ceylon v. Bantemburc Korale* 7.1.1831 (23/26)
4. Kane, Vol. III, p. 315
5. 20.10.1817 (23/3)
6. J.C. 11.10.1819; Lawrie's MS. Vol III
7. *Jawettenegedera Ukku Naide v. Nayerianne Mularcharia* 17.8.1823 (23/10)
8. 21.10.1829 (23/25) Part II
9. *Galladonda and Boramine Punchyralle v. Agara Vidaka Mahaduraya* 28.9.1822 (23/7)

the Execution of Deeds and Documents Ordinance (Cap. 71), the transfer of land could also be effected in the presence of a judge.

Among the Kandyans, a sale was never considered absolute unless the vendor, by appropriate words, expressly renounced his right of redemption.[1] In the absence of the clause which stated in unequivocal terms that a deed of sale cannot be rescinded, a deed can be revoked in the lifetime of the vendor and the vendee. Death of either party made the sale absolute in accordance with the maxim "the death of one party is the lapse of a generation".

The only exception to the rule of revocability of a sale is the deed executed for the sale of high lands which were sold absolutely and could not be rescinded.[2] Since the rule of revocability was detrimental to commerce, by legislative measure it was enacted that a sale was irrevocable.

Under the Kandyan law, as a mortgage was redeemable at any time, and a sale became absolute on the death of either the vendor or vendee, parties who executed mortgages often used appropriate words so that the transaction might be masqueraded as a sale. As in some cases no written deed was executed, it became a matter of great importance to distinguish between a sale (*vikka*), a mortgage (*ukas*), and a transfer in trust (*bāra-dunna*).[3]

One of the criteria applied in determining whether a transfer was a sale or a mortgage was to determine who should perform the service tenures after the transaction. In a genuine sale, the vendee performed them; but in a mortgage, the mortgagor continued to render them. Hence, if the original transferor continued to perform the services, the transaction was presumed to be a mortgage.[4]

As a solution to this vexed problem, the assessors suggested that unless a regular deed of sale was executed, the transaction should never be regarded as a sale and the mere surrender of an old deed was insufficient to prove a sale.[5]

Testate and intestate succession, and donations, are also modes by which persons became owners of land. In view of their importance, they are discussed later in greater detail.

Forfeiture

In the time of the Kandyan kings, a forfeiture of land could take place in various ways: non-performance of services, conviction for certain heinous crimes, and the lack of a male heir to continue the services in respect of service tenures.

Non-performance of services was tantamount to an abandonment by the tenant. If the female heir was not able to perform services

1. *Bannekey Kapuralla v. Uguredepitiye Lekamaley Appu* 7.12.1824 (23/13)
2. *Kirlegama Unnanse v. Hangerangoda Duraya* 30.1.1818 (23/4)
3. *Lellewahapatliya Gam Ettigey v. Lellewahapittiya Hettekandey Vidan* 14.5.1819 (23/5)
4. *Potuhera Mudalihamy v. Kurrepotte Arachilla* 2.2.1826 (23/17)
5. *Morrangodda Kiria v. Putliniala Pakir Tamby* 1.9.1825 (23/16)

which were customary for a male to perform, or vice versa, it was open to her to provide a substitute to perform them. Failure to provide a substitute entailed forfeiture and the land reverted to the king who later made a grant to any person who was able to perform the required services. On reversion, these lands were known as *purapaddu* (derived from a Tamil term meaning abandonment) and were at the disposal not only of the king, but also of the chiefs, if they happened to be overlords. The latter were able to grant the *purapaddu* lands to the tenants of their choice.

If the heirs came forward later to perform the services, they were given the concession of regaining possession of the land, provided the new grantee or his heirs had not acquired prescriptive title.[1]

Forfeiture of land as a penalty was reserved only for serious crimes such as treason[2] and murder, and not mere wounding which resulted in death.[3]

When a person was convicted of murder, the property which he forfeited was given by way of compensation to the heirs of the deceased. In case of conviction for treason, the king restored the property when the prisoner was pardoned; otherwise, he gave such lands on service tenures to others.

If a convicted robber defaulted to pay the fine imposed on him, his property was forfeited and the injured party had the same right as a creditor to place his debtor in *velekme* (the custom by which a creditor stopped a debtor, and confined him by drawing a circle round him and sitting beside him after enjoining in the king's name not to move till his debt was paid).[4] The Indian practice was the same.[5]

Jura in re aliena

In discussing the right in *rem* over others' property, the forms of mortgages, leases and tenures in ancient times are not in force now and are generally replaced by tenure known to the Roman-Dutch Law or statutory tenures.

The law governing servitude is the Roman-Dutch Law, but servitudes unknown to the Roman-Dutch Law have been recognized. In *Kawrala v. Kiri Hamy*,[6] Shaw, J. observed that the Roman-Dutch Law was not sufficiently flexible to meet the modern requirements of the twentieth century. In this case a servitude to thresh paddy in the land of another was recognized. Apart from the interests in land recognized by the Roman-Dutch Law, tenures peculiar to Kandyan law exist. It is more convenient to deal with this topic under 'Feudal Tenures'.

1. *Paul Peiris Felicitation Volume*, p. 94.
2. *Rajapakse Duraya v Wattawa Duraya* 22.3.1826 (23/17)
3. *Rex v. Neherr[illegible]o'a Mohottala* 24.1.1818 (23/4)
4. D'Oyly's *Sketch of the Constitution of the Kandyan Kingdom* (1929) p. 64
5. Kane, Vol. III, p. 438
6. (1917) 4 C. W. R. p. 187

CHAPTER XIII

HISTORY OF FEUDAL TENURES

The early period

The early settlers occupied the north-east and south-west regions of Ceylon, and not the luxuriant and fertile lands of the rain-fed Wet Zone. Among other causes, the fact that these places had ports at which the boats of the new settlers could be easily moored was a deciding factor for this choice. The north-east of Ceylon was populated by a band of Shatriyas of different origin. The Brahmi Inscriptions in Yala show that guilds and corporations existed.

There was also the chiefs (*parumakas*), who were perhaps the descendants of the old settlers under whose leadership the various settlements took place. It is likely that lands were given in the form of feudal tenure by the chiefs who formed the ruling aristocracy. By about the beginning of the Christian era, the *parumakas* fade away and are not mentioned in any Inscriptions.[1]

Some settlements were made on a communal or occupational basis. A Pali work of the fifth century refers to weavers of a village in ancient Ceylon, all working together in a factory (*sāla*).[2] Literary sources refer to the outcastes such as the *candalas*, being settled in areas outside the city. Inscriptions on the Tamil householders or 'Terrace', also suggest that they held communal holdings.

The presence of large numbers of Brahmins in Ceylon is also evidenced in the lithic and literary records. Some of them were powerful enough to be given important posts. The Brahmana of Tavistagama wielded great influence.[3] It is probable that these villages where the Brahmins settled were on the same pattern as the *chatturveda mangalams* in India.

Artisans who lived in communal holdings are mentioned in the lithic records of this period. The Brahmana representing the Brahmins, the Shatrias representing the *paramukas*, and the *gahapati* representing the householders, organized themselves into small communities and were settled in towns and villages in communal holdings. To prevent pollution, the *candalas* and other 'untouchables' were given separate lands outside the city or village. The pattern of the ancient village in Ceylonese society could not have been very different from that in India.

Following the Indian pattern, the unit of the social system was the family. An association of families was considered a body corporate. These corporate bodies performed the duties and functions of the caste to which the member belonged.

1. *History of Ceylon*—University of Ceylon Press—Vol. I, p. 235
2. This gives a clue to the word '*Salagama*'
3. *Mv.* XIX 54; (Geiger's Edition, p. 132)

Just as in India an association of the *grahman*, the *tare* and *cheri* were corporate bodies of the Brahmins, the Nayars of Malabar, and the Tiyans of Malabar respectively (the Iluvars are said to have been the Sinhalese from Ceylon[1]), so in Ceylon each of these corporate bodies or guilds belonging to a particular caste had distinct functions to perform and occupied communal holdings.

The mighty Mauryan Empire had spread its influence over Ceylon and there is evidence that feudal organizations of the early period was based on the Mauryan pattern.[2] When Devānampiya Tissa was appointed king of Ceylon with the help of the powerful Mauryan Empire, he would have brought the *parumakas* under his power and made them feudalatories. A system of land tenure with the king as the ultimate overlord was gradually evolved. Certain lands were held by Village Communities or Corporations based on caste. Land was also sold or exchanged and individuals could become owners of land.

With the establishment of kingship, various taxes were imposed, such as the land tax (probably the *bagaaka-bajika* or *boyiya-pata* found in the inscriptions of the 1st to 4th centuries[3] belong to this class), water rates (*dakapati*) and taxes on fish caught in the tanks and reservoirs (*matira majibaka-pati*)[4] and other taxes.[5]

To fill the coffers of the State, the monarch did not hesitate to make requisitions even on grain and cattle.[6] The inhabitants had also to feed the king's official who paid periodical visits to the outlying posts of the kingdom. There is evidence that these visits were dreaded because rapacious officials often made preposterous demands. Even the king's visit with his ministers to eat fruits was resented by the people.[7]

The precarious state of the tenants was not conducive to the development of agriculture, and grants on more generous terms became necessary. Hence the king not only checked his officials but also granted charters ensuring the rights of the tenant.[9] To encourage agriculture, people were given financial support to build private reservoirs and private ownership of tanks was permitted in ancient Ceylon.[8] The owners of tanks had the water rights in such tanks and supplied water to other owners of fields and recovered water rates.

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1. Logan's *Manual of the Malabar District*, Vol. I, p. 111
2. *Feudal Tenures in Ceylon* by Lanerolle
3. EZ. III, p. 117; Cod. p. 31
4. EZ. IV, p. 227; for an interpretation, *vide* JCBRAS, New Series, Vol. V, pp. 130-131, for further details *vide History of Ceylon*, Vol. I, p. 239
5. CJSG-II, p. 197, Inscription No. 586
6. RAS II, p. 131
7. *Mv.* XXXVI vv. 70-72
8. The Kantakarana Inscriptions
9. *History of Ceylon*, Vol. I, p. 240

The later Anuradhapura period

The inscriptions of the 8th and 9th centuries show the imposition of heavy taxes, perhaps necessitated by the heavy expenditure incurred in maintaining a large military force to repel foreign invasions. But when grants of villages were made to influential or religious institutions, immunities were also given. In earlier grants, such immunities were briefly worded but in the later ones they are contained in elaborate documents which give an insight into the administrative system of that period.

Some of the villages in respect of which immunities were granted were sanctuaries where even royal officials had no right to enter but had to remain outside the boundaries of the village and negotiate the extradition of criminals. These privileges appear to have been abused and later grants show that sanctuary was refused to criminals who committed the five great crimes (*pañchamā pāthakam*).[1]

The Sinhalese kings distributed lands to chiefs who in turn had vassals under them from whom they exacted tribute. This is evident from the term *melatse* (derived from the Tamil 'மேலாண்மை' meaning overlordship) which signifies dues of the overlord over and above the normal land tax exacted from the service tenants.

In an agricultural economy, the distribution of a network of irrigation projects became a pressing necessity. Forced labour known as *vari* (derived from a Tamil word) was also exacted from the people. Every peasant had to perform forced labour during a certain number of days (*maha-var*) and also work for an additional number of days (*sulu-var*), if required to do so by the king. (This corresponds to the *aliyar-vela* of the Tamil country.) By using the vast free labour force, the kings were able to construct an elaborate system of tanks, a network of channels, magnificent buildings and the vast stupas and dāgobas which studded the country. No salaries appear to have been given to high public servants but they were given lands which they enjoyed in the form of service tenures.

The cultivators were divided into a privileged class who lived on the dues (*melatse*) they received as overlords (the *sam-dara*—overlord corresponding to the *melkudi* of the Tamils) from their tenants[2] and the tillers of the soil (the *kudin* or *gampasi*, the Tamil equivalent being *kudi* and *kamavasi*), who cultivated the land by the sweat of their brow. (A similar division between the Tamil *vellālas* existed—the *ulkudi* and the *purakudi*.)

The similarity of the division of persons engaged in agriculture, and the Tamil word *melatse* as opposed to *upari-kara*, its Sanskrit equivalent, and the existence of officials called *vel-kami*, all lend support to the theory of Sir Arunachalam that the Sinhalese kings

1. EZ. III, p. 141.
2. Cod. p. 31; EZ. III, pp. 110, 111

brought from South India a large number of *vellālas* who were skilled in agriculture, to take charge of the large tracts of land opened up for cultivation.[1]

In the outposts, the *dandanāyakas* (a Tamil term to denote a general) held large tracts of land in lieu of military service. From the derivation of the word *dandanāyaka* and in view of the fact that almost all the mercenaries were Tamils or Malabars,[2] it is probable that these *dandanāyakas* were Tamil generals commanding Tamil mercenaries who were posted at the frontiers. The Kondavattavan Pillar Inscriptions[3] state that revenues of the village named Aragam were enjoyed by a *dandanāyaka*.

These overlords and their descendants (*sam-daru*—sons of lords), formed the gentry of medieval Ceylon, and officials of the royal palace and various administrative departments were selected from this class.[4]

The different types of land tenures

(1) *Paramparuwa* or *Pamunu*

The land holdings of the landed aristocracy, the *sam-daru*, belonged to various categories. The most advantageous form of tenure was known as *paramparuwa* or *pamunu*. Some overlords who held land under this form of tenure were not obliged to pay any dues or taxes, whereas others paid only a nominal quit rent. Thus the king's physician had only to give a dried piece of ginger to the king.

These overlords leased out their large tracts of lands either to peasant-holders (*kudin*) for cultivation, or to revenue farmers referred to as *patta ladda*.[5] The Kadavettu Inscriptions say that any dispute between the tenants and householders should be settled by the decisions of other tenants.

(2) *Gam-ladda*

The term *gam-ladda* connotes one who not only has received a village to enjoy the revenue in whole or in part, but one who also rules it.

The *gam-ladda* held their lands as recompense for the various services they owed to the State and were not under any obligation to pay any share of the produce to the Treasury. In Malabar, a similar status was enjoyed by the hereditary head of a village, *desavelli*, and the head of a district, *naduvali*.[6]

1. *The Census of Ceylon* (1901) by Sir Ponnambalam Arunachalam, Vol. I, pp. 8,9
2. Geiger, pp. 152, 153
3. EZ. III, p. 79
4. *History of Ceylon*, Vol. I, p. 375
5. EZ. V, pp. 127 ff ; also for meaning of *ladda*, *vide* Codrington, p. 2
6. Codrington's *Land Tenure*, p. 2

(3) *Kaballa-ladda*

The *kaballa-ladda* was another class of tenant (etymologically, *kaballa* means 'a piece or fragment', and could be equated with a *panguwa*). This term when used in connection with land, means a piece either of a village or some unit of land.

A tenure known as *kaballa-ladda* is evidenced in the Anuradhapura Slab Inscriptions assigned to Mahinda IV (A.D. 956-972).[1] This Inscription refers to *kabala* fields in the *kaballa* enjoyed earlier by the royal family,[2] where there were *viyals* (a derivative from the Tamil *vayal* which means a field). It meant that before the date of this edict *pamunu* holders could possess *viyals* but the *kabala* holders were not permitted to do so. When the *pamunu* holders had ploughed the land and made them fields, a share of one *akekerded* on every *kiriya* of land sown (*kiri-amuna-ha*) was divided and taken by the clerk holders, and in case of dispute, the warden, the chief clerk, the steward and administrator of the *lad* decided the share to be given. It is also stated that in the Tamil villages and the lands set out in the four directions in respect of previously made plantations, the produce should be appropriated in accordance with former custom.

Thus, the *kaballa* holders, the *pamunu* holders and *de-kaballa*[3] holders divided the four great dues (*sataremaha-valih*) and in addition one-tenth share was given in the case of coconut or palmyrah trees planted by them. As for betel, vines, orange trees, etc. the *de-kaballa*[3] holders were to divide and take yearly 2 *akes* as well.

A *kaballa* is a *panguwa* which in ancient times was of considerable size and differs from its modern connotation.[4] A *panguwa* was more like a village. *Kabali* therefore were large tracts of land given to various persons or bodies to which were attached a number of tenants and could be a fraction of a whole [as in the case of *dek*- (half) *panguwa*].[5]

The inscriptions speak of *kaballas* enjoyed by the Buddhist temples;[6] by the priesthood;[7] by the three brotherhoods (*trinikayas*), and the royal family.[8]

Raja-bhagu, with its *paricaruka* (tenants), was exercised in villages and *viharas* by governors (*rat-ladu*)[9], by Tamils (*demelak*),[10] by *pamunu* holders (*pamunak*),[11] and by others irregularly (*aniyak*).[12]

1. EZ. I. 8
2. EZ. I 8, Lines 4–7
3. *de-kaballa* means double allotment or share, *vide* Codrington, p. 17
4. Codrington's *Land Tenure*, p. 17
5. EZ. I. 8, AIC 14
6. EZ I. 2.16; *Veher, Veherale*
7. EZ. IV. 5
8. EZ. I. 8
9. AIC 114; *Mhv.* XLIV, 120
10. EZ. II, 143; EZ. III, 28
11. EZ. III, 28
12. ibid.

The inscriptions contain prohibition of *kaballa* in the grant of temples, indicating that they were fetters on ownership. Although the precise nature of this tenure is not known, its holders enjoyed its revenue.[1] If the cultivators defaulted, they were by edict protected in the *Daladage* and could not be driven out.

(4) *Ukas*

A tenure known as *ukas* occurs in inscriptions.[2] *Ukas* is a mortgage and the subject matter of it may be a village (*ukas-gam*) or a piece of land. *Ukas* is similar to the Tamil *otti*, the common usufructuary mortgage. A variant form called *karal-badda* existed in Dumbara, in which the mortgagor was entitled to redeem it only at the end of cultivation seasons fixed by agreement. The *karal-badda* has the same incidents as the *otti* of the *Thesawalamai*. The actual tillers of lands who held land under these various forms of tenures, had hereditary rights and could not be ejected.

(5) The proletariat

Apart from the peasant cultivators, there were the labourers who worked for wages. There were slaves who like their Indian counterparts, toiled for their masters and were owned by individuals and monasteries. Although Buddhism prohibited slavery and upheld human dignity, the monasteries followed the practice of the *devasthanams* of South India and owned slaves.[3]

In the Polonnaruwa period which followed the Chola rule, it was natural that the system of land tenures which existed during the Chola regime should have been continued.

"In the twelfth century," says Codrington,[4] "the land and revenue system almost certainly was similar to that prevalent in India, as it doubtless had been for centuries. With certain exceptions all land cultivated paid a share of the produce whether paddy fields, *chena* or gardens." By this system *chena* cultivation was discouraged. The king's interest was to have paddy rather than fine grains cultivated.[5] The king, in addition to his revenue from the country, had also his own lands from which he derived an income.[6]

(6) The aristocracy

The invasions of the lands of the Ariyas by Rajadhiraja and his illustrious son Rajendra brought a large influx of Brahmins not only to South India but also to Ceylon. The Brahmins who had come in large numbers during the reign of these kings, would not

1. Codrington's *Land Tenure*, p. 17
2. *History of Ceylon*, Vol. I, p. 377
3. ibid.
4. Codrington's *Land Tenure*, p. 59
5. ibid.
6. ibid.

have hesitated to assert their intellectual prowess and mingle with the ruling class.

(7) The Sangha

The most powerful ecclesiastical body was the Sangha. The Brahmana Theras from South India, such as Buddhadatta and Buddhaghosa, came to Ceylon and made deep impressions on the religious and cultural life of this country. The kings vied with each other to acquire merit and granted large benefactions to *vihāras* and *devāles*. The Buddhist shrines and assemblies of Theras also flourished in India during the second to the sixth centuries when the whole of India was profoundly influenced by Buddhism.[1] The *vihāras* of Ceylon were granted large tracts of land; sometimes a village (*vihāragam*) or a group of villages belonged to a *vihara*.

Next to royalty, the members of the Buddhist Sangha and the Brahmins enjoyed a privileged position and formed the nobility. These nobles obtained grants of heritable lands from which they derived large incomes. These grants were called *paraveni*, *pamunu* or *gamvasa*. These were also given to generals who led victorious armies in successful expeditions.[2]

The term *paraveni* which cannot be traced beyond the Chola conquest in the early 11th century[3] is probably the Tamil form of *paraveni* (பரவேணி) which means ancestral hereditary property, derived from the Sanskrit word *paraveni*. The word first occurs in its Pali form as *Puveni gama* in the reign of Vijayabahu I. The 14th century Naka Lekam Record referring to the hereditary holders of land and their sons, speaks of property made of *praveni* by royal commons.

In the reign of Parakramabahu II (A.D. 1234–1269) the tenure called *kulapuveni* is used.[4] The *Rājāvaliya* refers to it as *pamunu parapura* or *mav-piyan-ge kula parapura* (property in the unbroken succession in the family of the mother and father). This form of tenure will be discussed later.

(8) *Divel*

Another form of tenure is *divel* (corrupted *jivita*).[5] This was a grant of land by the king to an official during his lifetime as recompense for serving the State. This form of grant was frequent in the Chola country[6] and as the tenure appeared only after the Chola period, it is probable that this was introduced during the Chola conquest of Ceylon and was continued thereafter.

1. The Tamil classic *Manimegalai* shows the Buddhist influence among the Tamils.
2. *History of Ceylon*, Vol. I, Part II, p. 560
3. Codrington's *Land Tenure*, p. 11
4. *Mhv.* LXXXIV, pp. 19, 21. 22
5. *History of Ceylon*, Vol. I, Part II, p. 560
6. *The Colas* by Nilakanta Sastri, p. 461

Some menial services were not paid for in cash. A *badavadella* or *divela* was given to washermen for their services to the village. A cross division of *panguwa* called *liyadde* was given for such services to the village. This was sown and cultivated by the grantee and the produce was given to the washermen.[1] Ivers gives the term *ulappawa* as the alternative for the *divel* (*ullappawa* is derived from the Tamil word உழைப்பு, meaning employment).

(9) *Patta*

The *patta* is a form of tenure identical with the Malabar *pattam*. The word *patta* is derived from the Tamil பட்டம் (rent),[2] a form of lease common in the Tinnevely District in South India. The rent was payable in cash and not in produce. In this respect it differed from the *patta* of the Malayalam country in which payment was in cash or in produce.

Another inscription states that if a person who enjoyed a lease known as *gam patta* took sanctuary even in the temple, his debts could be recovered. The word *patta* is not found after the 10th century, except in the Mihintale Tablets. The precise nature of the *patta* is not clear but it appears to have been a lease for a fixed term and was similar to the Tamil *paddam*.[3]

The Mihintale Tablets provide that temple lands should not be given as *patta* but should be tied up in the form of tenure known as *karaya*.[4] In these tablets the tenure *patta* is placed before *kara* and after *lekas pamuna*.

(10) *Kara* or *Karaya*

The Mihintale Tablets refer to a tenure as *karaya* but the term is found in other inscriptions,[5] e.g. the Eppavala Inscription.[6] The terms *dasa kara* (servile black)[7] and *jival kara*[8] occur.

The term *karai* has been given many fanciful derivations, but a solution is offered by Mr. Codrington who states that the word is derived from the Tamil கரை meaning shore, land or limit. It means a large division of co-parcenary land in a village consisting of dry and wet fields and also high lands in the littoral areas of Ceylon.

A similar form of tenure was in existence in the Tanjore district of South India. There the lands in a village were redistributed among the villagers periodically. The villagers had no separate

1. Codrington's *Land Tenure*, p. 65
2. See *Short History of Ceylon* by Codrington, p. 54
3. Codrington's *Land Tenure*, p. 14
4. EZ. I, No. 7 pp. 93, 94, 105
5. EZ. III, 4, C line 4
6. EZ. III, 18
7. EZ. I, 4, 20
8. EZ. II, 37

property but only shares, and the produce of the lands was distributed proportionately according to the shares. The period of tenure varied.[1]

As the Mihintale Tablets speak of the former Tamil times,[2] the *kara* system must have been in vogue during the Chola rule[3] and survived thereafter. This system was advantageous to the owner as his title was recognized and the cultivators only had a temporary interest in the land.

In the Mihintale villages, the cultivators who worked the *kara* were not the owners, although the same men continued to cultivate it seasonally. The manager of the *karai* was called *karakkaran*. The land was measured in *nelis* (a Tamil term used to denote an area) and given on *kara*. These temporary allotments later became permanent.[4]

The period of decline

The system of land tenure which prevailed during the period of decline was basically the same as that which prevailed during the Polonnaruwa period. The types of tenure called *pamunu*, *praveni*, and *divel* referred to earlier, are mentioned in the documents which dealt with lands given to principal dignitaries and temples of this period.[5]

The unit of land-holding was measured in terms of sowing extent (such as kurakkan sowing extent). The types of holding had descriptive terms such as *valpita* (forest), *vil* (shallow lakes), *gevatu* (house-sites), *gasa-kola* (plantations) and *oviti* (vegetable plots), and appurtenances to the *kumburu* (the fields) indicating the nature of the plantations.[6]

The chiefs of the Pandyan dynasty, who came into power after the Chola decline, were the *mudaligal*.[7] It is probable that they were the nobility of Ceylon, and became the lords of the tracts of lands given on service tenures during the period. It is not without significance that the term *mudali* is used to denote *amatya*, and it came into use only during the Gampola period.[8] It occurs in South Indian documents of an earlier period.[9]

Under Parākramabahu IV (A.D. 1325–1326) those who paid tributes to the Tooth Relic fell under three classes: those who held (i) *pamunu* (ii) *divelgam* and (iii) the rest.

1. Codrington's *Land Tenure*, pp. 15, 16
2. B. pp. 55, 56
3. Codrington's *Land Tenure*, p. 16
4. ibid. pp. 15, 16
5. For *pamunu*, *vide* Codrington, p. 13
6. *History of Ceylon*, Vol. I, Part II, p. 720
7. *The Pandyan Kingdom* by Nilakanta Sastri, p. 219
8. *History of Ceylon*, Vol. I Part II, p. 735; EZ. III, p. 246; JCBRAS XX, No. 60, p. 69 ff.
9. EI. XXI, p. 189

The first category paid a cash tribute (*pandara*); the second, lamp wicks and oil; and the third, money, daily or monthly or as headmoney.[1] The second or *divelgam*, formed the majority; *pamunugam* and *nindagam* were not numerous. On the analogy of the later *angabadda* or poll tax, Codrington surmises that the third class consisted of the lower classes. By the 14th century, the bulk of the holdings in the Sinhalese kingdom was made up of service tenures and they continued to remain so until the Portuguese arrived. In the time of Bhuvanekabahu VII (A.D. 1521–51), the widely prevalent form of tenure was service tenure.[2]

The Portuguese *tombos* show that in the Seven Korales large areas of paddy land still paid *otti* but in the Four Korales the extension of *divel* had caused the areas paying *otti* to disappear.[3]

The system which continued in Jaffna is of importance in reconstructing the 12th century system of land tenure in Ceylon.[4] The *otti* was transferred from the king to the *gamladda*, the reasons being the decrease of prosperity, the long periods of Tamil rule, the costly campaign of Parakramabahu, the usurpation of Magha and the decay of the irrigation systems. All these causes made the ancient administrative system highly specialized and burdensome to the country and hence there was a gradual extension of the direct form of tenure granted in lieu of services.

The Portuguese Period

The Portuguese followed the Sinhalese system of land tenure in all its details.

The village usually consisted of the holdings called *waduwasam* (*divel* held by officers such as cultivation headmen or mayorals, and village tenants such as blacksmiths, etc.). Some holdings were indivisible. Some were heritable in the male line and liable to be each escheated to the Crown or the overlord in default of performance of services.

The rest of the village was given to the other members of the village who paid a share of the produce (*otu*) to the Crown or the overlord. These lands are heritable, descending both on the male and female lines.

The Dutch Period

The Dutch continued the system taken over by them from the Portuguese. Service tenure known as as *accommodessan*, which was practically the same as *divel*, was drastically cut down, and cash payments were made for services. Where no land was available

1. Codrington's *Land Tenure*, p. 59
2. ibid.
3. ibid.
4. Re Tamil Tenures, *vide* Codrington's *Land Tenure*, p. 53

for development, the services were paid for by the remission of other garden dues.

The British Period

When the British took over from the Dutch, the ancient land tenures were abolished and the Madras revenue system was introduced. Services were paid out in money, the *uliyam* (compulsory service) was done away with, and the service (*paraveni*) holdings were vested in the owners of these properties and became alienable. A levy of 1/10th of the produce was recovered by the Government from all owners of land.

The rapacious policy of the revenue farmers and the heavy taxes the people paid, led to the collapse of the Madras system of administration. In 1798 service tenures were restored. Governor North who was dissatisfied with the old order, brought radical changes by proclamation dated May 3rd, 1800, and ordered that:—

PARA. 1 On and after May 1, 1801, all land then held in undivided tenure by more than one proprietor, was to pay to Government a tax of one-fifth of the produce. When divided, the tax was reduced to one-tenth except where held subject to payment of *ande*.

PARA. 2 All persons having a common and undivided interest were to make it known to the Landraad before May 1, 1801.

PARA. 8 All land now enjoyed without title or grant under the denomination of *Canois Parveny, Ratmahere* or any other whatsoever, may be appropriated by the occupier on condition that he do state the said possession before Landraad before the first of November 1801, and have the same registered duly in the Registry of the District. Such were to pay one-tenth, or if not registered, one half.

PARA. 11 All persons holding land by tenure of service might appropriate the same on payment of one-tenth of the produce of high lands and one quarter of the produce of low lands, unless the tenure of such service or *accommodessan* land was formerly *malapala, nilapala, ratninda* and *anda*, which might be appropriated paying one quarter of the produce.

PARA. 14 Grants of land to all deserving persons 'in full and perpetual property', the amount granted at one time not to exceed 4 *amunams* of low or 8 *amunams* of high lands, were promised duty-free for the first five years. At the expiry of that term the uncultivated part was

to revert to Government. The tax was one quarter of the produce of low lands and one-tenth of that of high land.

PARA. 16 All lascarins or families of lascarins having *accommodessans* from Government and being obliged to serve on account of such *accommodessans* were at liberty to give up the same. They were to serve only on the special command of the Governor, and for payment the same rule applying to lascarins who could prove that they received from Government neither lands nor *accommodessan*.

By proclamation of September 2, 1801, paragraphs 2 and 16 of the previous proclamations were withdrawn. From May 1, 1802, all obligations to service of tenure of lands were to cease; those held duty-free on account of service or those tenants paying one-tenth for high land and one-fifth for low lands, unless this was *malapala*, *nilapala*, *ratninda* or *anda*, continued to pay one quarter. Special *accommodessans* enjoyed by headmen and others were resumed. Although Governor Maitland did not agree with North's policy, service tenures were not restored. Nevertheless, in order to reverse a decision of the Supreme Court which held that service *paraveni* land was liable to sale for debt, Regulation No. 8 of 1809 was passed. It dealt with abuses in such holdings which prejudiced the rights of Government and impoverished the families concerned. This regulation enacted that—

(1) all such lands should be held, as in former times, immediately under Government;

(2) the privilege of succeeding thereto was in the male heirs only of those who died possessed of the same;

(3) these lands were to revert to His Majesty on failure of such male heirs or breach of the conditions of tenure;

(4) they could not be alienated by gift, sale, bequest or other act of any party, or charged or incumbered with any debt whatever;

(5) nor were they liable to be sold by virtue of any writ.

Classification of tenures according to the nature of the land

The fields where paddy was sown, were known as *kumburu*. Such fields were either dependent on rain water or on irrigation. Fields which lie fallow were *puran* or *malan*. Subject to periodical cultivation were the *oviti* which consisted of flat meadow land. Strictly speaking, *oviti* should be by the side of a stream (*oya*) but they could be anywhere. The Portuguese *tombos* describe them as *kakulams* (dry fields). Such fields were not by the side of the stream

or *oya*. In the Dutch new *tombo*, these *oviti* were referred to as *deniyas* and *vilhadu* (*vilhadu* in Galle were cultivated with kurakkan). In the Galle District there are fields which have a sub-stratum of decaying trunks of trees (*vil-kotan*). There were also *deniyas*, which are narrow valleys running up between the spurs of ranges of hills and cultivated with paddy. The word *deniya* is derived either from the Pali word *doni* or from the Tamil word தோணி which means a trough. Van Imhoff in his Memoirs describes *deniyas* as 'sand plains' and states that these *oviti* were cultivated with kurakkan.

There were also lands newly brought into cultivation as paddy fields known as *asvadduma* or *dalupata* (tender leaf). Such lands were not of great extent. Sometimes this name is applied to the lowest tract of fields under a tank. The early medieval name was *viyala* (see the Tamil word *vayal*).[1] The words *khetta* and *vatthu* are also used to describe these fields.

Garden lands were "home garden" or *gevatu* (see the Tamil word *vathai*) and plantations or *vatu*. When the plantation consisted of arecanut groves it was called *aramba*.

High lands were cleared of jungle by periodic felling and burning, the resulting ash being used as manure for the cultivation of hill paddy and fine grain. Such lands became known as *chena* land. The cycle of cultivation lasted for two or three years, after which the land lapsed into jungle. *Chena* cultivation was widely practised in Ceylon from ancient times. Thus, many inscriptions refer to the *chena* form of cultivation.[2]

There were also the king's jungle preserves (*ratmahara*—the king's great thickets). This was the description given to the waste lands in general which were later permitted to be used for *chena* cultivation. By the beginning of the seventeenth century parts of it were then owned as *paraveni* or heritable property.

Forests or jungle of large extent, cut down and cleared by individuals, and sown once every seven or eight years were known as *kanu-his paraveni* (*kanu*-'stumps', *his*—'empty' or 'cleared of') meaning that forests were felled and after the stumps were cleared, paddy was sown.[3] The use of this name was confined to certain localities, such as the Chilaw and Matara districts.[4]

Ande

Another form of tenure is the *ande* where the cultivator paid perhaps half of the produce to the owner of the fields. *Ande* is derived from the Sanskrit *ardha* (half) and occurs in the Sinhalese

1. Inscription of Gadasa Mahā, EZ. II, 30
2. EZ. III, p. 238; Aramanapola documents of Parakramabahu VI 1412–c, 1467, in Vidyodaya II, pp. 11, 12; also *chena* referred to in Velivitta Sannasa of Saka 1727 (A.D 1805)
3. Statements of Different Tenures of Land, 1818
4. Codrington's *Land Tenure*, p. 8

literary work *Kurudharma Jātaka*. Queyroz[1] referring to a petition sent to the Portuguese Captain, divides *ande* fields into two classes. In the first, the crop of *ande* fields was divided into two equal parts (after deducting the two customs (i) *paldora* and (ii) *assucadao*), where one half went to the king or lord and the other to the cultivator. *Paldora* is the perquisite due to the watcher of the field, being the crop of paddy round the watch-hut. The second was the *karuande* which was the quarter of the crop, that is the half divided between two cultivators. Sometimes the lord's share was one-third or *tunen-ande*.

Ande tenure was recognized in the Maritime Provinces. The Portuguese *tombo* in the Galle and Matara Districts mentions *anda de bada* (*badu-ande*) due on *badu-kumburu*. *Ande* share was levied from the fields, usually the fertile ones, and is still in vogue.

Ottu

The history of land tenure in Malabar is admirably set out by Logan.[2] He says that when the king gave a land to a grantee as perpetual heritable tenure, the grantee would entrust its cultivation to those who would undertake the supervision. The grantee would borrow money from these supervisors and the interest on the loan was set off from the produce. When interests accumulate to such an extent that the share of the produce due to the grantee was not sufficient to pay the interest, this form of tenure came into existence and the person to whom the property was entrusted for supervision took all the produce.

The grantee still retained certain rights over the land and its occupants. He could redeem the *ottu* by paying off the debt and the interest.[3]

Classification by apportionment of the crop

Tenures also could be classified according to the share of the crop which the owner was entitled to receive. Lands possessed by persons and which were free of dues were referred to as *ninda*. The word *ninda* is derived from the Tamil word *nintham*[4] (நிந்தம்) meaning freehold. In this type of holding, the crop is entirely taken by the possessor. In the Portuguese *tombo* it is rendered by the word *foro* which however did not apply to all fields which paid no *ande* or *ottu*, for such lands might be service land. This term applied only to those of the village proprietor or the proprietor of part of the village, who then dealt, or at one time dealt, directly with the Crown.

Ratninda meant the 'king's exclusive possession', and usually consisted of a field corresponding with *keta* (a royal field). In the royal villages it was the same as *muttettuwa*.

1. *Conquest of Ceylon* (translation by Fr. S. G. Perera) p. 1017
2. Logan's *Manual of the Malabar District*, pp. 602 et seq.
3. ibid. pp. 610-611
4. Codrington's *Land Tenure*, p. 8

The *otu* of the Sinhalese differed from the *ottu* of South India. *Otu* was of three kinds:[1] (1) The share due to the overlord may be a portion of the crop equal to the extent sown, or one and a half or double this measure. This was usually the arrangement made with the proprietor by a cultivator of fields which were barren or difficult to protect from wild animals, particularly in the Seven Korales, Saffragam, Hewaheta, and some *chenas* in Harispattu. In many royal villages in the Seven Korales there were lands paying *otu* to the Crown.[2] (2)The second form of *otu* in vogue was where the share of one-third is paid from a field of mediocre fertility, or from a good *chena* sown with paddy. (3) The third form of *otu* was where the proprietor of a *chena* sown by another with fine grain is entitled to cut first a large basketful, or a man's burden from the ripe crop.

Land given out in *otu* normally was that which was left over after the best has been kept for the lord either as *muttettuwa* or as *ande* fields. In the Portuguese *tombos* the *otu*-paying land is that remaining after the needs of the overlord and of the service tenants had been provided for. With a growing population it was not profitable to give land in *otu* and therefore it ceased to be in operation in the populated areas. In the Four Korales for instance, the *otu* land has almost disappeared; in the Seven Korales this form of tenure existed only where the land was of a large extent.[3] Codrington states that "at the present day *ande* is paid in respect of the lord's own land, and *otu* in respect of a tenant's own holding". The first is always a definite proportion of the actual crop; the second is based on the sowing extent and is less in amount than *ande*.

"Payment of *ande* or of *otu*, however does not necessarily indicate different interests in the land; in either case this may belong to the lord absolutely; whether one is paid or the other then depends on the lord providing or not providing the seed paddy, cattle, etc."[3] He further states that "the two principles, the supply of seed paddy, cattle, etc., and the fertility of the soil are seen at work in the Tamil districts".[4]

Paraveni and Maruwena tenures

Land tenures also may be divided into *paraveni* tenure and *maruwena* tenure. *Paraveniya* (Sanskrit *paraveniya*; the Ceylon Tamil form *paraveni* பரவேணி; Pali *paveni*) means "series, succession, line, tradition, custom, usage". D'Oyly defines *paraveni* land as that which is "the private property of an individual proprietor, land long possessed by his family, but so called also if recently acquired in fee simple".[5] The interest in a *nindagam* is frequently

1. D'Oyly, p. 55
2. Codrington's *Land Tenure*, p. 9
3. ibid.
4. ibid. p. 10
5. D'Oyly, p.

referred to as *paraveni*. However the right of possession was subject to the limitation that failure to perform service might lead to escheat. Due to judicial and legislative action under the British Government the *paraveni* tenant's position became secure. *Paraveni*, therefore, does not necessarily imply absolute ownership; strictly speaking it means only that the land is heritable and that it has come into the owner's possession from his ancestors.

As opposed to *paraveni* holding is the *māruwena* holding. The term *māruwena* means "changing" (from the Tamil word *mārave-num*-மாறவேணும்) and therefore may be equated to tenancy at will, but subject to the right of the tenant not to be removed until the end of the cultivation year or season. Although in theory the *māruwena* tenant can be removed by his overlord, yet in practice he often remains without interference for many generations. The change of *māruwena* tenure into *paraveni* tenure has been going on through several centuries and sometimes the process is reversed. Lands which were held as *paraveni* tenure have been changed into *māruwena* tenure at a later date.[1] Many *māruwena* tenures may become *paraveni* tenures by long-continued possession. There is an old Sinhala maxim that "after a possession of thirty years a *dival* may become a *paraveni* proprietor". The Board of Commissioners invariably applied this rule and held that if a person was in possession for 30 years he should be regarded as the *paraveni* holder.[2] D'Oyly however, states:[3] "No specific term of years constitutes a prescriptive title of land, notwithstanding a vulgar saying which attaches validity to 30 years. But an undisturbed possession of many years is considered in all cases as a strong presumptive proof in favour of the possessor."

Paraveni may be classified into the following categories:

(*a*) *Anda-paraveni*: This was land originally the property of the Government, cleared and cultivated by individuals without permission. The cultivators or the persons who converted them into fields were entitled to one half of the soil which they could either sell or mortgage, and their rights were heritable.[4] This was the position in the Maritime Provinces, but in Sabaragamuwa in 1818, fields called *anda* were treated as the private property of the village people and cultivated at the joint expense of the village proprietor (*gam-ladda*) and the field owner.[5]

(*b*) *Asvadu-paraveni*: These were encroachments by the holder of a *paraveni* field.

(*c*) *Otu paraveni*: This was heritable paddy land paying *otu* to Government. Under the Dutch Government the excess land of

1. Codrington's *Land Tenure*, p. 11
2. Decisions of the Board of Commissioners, Vol. 7 of 1819
3. D'Oyly, p. 45
4. Statements of Different Tenures of Land, 1818
5. Sab. Report (H. Wright, Govt. Agent, Sab.) Oct. 6, 1818

the Company not given as *dival* or service land was given in this form of tenure. In Sabaragamuwa, in 1818, *otu* was paid to the village proprietor from fields by the inhabitants who cultivated them entirely at their own expense.[1] Similar to this in the Maritime Provinces were the tenures *otu kumburu paraveni, oviti paraveni, kanu-his paraveni,* and *karudena paraveni.*

This class of *paraveni* should have paid a quarter (a *karuva*) of its produce. Bertolacci describes it as land covered with low jungle and impregnated with salt water.

(*d*) Purchase *paraveni*: In the Kelaniya Inscription of Parakramabahu IX,[2] there is a reference to a provision for payment of a share of the paddy crop from land purchased, and from land which was inherited.

In the Maritime Provinces property bought was known as *lat-paraveni* or *mudal-paraveni.* According to the Statement of Different Tenures,[3] purchase *paraveni* was revertible to Government on failure of male or female heirs; it was possessed by paying *otu* and was saleable. Cleghorn, in his Minute of 1799, states that 5 per cent was paid to Government on every change of proprietorship in addition to the collateral taxes such as the tithe of rice, oil, betel-nut, etc. In the Kandyan *sittuva*[4] the same distinction is made between ancestral property (*paraveni*) and property bought by purchase (*mudal dun peruvak*).

As stated earlier, the term *praveni* or *paraveni* cannot be traced back beyond the Chola conquest in the early eleventh century, and is perhaps of Chola origin. The word first occurs in its Pali form as *pavenigama* in the reign of Vijayabahu I (A.D. 1056-1111).[5] Under Parakramabahu II (A.D. 1234-1269) *kulappaveni* in *Mahavamsa*[6] is referred to in the contemporary *Pujavaliya* by *pamunu parapura* and by *mav-piyan-ge kula parapura* ("property in unbroken succesion (Sanskrit *parampara*) in the family of mother and father"). The word *parapura* is common in Nissankamalla's Inscription (A.D. 1187-96) preceded by and qualified by *pamunu.* But a passage in *Mahavamsa,*[7] referred to below in the sections on *pamunu,* shows that the two were not identical. The oldest instance of *parapura* known, says Codrington, is *haskaru parapuren* ("cultivation in unbroken succession") in the Mihintale Tablets.[8]

The term *aya-paraveniya* occurs under Parakramabahu IX. The ancestral home of the great Alagakkonara (14th century) is described in the *Nikaya Sangraha* as his *janma-paraveni,* and in the

1. Sab. Report 1016
2. Acc. 1509; CA I, p. 153
3. Statements of Different Tenures of Land, 1818
4. N.C.P. No. 1155
5. *Mahavamsa* LV, 31, LX, 75
6. *Mahavamsa* LXXXIV, 2; LXXXVII, 19, 21, 22
7. *Mahavamsa* LV, 31
8. Codrington's *Land Tenure*, p. 12

Lankātilaka Inscription of the third year of Buvanekabahu IV,[1] mention is made of *pamunu praveniya* (*janma* is the equivalent of *paraveni* in the Malabar country[2]). The fourteenth century Nakolagane Record, referring to the twelfth century holders of the land and their sons, speaks of the property having been made *praveni* by royal command.

(*e*) Holdings held by persons of foreign origin: An exception to the universality of service tenure in the Kandyan Provinces in 1815 is to be found in the case of the Madige Department. Codrington says that it is "an exception, however, more apparent than real and negligible for practical purposes. This department consisted chiefly of Moors and in some few places of *karāva* people. The Moors being traders, were possessed of pack bullocks with which they transported the king's grain, brought salt from the coast, and carried on trade on the king's behalf. Their lands, however, do not seem strictly speaking to have been held for service". In 1820 they were told that they were liable to answer unlimited calls of the Kandyan Government for the gratuitous service of their cattle. Although they held no service lands, most of them were subject to a considerable tax payable in salt and salt fish, which they either purchased or obtained by barter at their own expense in the Maritime Provinces and delivered into the royal stores in Kandy free of all cost to the Crown.[3] For this service "permission to reside and settle in the Kandyan country was deemed sufficient compensation",[4] but although the Moors and *karavas* were given service free lands they were in fact treated as foreigners. In the low country, for the same reason both they and the Chetties were liable to forced labour or *uliyam*.[5]

Codrington states that "perhaps it was for this reason that the *Chalias*, also in origin foreign immigrants, were treated by the Portuguese as king's slaves, which, of course, they were not". The *Chalias* paid *thuppatia*, a piece of cloth as tax, which shows that their hereditary occupation was weaving. (The Petition of 1636[6] states that the *Chalias* paid one *tuppottiya* cloth yearly, as they were weavers.)

(*f*) *Binna, bini*—This term occurs in several Kandyan *lekammitiyas* and its meaning appears to be obscure. Codrington surmises that a *binna* system of marriage prevalent among the Kandyans, by which the man lives in the wife's house, accounts for the origin of this form of holding. It occurs either as *binna, bini, bini-vasam*

1. Acc. Saka 1266–1344/5
2. Logan's *Manual of the Malabar District*, p. 62 et seq.
3. Bd. of Comm. Vol. 9
4. ibid.; 543 Kurunegala, June 10, 1818
5. Codrington's *Land Tenure*, p. 20
6. Queyroz, p. 1018

or *bini-pangu*,the abbreviation being *bi*—(*vide Udapalata-disave arachchivasam hevavasam gampattu bini me pamanayi*;[1] and *mema disave gampattu binivala vaga nam*[2]). No particuar caste seems to be associated with the term. The *bini* tenants paid the pingo duty (*kat-hal*). They performed no public duty, but paid certain dues to the Adigar and some of them were liable to occasional work.[3]

The expression *gānu-panguva*, ('woman's lot') occurs in Lawrie's *Gazetteer*,[4] and also in the *Nīti Nighanduwa*.[5] A consideration of the above passages "tends to the conclusion that *gānu-binna* and *gānu-panguva* are two names for the same thing, namely, property held by a woman in her own right, whether transmissible in the female line or not". The *gānu-binna* in two of the passages cited, is presumably connected with *binna*-marriage.[6]

As large tracts were given to individuals, temples, etc., by the kings, villages often became the property of lords or temples, and hence acquired the name of the tenure. The gift of a village was known as a *gamvara*.

The significance of the term *binna* has already been discussed under the heading of marriage. Codrington says that the term *binna* which seems to mean "portion, piece broken off" in the concrete, applied to landed property and so *gānu-binna* should be "woman's portion or lot". This appears to be identical with *gānu-panguva*. Codrington says that the only explanation which occurs to him is the suggestion by Knox[7] who states: "Lands of Inheritance which belong to Women are exempted from paying Herriots to the King. Women pay no custom for things they carry to the Sea-Ports. Neither is any Custom paid for what is carried upon any Female Cattle, Cow or Buffalo." If the exemption from the *marāla* or death duty was the distinguishing feature of *bini*, the abolition of this exaction by Kirtisri (A.D. 1747–82) would account for the loss of all popular recollection concerning the tenure, as it merged in the general mass of service tenures.[8] In the *binna* form of tenure no services were rendered or paid to the king or the overlord.

Classification of Villages according to Service Tenures:

Gamvara

In medieval and ancient Lanka the term *gamvara* frequently occurred in Sinhala literature. In the Udapalāta *Lekammitiya* of Saka 1712[9] *gamvara* meant a "village". In the Kantalai Inscription of

1. Udapalata LM. Saka 1678-1756
2. Udapalata LM. Saka 1737-1815
3. D'Oyly, p. 2
4. op. cit. p. 83
5. *Nīti*, p. 119
6. Codrington's *Land Tenure*, p. 21
7. Pt. III, chap. 7
8. Codrington, p. 22
9. A.D. 1790/1

Nissankamalla,[1] the phrase "a *gamvara* and other revenue" occurs. The term often appears in the Sinhalese Jatakas. By *vara* (Tamil equivalent—*varam*) is meant "boon, blessing, favour, gift, reward benefit, advantage, privilege, charity, alms". According to Codrington the term *gamvara* may have meant at one time "village-gift" or "village-benefit". The person who was given the gift of a *gamvara* was able to collect the village revenue.

Saṁghabhogagama :

In the *Mahavaṁsa* the word commonly used for a village granted by the king to the priesthood is *saṁghabhoga-gama* and to others is *bhogagama*.[2] A village is styled in the Rambawa Inscription[3] *saṁghabhogagama*, which is the same as *sarvamaniyam* in Tamil which means "complete exemption from tax". *Sarvamaniyam* is found in the Munessaram Tamil Record of Parākramabahu VI and this form is vogue in the Travancore District.[4]

Pamunugama :

A *pamunugama*, that is a village granted or made *pamunu* (a form of nominal quit rent for heritable land),[5] may be granted either permanently or temporarily. As an example of the second-named, is the conferment on a courtier, Siva by name, of the sea-port Mavatu with its revenue in the story *Nandi-vānija-vastu* in Dharmakirti's *Saddharmālankāra*.

Ukasgama:

Similar to *pamuṇugam* were also *ukasgam* which means 'mortgage village'. If the whole of a village was mortgaged it acquired such a name.[6] *Divelgam* were villages held for service or for maintenance of the grantees.

Dasagama:

The Sinhalese kings sometimes gave a group of ten villages to a person. Thus King Buddhadāsa is said to have provided a physician for every ten villages. The *dasagama* appearing in the medieval inscriptions is not a servile village but a group of ten (*dasa*) villages. There is communal liability if the group has committed any crime. The word *dasagama* has the same meaning in Kautilya's *Arthasāstra*.[7]

Muttettuwagama:

Muttettu lands were of two kinds, viz: *ninda muttettu*, which is sown entirely and gratuitously for the benefit of the proprietor,

1. EZ II, 42
2. *Mahavaṁsa* LIV, 28
3. EZ. II, 12
4. Codrington's *Land Tenure*, p. 23
5. EZ. V, p. 49
6. EZ. I, 8
7. op. cit. p. 207

grantee, or chief, by his service tenants (*nilakārayo*), in consideration of the lands which they possess; and *anda muttettu*, which is sown by the tenant on the usual condition of giving half the crop to the proprietor.[1] Where the lands were held by the *vidane* or headman as recompense for his services, it is often known as *Vidāna muttettuwa*. The word *muttettu* is Tamil and is still in use in Batticaloa District.[2] The old Sinhala word for such fields in royal villages is *ratninda* or king's *ninda*. A *keta* is "a royal field or land sown on account of the Crown. In royal villages it is the same as the *muttettu*".[3]

Gabadāgama:

The division of *muttettu* lands continued during the Kandyan period. Certain villages during the Kandyan period were called *gabadāgam*. The *gabadāgam* (or villages of the storehouse) in Kandyan times belonged either to the *Maha Gabadāva*, the king's principal storehouse, or to the *Uda Gabadāva*, his private storehouse, or to the *Palle Vahala Gabadāva*, that of the queens and princes. These were retained in the possession of the king or other royal personages, or similarly conferred on officers such as a Disava as a condition of the performance of their service, or granted temporarily as *nindagam*, in which case they were known as *saramaru* ('change').

Gabadāgam were either (*a*) ancient ones which had always been in the king's hands, or (*b*) confiscated property. In the royal villages the lands belonged to the king and the service tenants had no title in lands in such villages except to confiscated lands which were given to service tenants in *paraveni*. In most of the royal villages which were never alienated by the Crown, none of the *nilakārayas* had hereditary right to their *panguwas*.[4]

According to the Minutes of the Board of Commissioners,[5] in Uva, where the royal villages were never alienated and one half of their produce went to the Crown,[6] none of the *nila* fields were *paraveni* except in villages confiscated by the last king. The *nilakāraya* was changed at the will and pleasure of the *vidane*. Similarly neither the *panividakārayo* (a Tamil word பணிவிடைக்காரர் which means those who were messengers), nor headmen, nor the *gammahes* had *paraveni* lands; the *gannila* field, though always held by the *gammahe* and continued generally in the same family, was not at their disposal and they could be ejected.

Sharpe, who was Assistant Agent in Badulla in 1869, divides *gabadagam* into three classes: (1) the *muttettuwa*, "the absolute property of the Sovereign, for whom it was cultivated and to whose granary its crop was delivered by certain *paraveni* tenants or

1. D'Oyly, p. 54
2. Codrington's *Land Tenure*, p. 23
3. D'Oyly, p. 54
4. Board of Comm. Vol. 38, March 3, 1829; D'Oyly, p. 88
5. Vol. 933 (March 6, 1832)
6. Sab. Report, 1818

pangukārayo, generally five in number, who held from generation to generation as hereditary this tenure; (2) *panguas* or *paraveni* fields held on condition of services, which consisted of assuming responsibility for the due cultivation, care and delivery to the Royal Granary of the *pangu's* portion of the *muttettuwa* yearly (the actual cultivation was done by *nilakārayo* who were allowed to occupy the land); (3) the *nila* fields, generally distributed at the rate of one amunam per person and which were distributed yearly by the Disava as he thought fit to the *nilakārayo*, who as tenants-at-will, held their lands in return for their labour of cultivating the *muttettu* field (for the safe delivery of whose crop the *pangukārayo* were responsible) and of carrying the produce to the local granary or to Kandy when ordered. In addition they were required to do any work at the residence of the Disava.[1]

Purappadu Lands:

In the Kandyan country there was also *purappadu* land (புறம்பாடு —*purappadu* (Tamil) meaning land vacant or without an owner, either through failure of heirs, or by abandonment, or by forfeiture). If the Crown happens to take over the land, then it was called *gabadagama*.[2] Land not forfeited but only abandoned could be reclaimed at any time. It was at the disposal of the Disava, who delivered it to any applicant on payment of 8 or 10 *ridies* as *bulat hurulla*. The new occupant then paid *otu* to the "proprietor" of the village. In the *nindagama*, *purappadu* land was at the disposal of the lord.[3]

Nilapala and *Malapala*:

In the Maritime Provinces, the old distinctions of the *nilapala* and *malapala* were retained. *Nilapala* land was that held on service tenure which reverted to the Crown either through failure of male heirs, through non-performance of service dues, or because the office to which the land was given as a perquisite itself may have been discontinued.[4] *Malapala* were lands originally held by private persons, but which had reverted to the Crown through failure of other heirs.[5]

Nindagama:

Some Sinhalese villages were *nindagam*. *Nindagama* is defined by D'Oyly as "a village which for the time being is the entire property of the grantee or temporary chief, when definitely granted by the king with *sannas*, it becomes *parveni*. It generally contains a *muttettu* field, which the inhabitants, in consideration of their

1. Codrington's *Land Tenure*, pp. 24 & 25
2. D'Oyly, p. 55; Armour, p. 100
3. Sab. Report, 1818; D'Oyly, p. 77
4. Codrington's *Land Tenure*, p. 25
5. ibid.

lands, cultivate gratuitously for the benefit of the grantee, and besides are liable to the performance of certain other services for him".[1] In a *nindagama* tenancy there may be various kinds of service tenants. Sawers states that it is impossible to define all the tenures upon which lands are held, as these differ in every village and as they rise from that of the *uliyakkāraya*, "whose condition appears to be little better than that of a slave, to that of a person who merely pays homage by appearing on particular seasons, or at festivals, with a few betel leaves". He therefore divides service tenants into six classes: (1) the *uliyakkārayo*, who perform low or menial service (Tamil—*uliyakaran*); (2) the *nilakārayo*, already described; (3) the *hevanannahas* and *patabando*, always of the *rate* or *vellāla* caste who generally did honourable service; (4) the *vatukārayo* "who possessed gardens and paid a certain portion of the produce yearly to the *ninda* proprietor, and were generally liable to be called on to assist the proprietor, being paid by him or fed, for their labour"; (5) the *asvaddumkārayo*, "who have brought pieces of waste land into cultivation on certain conditions, which are so various as not to be defined"; and lastly, (6) those persons "subject to no service to the *ninda* proprietor beyond that of rendering him the same slight token of homage as chief of the village".[2] The last in many ways represent the co-heirs of the original lord.

There were also smiths, potters, and other artisans, as well as the washermen, who both in *nindagam* and in king's villages held land for the services appropriate to their respective callings. In addition to the *nilakārayo* there were *anilakārayo*. (The word *nila* is derived from the Tamil verb *nil*, which means "stand, stop, be, remain, become fixed", and directly from the noun *nilai*, which means "state, condition, stand, post". The meaning of *anila*, seems to be "unfixed", the *anilakāraya* being a tenant with unfixed or indefinite service.[3]) In the Portuguese *tombos*, cases of smiths and potters are found who were bound to serve the king whenever required, but the *anilakārayo* in these *tombos* were "coolies" as were the *nilakārayo* "the service coolies". Codrington says that in the "late Kandyan government there was an *anila badda* or caste organized in a department, it consisted of an inferior class of tom-tom-beaters".[4]

Viharagam or *devālegam*:

Nindagam when held by temples were called *vihāragam* when attached to a *vihāra*, and *devālegam* when attached to a temple (often attached to the *vihāra*). Villages held under a special tenure (viz: that the grantee had no other right than that of having the *muttettuwa* cultivated for himself by the *nilakarayo*

1. D'Oyly, p. 54
2. ibid. pp. 66, 67
3. Codrington's *Land Tenure*, p. 26
4. ibid.

while the latter were liable to pay certain dues to the royal stores and to perform certain services to the Crown[1]) are referred to in the proceedings of the Board of Commissioners. Such villages were chiefly in Three Korales and in Beligal Korale of Four Korales.[2]

Korālagam, Vidānagam, etc.:

Several villages are also known as *korālagam* and *vidānagam* as they were given to officials (*korālas* or *vidanas*) for services rendered. In the neighbourhood of Kandy a number of departments had service tenants in the same village. The difference between such villages and royal villages, which had always been in the king's hands, seems to have been that the inhabitants of the first were free men while those of the second were originally mostly serfs.[3]

1. Bd. of Comm. Vol. 6, June 8, 1819
2. Codrington's *Land Tenure*, p. 26
3. ibid. pp. 26 & 27

CHAPTER XIV

TENURES (KANDYAN PERIOD)

The development of the rajakariya System

The medieval system of land tenure was continued during the Kandyan period. Following the ancient practice, lands granted by the king in perpetuity in his capacity as paramount owner of the soil or by any other authority to private individuals and officials for the performance of civil, military or literary services or by way of favour, were known as *nindagam*. When such lands were given to Buddhist *viharas* they were known as *vihāragam*, and when given to *devales* as *devālegam*.

In addition to these grants the kings often had certain lands reserved for themselves, which were known as *gabadagam*, for the maintenance and support of the royal household. Royal grants included the most valuable lands, such as paddy fields, gardens and high land. Royal villages were, in general, cultivated gratuitously by tenants-at-will, who delivered the entire produce for the use of the king's household. In lieu of their services, such tenants possessed other lands which they tilled for their own subsistence. Lands granted to persons as *nindagam* were given either for service rendered to the king or as an appurtenance of office. Here again the Kandyan kings followed the ancient Indian practice. These grants were either hereditary or for life. D'Oyly states that a *nindagama* "for the time being is the entire property of the grantee or temporary chief; if definitely granted by the king with *sannasa*, it becomes *paraveni*". All lands which were given merely by the king's grant, could, at any time, be resumed by his will, and no private individual or body could possess them at all, independently of this tacit reservation.

The grantees of such lands (*gam*), whether they were private individuals, *viharas* or *devales*, became their overlords or proprietors and they in turn gave these lands to tenants or *nilakārayas*. In a *nindagama*, the overlord or proprietor is sometimes referred to as the *ninda* lord.

A Kandyan *gama* usually consisted of:

(*a*) the *muttettu* (fields) of the overlord which may be sub-divided into:

(i) *ninda muttettu*, which meant the grant of land which was cultivated entirely for the benefit of the overlord as a feudal service by the *nilakārayas* in consideration of the lands which they possess;

(ii) *ande muttettu*, lands acquired by the overlord by way of escheat, gift or purchase, in respect of which he is not entitled to exact free services, but cultivated by anyone with an obligation to give half the crop to the proprietor.

(*b*) the *paraveni paṇgu* or holdings of the *nilakārayas*: a *paraveni paṇgu* has been defined as an allotment or share of land held in perpetuity by one or more holders, subject to the performance of certain services. Such a *paṇgu* generally includes paddy fields and gardens appurtenant to the dwellings, and *chenas*.

(*c*) high land held as appurtenant to the *muttettu* and to the fields of the *paraveni paṇgu*.

A *gama* may also contain the residential compound known as the *walawwe* where the house of the overlord is built. In the case of *vihāragam* and *devālegam*, the *vihara* or the *devāle* buildings would correspond to the *walawwe* of the *nindagam*. The *bandāra* lands consisting of the *walawwe*, the *muttettu* and the high land appurtenant thereto are the absolute property of the *ninda* lord.

A *gama* may have *chenas* attached to the *muttettu* cultivated by the *nilakārayas*, who give a form of rent known as *ottu* or ground share, generally 1/10th of the crop, to the proprietor. Sometimes high lands belonging to *paraveni paṇgu* or to the proprietor of the village were brought into cultivation as paddy fields by the people, and such lands are called *asweddumas* or *dalupathas*. In a *gama* there may also be a tenure known as *maruwena* (derived from the Tamil *māruwenam*). By *maruwena paṇguwa* is meant an allotment or share of land in a *gama* held by one or more *nilakārayas* at the will of the overlord. It is not clear as to whether these lands form part of the *bandāra* property or are a separate species of lands where the right of ownership of the overlord is restricted by an obligation to give them to his *nilakārayas* for cultivation.

When a royal grant was made, the rights of the Sovereign to demand services from the holders of the lands were included in the grant and passed to the grantee or overlord. In respect of their lands they became entitled to the services to be performed by the *nilakārayas* of the *gama*. The *nilakārayas* in turn had the right to possess the *paraveni pangu*, subject to the obligation to perform certain services to the overlord. The holders of such *paraveni paṇgu* are called *paraveni nilakārayas*, as distinguished from the *māruwena nilakārayas* who hold *māruwena paṇgu* as tenants-at-will. A *māruwena paṇgu* is given to a *nilakāraya* for a cultivation season. His tenure is during the season of cultivation only and can be terminated at the will and pleasure of the overlord, but in practice the overlord does not eject the *nilakāraya* during that season. The tenants who hold land under *māruwena* tenure are known as *māruwena nilakārayas* and their obligations are regulated by

mutual agreement. These lands are held from year to year or sometimes for generations. No *paraveni* or hereditary title could be acquired over such lands nor could such lands be sold or leased by the *māruwena nilakārayas*.

The term *pangukāraya* (derived from the Tamil word *pangukarar*) was also used at one time in contradisitinction to *nilakāraya* to connote the holder of a service *pangu*, and by the word *nilakāraya*, the person chosen to cultivate the *māruwena* and *bandāra* lands was meant. But this distinction ceased after some time and both classes came to be known as *nilakārayas*, the holder of the service *pangu* being known as a *paraveni nilakāraya*. The term *paraveni*, or *praveni* in its original significance, implied long possession in the family and inheritance by the heirs if not alienated, as opposed to *māruwena* which is a tenancy-at-will or a right over land held by virtue of office.[1]

As stated, the *paraveni nilakārayas* in a *gama* were those who were in occupation of the lands before the grant to the *ninda* lord or to a *vihāra* or a *devāle*. The liability to perform service is an obligation which attaches to the land, and the *pangu* is the unit of contribution of service. Thus D'Oyly states that "this peculiar system of service tenure which prevailed in the Kandyan Provinces dates its origin from the time when there was no trade and very little money in circulation in the country and came into being as an expedient of political and social or domestic economy and convenience".

This system of economy is common both to India and Ceylon. Phear says:[2]

> "In this way, we arrive at a state economy in which the Crown is paramount village head or chieftain, with certain lay village heads holding under it, generally on obligation of military or other service of honour, and also ecclesiastical village heads, similarly holding under it, though without any positive obligations, and therefore virtually independent. The services and aids receivable from the tenants to lay headmen, and the services and contributions due directly from the shareholders of those villages, in respect of which no middlemen existed, together with the chieftain's *muttettu* lands therein, constituted the principal revenues and means of the supreme power; though these were supplemented, especially in relatively modern times, by dues of very various kinds levied simply by the exercise of sovereign authority."

The *nilakāraya* had to perform his obligations. It may also happen that the hereditary *nilakāraya* may be a woman or a person incapable of performing the services required under the tenure.

1. Modder's *Kandyan Law*, p. 401; Hayley's *Kandyan Law*, pp. 221, 222; Sawers's *Digest*, p. 10

2. J.B.Phear's *The Aryan Village*, pp. 212, 213 (1880 Ed.) Mac Millan & Co.

Such persons were, however, allowed to pay monies in lieu of the services or to get the services performed by suitable persons.[1] Also, Regulation No. 8 of 1809 stated that service *paraveṇi* lands could not be alienated and encumbered. The statute states, *inter alia*, the customary law obtaining at that time, (that is, before the cession of the Kandyan Kingdom to the British), in regard to the right of inheritance of *devales* to service *paraveṇi* lands. The regulation provided that the privilege of succeeding to service *paraveṇi* lands is in the male heirs only of those who die possessed of such lands, and that the same reverted to His Majesty's use on failure of such male heirs, or breach of the condition of tenure. This regulation was subsequently repealed by Ordinance No. 3 of 1852 which was applicable to the whole Island and which removed the restriction on succession by females, and declared that the privilege of possession to service *paraveṇi* lands would be in the female as fully as in the male heirs.

If the nature of the service were menial, persons of high caste who were the *nilakārayas*, found it difficult to perform them personally. In such cases they were at liberty to provide a substitute to have the services performed.

D'Oyly states that personal services were often commuted for a money payment in the following cases :[2]

(1) The *atapattu*, *hewawasam* and *kodituwakku* people and those of the *lekam* or other departments in the upper districts, who performed duty at the house of their chief or other stations, made a payment of one to five *ridi* for exemption, according to the number of days they were expected to work.

(2) Persons whose duty it was to attend the public festivals at Kandy paid a fixed sum, if absent.

(3) Those liable to furnish timber, erect buildings, or perform other public services, if excused or prevented from complying by sickness or urgent private affairs, were required to pay commutation.

In a *nindagama*, the overlord was entitled to step into the shoes of the king and had the benefit of the services of the *nilakārayas*. In legal theory the king was the absolute owner of royal lands,[3] and the Crown could at any time resume possession of a *nilapaṅguwa* in a royal village on dispensing with the service for which it was held.[4] On the demise of a tenant, the king not only levied a tax known as *marāla* (the same as *marala* in the Tamil districts in South India, similar to the English heriot) but also became owner of the land

1. D'Oyly's *Sketch of the Constitution of the Kandyan Kingdom*
2. D'Oyly, p. 127; Hayley, p. 230
3. D.C. Kandy 8065
4. (1837) Austin, p. 35

by escheat, if the deceased left no heir.[1] As already stated, these lands which were reverted to the Crown by virtue of escheat or abandonment, were called *purappadu*.[2]

The Division of Villages

There were four main types of villages (*gam*) in the Kandyan districts :

(1) *Gabadagam* which were royal villages belonging directly to the Crown and were of the following kinds: *mahavahala gabadagam*, villages assigned to the Royal Stores into which the produce was delivered by the tenants; *udagabadagam*, villages which supplied the *udagabadawa*, or private stores of the king; *pallewahala gabadagam*, villages belonging to the establishment of the queens and other members of the royal family: disāva *gabadagam*, those which supplied allowances of paddy to the servants of the *udagabadagam*, the remainder being the perquisite of the Disāva. The nature of the services were however not unchangeable and a village might at any time be transferred from one class to another.[3]

(2) The *nindagam* villages which were under the dominion of the overlord who himself was a service tenant of the Crown, were of two kinds. Under the *nindagam* proper were lands granted to persons as perpetual estates of inheritance, usually by *sannas* given to the overlord who could alienate or bequeath the *gam*, but on his death without issue, they escheated to the Crown. There were also *nindagam* called *gallatgam*; when lands were granted under this form of tenure the Crown did not part with the title or its prerogatives, but the grantee could only claim a share of the produce from his service tenants, or had a claim only over his *muttettu*. Thus, in certain villages in the Three Koralcs, the lord was entitled to the produce of the *muttettuwa* but the other services were owed directly to the king.[4] Conversely, in others, the overlord could claim the performance of services by the tenants, but the *muttettuwa* was cultivated for the king either wholly or in part.

(3) *Vihāragam* and (4) *Devālegam*: Where the villages consist of lands granted to temples (*viharas* and *devales*) such lands are known as either *vihāragam or devālegam*, as the case may be. The chief characteristic of temple lands was their exemption from tax or service to the

1. D'Oyly, p. 125; Knox, R. p. 69
2. D'Oyly, p. 133
3. Hayley, p 236
4. Bd. of Minutes, April 2nd, 1819

Crown. The kings, out of deference to the superior claims of Buddha and the Gods, relinquished all exactions other than the right to general military service in case of need, or other national service of importance or urgency. The *Mahavaṁsa*, as well as the *Culavaṁsa*, records a large number of grants to these institutions. Granting of lands to religious institutions added to the spiritual merit of the king. The institutions themselves encouraged such gifts of which many are recorded in history. (In the first chapter of the *Mahavaṁsa* it is stated that, on the Buddha's first visit to Lanka, many Gods attained the first stage of sanctification. King Dappula who lived in A.D. 448 is mentioned as having built a temple to the God Vishnu and made offerings to him. Parākramabāhu the Great is said to have built thirteen *devāles* in Polonnaruwa and twenty-four in the Ruhunu country. King Pandita Parākramabāhu II, who had his court in Dambadeniya, effected repairs to Vishnu Devāle in Devinuwara.)

Lekammitiyas

The exemption of temple lands from taxes led to many claims based on spurious transfers to temples, and the Sinhalese kings found it necessary to prohibit all such alienation by private individuals without royal sanction. This was ensured by registering lands liable to taxation in registers called *kathal-lekammitiya* and *hi-lekammitiya* compiled by the officers of the Crown. These registers enabled the Government to reclaim some of the lands which were abandoned by the temple authorities, as frequently occurred in times of war when buildings were destroyed by invading armies. In spite of these restrictions there were abuses. The Temple Land Commissioners, in referring to the devices adopted to circumvent the law, stated:[1] "An individual in a village, who had interest enough with the *Maha Nilame* or *Disava* to procure the king's permission to dedicate some lands, planted a Bo-tree and put a *pilimage* (image house) under it. Some of the other villagers dedicated their fields to it, by which procedure they were free from *rājakāriya*, and the services of the temple which consisted in thatching the *pilimage* and making daily offerings of flowers at it, were performed by the tenants in turns. In the previous Temple Register, we find lands recorded as belonging to such a *bo-maluwa* (*bo*-tree enclosures), and in their cases abandonment is more difficult to prove, because in fact there was nothing to abandon. The lands appear in the *hi-lekammitiya* and one or other of the former Temple Registers. The *pilimage*, perhaps two feet square, has been put up, a small image put in it, and a few flowers laid on the stone in front of it, and although it may be perfectly notorious that no

1. (1857-58) T.L.C. Report, p. 11

services have been performed for years, the tenants all come forward and swear that they have performed regularly, without a day's omission since the king's time."

Further, the prohibition against the alienation to religious foundation was not strictly enforced. In the *disavanes* (area within the jurisdiction of the disava) the disava himself sometimes assumed authority to grant leave, and private land holders in the villages often dedicated a small portion of their *panguwas* to the local *devāle*, without continuing to perform the government services for the whole.[1]

In addition to their *gam* duly authorized by the king or with the sanction of the *viharas* and *devāles*, there were numerous small allotments scattered over the country. For the most part many of these lands were given out in *ande* or cultivated in the villages voluntarily as works of merit.

The nature of the tenures on whch *devālegam* or *vihāragam* were held, varied. They were described to the Board of Commissioners by the Judicial Commissioners in 1819 as follows :[2]

> "In some the fee simply vests wholly in the temple; there are others in which the possessors have become such perfect copyholders that, provided they perform a certain required service, they cannot be divested of their lands. Others in which the *paraveni* right being in individuals, the sovereign made over to the temples the dues and services due to the Crown, and in some of these, the dues and services have been commuted; and lastly a large portion consists of lands offered by private individuals and these are again subdivided into two classes—the first where the land offered was previously liable to certain dues and services to the Crown, which by consent of the Crown became transferred; the other where an individual, having brought a piece of waste land into cultivation, has offered it to the temple with the view of escaping from the imposition of royal services. In these latter instances, which are very numerous, the services performed or the duties paid to the temples under which the lands are nominally held are very light. In one instance which the Judicial Commissioner brought to the notice of the Board, it appeared that the duty on a land of five *amunams* has been commuted for a payment of five *rixdi* a year. In others he has found the duties merely that of giving a small bag of rice, in others that of rendering occasional aid in working a field and furnishing of straw to thatch a temple."

1. Sawers's Note, Hayley, Appendix I, p. 4
2. Bd. of Min. Oct. 19, 1819

As overlords, the *vihāras* and connected shrines and *pansalas* were in a different position from that of the *devāles*. The former were administered by the priests alone, and for the most part were free from political influence and to a great extent depended for the enforcement of services upon the goodwill of the villagers towards the particular priests. The *devāles*, on the other hand, were administered by lay chiefs of considerable power, who exercised a limited jurisdiction and had power over their *nilakārayas*. The extent of the power exercised by these powerful classes and the nature of the services may be indicated by the following extracts set out by the Temple Lands Commissioners:[1]

"It is now generally admitted that the large *devāle* establishments were encouraged and supported by the Kandyan kings, rather from financial and political reasons, than from religious feelings; financial, because each *Basnayake Nilame* paid a large sum on appointment, and a further monthly payment while he remained in office... and political, as forming a useful check on the ambition of the *disavas*, as no general disaffection could have existed in their provinces, without the knowledge of the *devāle* authorities... There are four principal *devāles* in the Kandyan Provinces, the Maha, Nāta, and Pattini in Kandy, and the Kataragam *devāle* the principal station of which is at Kataragama.

"At these stations most of the principal officers of the *devāles* generaly reside. The *Basnayake Nilamewaru, Mohottālas* and some of the *Vidanes* live at the station... a few of the subsidiary *devāles*, also, where the station is large enough to ensure a considerable amount of offerings, or the lands are extensive and profitable enough to make them worth looking after closely, have a staff of officers attached to them... with such exception as these, all the village *devāles* are left in charge of a *kapurāla* or hereditary priest of the *deiyo*, who is generally the largest tenant, and holds his lands as officiating priest. There is just the same difference between Buddhist priests and *devāle* officers, that there is between resident and absentee landlords, and the results to the tenants are similar. The *devāles* have found it more to their advantage to agree to terms which would make it the interest of the tenants to cultivate the *muttettu* properly. In some cases, the fields are let out in *ande*, the *devāle* share being a stated proportion of the crop. In others the *devāle* receives a fixed quantity of grain, whatever the crop may be, every time the field is cultivated; and latterly, in some cases, the fields have been let for a money rent... The result of this change of system is that those tenants who had to cultivate the *muttettus* are entirely freed from that which was their most severe service, while those who were obliged to watch at the village *atuwas* (barns) are no longer required to take their turn as guards...

1. (1857-58) T L.C. Report, p. 15

"Of the fixed services which were exacted under Kandyan rule, almost the only ones which are now performed are conveying the *devāle* share of grain from village *atuwas* to the principal station, furnishing guards, tom-tom beaters, etc., to the *devāle* there, attending at the festivals (on which occasions they take a present to the *devāle* chiefs and officers) and, at rare intervals, assisting in the repairs of some of the buildings. The officers... find it easier to exact ten times the amount of service from those tenants who reside at short distances from them, than to compel those who live 20, 30, or 50 miles from the *devāle* to bear their just share of the burden... Thus a number of *Nilakārayas* are harassed and oppressed, while we have large communities scattered through the country possessing whole villages and sometimes even *Aratchi-wasams*, in the anomalous position of rendering no service to the *devāles* for their land, and paying no tax to Government... At the time of the establishment of village *devāles*, each was an independent establishment, and its tenants performed their services at the local *devāle* of their own village. This was so much easier than the Government *rajakariya*, by which people were often taken from their homes and obliged to remain absent for a considerable time, that it became a common practice for the land owners of a village to build a small *devāle* and dedicate their lands to it; by doing which they freed themselves from services to the Crown. This was at last carried to such an extent, as to begin to affect the number of people required for Government services; and the king, to check it, without by so doing incurring the charge of irreligion, ordered all tenants of the village *devāles* to perform their services at the principal *devāle* of the *Deiyo* to whom their village was dedicated... This, as it naturally would, put a stop to village dedication."

When the British Government took over the administration of the Kandyan Provinces, it also assumed jurisdiction over temple lands and succession to the temple lands. The British Sovereign stepped into the shoes of the Kandyan King. In the year 1815 the Convention entered into, which is commonly known as the Kandyan Convention, reads as follows :

> "The religion of Boodhoo, professed by the chief and inhabitants of these provinces, is declared inviolable, and its rites, ministers, and places of worship are to be maintained and protected." (Article 5)

The British Government exempted temple lands from liability for service to the Crown or taxation and the Government took further steps to implement the terms of the Convention and to safeguard the religious institutions.

By a Minute of 21st January, 1818 by Governor Sir Robert Brownrigg, addressed to the Board of Commissioners for the Kandyan

Provinces, the Government declared it to be an especial part of its duty in Article 5 of the Convention "to take care that the revenues appropriated to the support of the various temples and religious establishments in the Kandyan Provinces were not diverted from the purpose to which the former Government has allotted them", and "to provide that none of the religious edifices should, for want of timely attention and repair, either fall to ruins or become in such a state as to demand very expensive arrangements for their restoration or reconstruction". The Government also ordered the assessment of the extent of land belonging to temples and the annual revenue therefrom.[1]

In October 1817, the Kandyan Rebellion broke out, and after its suppression, the Government was anxious to indicate its readiness to adhere strictly to the stipulations of the Convention of 1815. In order to ensure this, the Government followed up with a Minute dated 21st November, 1818, Clause 21 of which states as follows:

> 'The Governor, desirous of showing the adherence of Government to its stipulation in favour of the religion of the people, exempts all lands which are now the property of temples from all taxation whatever, save and except that such of the inhabitants of those villages as were liable to perform fixed gratuitous services also to the Crown should still be liable thereto.'

By Clause 30 of this Proclamation, the right of the State to demand *rājakāriya* was waived except in regard to the construction of roads and bridges and a few other services, but in all other cases, the Crown, although it could insist on services, had to make payment for them. Services in *vihāragam*, *devālegam* and *nindagam* were, however, not abolished by this Proclamation. A general tax was imposed by Clause 18 on all paddy lands: 1/10th share of the produce, which was the normal rate, was reduced to 1/14th share in certain specified areas which had remained loyal to the British during the Rebellion. Lands belonging to several chiefs whose loyalty and adherence to the Government merited recognition, were declared free from duty during their lives. The introduction of this grain or paddy tax gave rise to many disputes in *nindagams*. *Nilakārayas*, under the impression that the payment of grain tax released them from the obligation of rendering services to the *ninda* lord, set up the plea that they were unable both to pay the tax and perform services and demanded that the *ninda* lord should pay the tax or else forfeit his claim to services. In some cases the *nilakārayas* paid the taxes direct to Government and endeavoured to free themselves from the burden of performing services. The result was that the *ninda* lord in order to safeguard himself was compelled to pay the grain tax too from the crop of his *muttettu*.

1. Report of the Commission on Tenure of Lands of *Vihārāgam*, *Devālegam* and *Nindagam*, Sess. Paper I of 1956, p. 11

There was subsequent legislation on the Government grain tax[1] and service tenures which was finally abolished with effect from 31st December, 1892 by Ordinance No. 4 of 1892.

As lands which were dedicated to the *vihāras* and *devāles* were exempted from taxation and the *nilakārayas* of these lands were not generally liable to perform services to the State, it became necessary to register such lands. To achieve this end a Proclamation was issued by the Governor on 18th September, 1819, directing the registration of all lands belonging to *vihāras* and *devāles* on 21st November, 1818 which was the date of the earlier Proclamation. It was declared that the registration should take place within twelve months, and all subsequent dedications were declared unlawful unless the written approval of the Government had been first obtained. Registration under this Proclaimation was carried on till the early part of 1822, when it was found that large extents of *vihāra* and *devāle* lands were still unregistered. It became therefore necessary to issue another Proclamation on the subject and so by Proclamation on 21st May, 1822, extension of time was given till 1st September, 1822, for application for registration to be received. The final clause of this Proclamation stated that no unregistered land would be exempted from duty as temple property. It was again brought to the notice of the Government that many lands of *vihāras* and *devāles* had still not been registered and the Government, by a further Proclamation dated 11th December, 1827, allowed time till 1st December, 1828, for the receipt of applications for registration. It was also declared that all lands belonging to *vihāras* and *devāles* which had not been registered on or before 31st December, 1828, would forfeit the privilege of being exempt from the payment of taxes and tithes to Government. It was ascertained that large extents of lands liable to tax had been included in the register and the Board of Commissioners, therefore decided to revise the registers. For several years thereafter, nothing was done, though the subject was brought to the attention of the Government by various officials.

In 1829, the Imperial Government sent a Commission consisting of Lieut.-Col. Sir Willam Colebrooke and C. H. Cameron to inquire and report on the administration of this Island. After the inquiry, their report was submitted to Viscount Godrich, the Secretary of State for the Colonies, on 24th December, 1831. Colebrooke in his report disapproved of the system of *rājakāriya* and the manner in which it was enforced. He stated that *rājakāriya* did not fall equally on all the people and that it impeded agricultural development by interfering with the normal occupation of the *nilakārayas* by preventing the free movement of labour. He also stated that it reduced the people to a state of abject serfdom and tended to preserve

1. Ordinance No. 14 of 1840; No. 29 of 1865 which amended No. 14 of 1840 in certain respects; No. 5 of 1866 and No. 11 of 1878

distinctions of caste. In reference to what he called the interference of Government in the religious affairs of the country, Colebrooke said: "While the Government was bound by the Convention of 1815 to protect the people in the free exercise of their religion, the interposition of its authority to enforce an observance of its rites is at variance with those principles of religious freedom which it is a paramount duty to uphold. Nor can it justly afford to the Buddhist faith a greater degree of support than it extends to the Christian religion and to other systems, including the Hindu and the Mohammedan."

Statutory Changes

Order-in-Council dated 12th April, 1832 was enacted to implement the recommendations of the Colebrooke Commission. It abolished *rājakāriya* or forced services to the State, but expressly reserved the rights of the Crown to services as private proprietor of the *gabadagam*. It further preserved "the services which the tenants of any lands in any temple villages in the Kandyan Provinces might be bound to render to any temple, so long as they continued as tenants of such lands, as well as the services which the tenants of lands in any other villages in the Kandyan Provinces might be bound to render to the proprietors of such villages, so long as they continued to be tenants of such lands". The rights of the Crown to services from *nilakārayas* of *gabadagam* gradually fell into abeyance and the preamble to the Service Tenures Ordinance, No. 4 of 1870, states that the enforcement of such services had been long since abandoned by the Government.

The Proclamation of 9th August, 1834, further declared that "although the Government will no longer interfere to enforce compulsory attendance at religious festivals, the inhabitants of the Colony, professing the religion of Budhoo, will continue to be protected and supported in the free exercise of their religion".

Ordinance No. 2 of 1846 was passed "to provide for the management of Buddhist *vihāras* and *devāles* in the Kandyan Provinces". This Ordinance made provision "(*a*) for the election and appointment of Buddhist priests, temple officials, committees of management and for the rendering of accounts, receipts and disbursements; (*b*) for ascertaining the extent and boundaries of temple lands, names and holdings of each *nilakāraya* and the nature of the services he had to render; (*c*) for enabling a *nilakāraya* to commute his services into a money payment; (*d*) for preventing future acquisitions of other lands, except by the Governor's licence;(*e*) for the ejectment of *nilakārayas* refusing to render services or to make the payment on condition of which he holds the lands; (*f*) for preventing the alienation of any such lands without the Governor's licence; (*g*) for rendering temple lands liable to taxation whenever they cease to be devoted to religious uses". Lord Grey, then Secre-

tary of State for the Colonies, disallowed this enactment by his Despatch No. 2 of 13th April, 1847.

Ordinance No. 10 of 1856 empowered the Commissioners to ascertain and set the boundaries of the temple lands in the Kandyan Provinces. The Commissioners started operations under the Ordinance in February, 1857, and concluded their labours in 1865. Their work involved the examination of numerous documents such as the *kathal-lekammitiya*, the *hi-lekammitiya* and a number of *sannas* and ola manuscripts. A perusal of the report will show the thoroughness with which the work was undertaken. This report contained the history of the temple lands question from early times, a description of the system of tenure in temple and *devāle* villages and detailed discussions of several special cases which came up before the Commission. Claims to exemption from taxation were either registered or rejected by them, and attached to each of their annual reports are tables indicating the extents of land registered and rejected in respect of each *vihāra* or *devāle* claim. Appendix A gives a statement showing the extent of land registered and rejected in each District.

Towards the middle of the 19th century, and from time to time thereafter, various protests and representations,[1] in the form of memorials, were made by certain members of the Christian clergy and officials regarding the protection afforded to the Buddhist religion by the British Government whose established religion is the Protestant Faith.

Sir Hercules Robinson, Governor of Ceylon, in his address to the opening sessions of the Legislative Council on 22nd September, 1869 condemned "the whole system" of land tenures as one "degrading to humanity". He said: "Under it, men are bought and sold with the land, industrial enterprise is blighted, agricultural improvement is barred, litigation is encouraged, oppression is legalized and, in the case of temple tenants, the freedom of conscience is interfered with."

The Service Tenures Ordinance

Shortly afterwards, and in pursuance of the assurance given by Sir Hercules Robinson in the Legislative Council, an Ordinance was passed "to define the services due by the *paraveni* tenants of *vihāragama*, *devālegama* and *nindagama* lands, and to provide for the commutation of those services". This Ordinance, known as the Service Tenures Ordinance, No. 4 of 1870, was brought into operation on 1st February, 1870, by a Proclamation dated 21st January, 1870. The work of registration under this Ordinance commenced in March, 1870.

1. For these protests see the Report of the Commission on Tenure of Lands of *Vihāragam*, *Devālegam* and *Nindagam*, Sess. Paper 1 of 1956, pp. 16 to 21

Section 3 of this Ordinance provided for the direct appointment of Commissioners for carrying into effect the provisions of the Ordinance, and by Section 9 empowered the Commissioners, after due inquiry, to determine—

(*a*) the tenure of each *pāṇgu* subject to service in the village, whether it be *paraveni* or *māruwena*;

(*b*) the names, as far as can be ascertained, of the proprietors and holders of each *paraveni paṇgu*;

(*c*) the nature and extent of the services due for each *paraveni paṇgu*;

(*d*) the annual amount of money payment for which such services may be fairly commuted at the time the registers are made.

The findings of the Commissioners as to the nature of the tenure, the nature of the service due in respect of each *paraveni paṇgu*, and the annual amount of money payment for which services may be commuted at the time the registers are made, were declared final and conclusive.

The Ordinance directs the Commissioners to enter in a book of registry the particulars determined by them under Section 9 (*b*) (*c*) and (*d*) and by Section 10 to transmit these registers to the Kachcheri of the district.

Section 13 empowers the Commissioners to limit the time and the area within which personal services could be exacted and to make a relevant entry to such limitation in the registry.

Section 14 further provides that any *paraveni nilakāraya* desirous of commuting any service for a money payment, could make a written application to the Commissioners during the pendency of the Commission, and after the close of the Commission to the Government Agent of the district in which the *paraveni paṇgu* is situated. If there is more than one *paraveni nilakāraya* in any *paraveni paṇgu*, the application to commute must be made or acquiesced in by a majority of the entire number of *nilakārayas* who shall have attained the age of sixteen years.

Section 15 of the Ordinance also enables the Commissioner or the Government Agent, after due notice as the case may be, to determine, if three years had elapsed since the date of the registration of the *paṇgu*, whether the service could be commuted for the annual money payment entered in the registry and to fix such sum as may appear just and reasonable. The order made by them is final and conclusive as to the liability of the *nilakārayas* of the *paṇgu* to pay commuted dues and not to render services, and as to the amount to be paid by the *nilakārayas* as head rent due to the proprietor.

Any persons aggrieved with the determination of the Commissioners under Section 9 or Section 15, could, by Section 23, apply to the Governor (now the Minister of Justice) for relief.

Section 24 of this Statute provides that arrears of personal services where the *paraveni nilakārayas* have not commuted, cannot be recoverable for any period beyond one year; arrears of commuted dues where the services have been commuted, could not be recoverable for any period beyond two years. If no services have been rendered and no commuted dues have been paid for ten years, the *paṇgu* was released from any liabilties for services or for payment of commuted dues.

Section 25 enables a proprietor to recover damages against a *paraveni nilakāraya* who has not commuted, for failure to render services. In assessing damages, a Court could award not only the sum for which the services have been assessed by the Commissioner for the purpose of perpetual commutation, but also the actual damages sustained by the proprietor through the default of the *nilakāraya* to render services. It is also provided that a proprietor cannot proceed to eject a *paraveni nilakāraya* for default of performing services or paying commuted dues. The proprietor could, in execution of the decree of Court, seize and sell the crop or fruits on the *paṇgu*, or failing those, the personal property of the *nilakāraya*, or failing both, seize and sell the *paṇgu* subject to the obligation to perform personal services or pay the commuted dues.

The Ordinance had as its main object the abolition of what was termed "serfdom" in the Kandyan provinces and the substitution for services, of a money payment. Sir Hercules Robinson in his address to the Legislative Council on 29th December, 1871, said: "It will be remembered that this Ordinance was introduced, not to remedy any crying and grievous evil, nor to peremptorily change the ancient custom of the country, but to record even to the very poorest of the Kandyan peasants the power, if he found his condition irksome, freely to claim that full measure of individual liberty which is the inherent right of every subject of the British Crown."

The registration of services was effected in 1870 and 1871, and in the year 1872 assessment of the annual amount of money payment for which services could be commuted was computed. Mr. J. F. Dickson in his Administration Report for 1870, commenting on the nature of the tenures which have been registered, says:

"These services are of every imaginable kind, some simply honorary, some of them most menial and of laborious description, the lightest being usually paid most highly while the heaviest are generally rewarded by enough land to afford only a bare subsistence, and precisely the same services are often paid in the same village at different rates; for instance, for sixty days service in the kitchen, one man will hold an acre of land, another, two acres and a third, only a few perches. In fact the services have become attached to the land in the course of many generations, according to the

pleasure of many landlords, and to the varying necessities of many tenants."[1]

The Commissioners appointed under the Service Tenures Ordinance completed their task in 1872 but certain outstanding problems affecting *vihāra* and *devāle* lands required further attention. In their Memorandum dated 11th June, 1873 on the "Resumption by the Crown of *vihāra* and *devāle* lands" presented to the Government by Mr. J. F. Dickson, the Chief Service Tenures Commissioner, it was pointed out that the Temple Lands Registration Ordinance of 1856 had given temples and *devāles* an absolute right of property which did not exist before, and that no means had been devised to prevent misappropriation of revenues of these institutions. This led to abuses and several complaints were made in regard to the misappropriation of properties belonging to the temples.

The Buddhist Temporalities Ordinance

In view of these and other complaints made against the administration of *vihāra* and *devāle* lands, a Commission was appointed by the Governor on 25th August, 1876, to inquire into the administration of Buddhist Temporalities. The Report of this Commission is dated 17th October, 1876, and appears in Sessional Paper XVII of 1876. This Commission made the following recommendations: (1) *nilakārayas'* service holdings should be converted into freeholds liable to tax; (2) a definition of the extent of the *nilakārayas'* holdings was necessary in order to prevent dispute and, for this purpose, *nilakārayas* should be required to take certificates of quiet possession with surveys attached and pay the cost of the survey; (3) all leases of *vihāra* and *devāle* lands should be cancelled; (4) the apportionment of the revenues from *vihāra* and *devāle* lands should be settled under the direction of Government; (5) Government should take over *vihāra* and *devāle* lands and hold them in trust for the Buddhist community, but the Commission differed as to the future management or disposal of them. *Vihāra* funds were also to be devoted to (*i*) the maintenance of the *vihāra* and the *pansala*; (*ii*) making moderate provision for the incumbent; (*iii*) the maintenance, where funds were adequate, of a village school in connection with the *vihāra*. Any surplus of *vihāra* funds was to be applied to the encouragement of the Buddhist education in the various districts and proper arrangements were to be made for the collection of offerings.

The Commission further suggested the formation of a Central Committee and seven District Committees. The Central Committee was to have a general control over the funds of *vihāras* and *devāles* and over the accounts to be rendered by the District Committees.

1. For the nature of the services in respect of certain *Vihāragam*, *Devālegam* and *Nindagam*, see Report of the Commission on Tenure of Lands of *Vihāragam*, *Devālegam* and *Nindagam*, Sess. Paper 1 of 1956, pp. 25 et seq.

It was also recommended that this Committee should have the power to appoint and remove the *Diyawadana Nilame* and the *Basnayake Nilame* and to confirm or disallow all elections by the priesthood to the office of *Anunāyake* and *Mahanāyake* and to remove the holders of these offices for misconduct.

By way of implementing the recommendations of this Commission, Ordinance No. 3 of 1889 was passed to provide for the better regulation and management of the Buddhist Temporalities in Ceylon. This Ordinance also provided for the election of District Committees and Provincial Committees and also for the election of *Basnayake Nilames* and for the submission of accounts by the Trustees who were in charge of *vihāras* and temple lands throughout Ceylon. This Ordinance was amended by Ordinance No. 17 of 1895, by which the Provincial Committee of the Central Province and the District Committees of the Kandy District together with the Buddhist *Ratemahatmayas* and the *Basnāyake Nilames* of the revenue district of Kandy were vested with the power of electing the *Diyawadana Nilame*. The period for which trustees could demise temple lands was extended from twenty years to fifty years. Further amendments were effected by Ordinance No. 3 of 1901 which prescribed a fixed term of office for the Provincial and the District Committees.

Some time prior to 1900, representations were made to the Government regarding the maladministration of temple property by the trustees. As a result, Mr. H. L. Crawford was appointed Commissioner and asked to furnish a report on the working of the Ordinance, and to indicate the lines on which it was necessary to introduce further legislation.

Mr. Crawford sent his report and suggested a change in legislation. The main features of the proposed Ordinance was the substitution of one strong Committee for two. Under the Ordinance of 1889, the object of the Provincial Committees was to check the District Committees. In practice it was found that the responsibility was divided and was an excuse for inaction. He also recommended that the period of office of trustees was to be limited to a term of years, and that the trustees should give security and receive payment for their services—payment being proportionate to the amount of security required and to the importance of their duties. A draft Ordinance was presented to the Legislative Council but it was later decided not to proceed with it in view of the objections raised against it by leading Buddhists who were of the view that it would be of no use unless it provided, *inter alia*, for the appointment of Commissioners to supervise and actively participate in the work of the Committees.

Subsequently, Ordinance No. 8 of 1905 was passed to consolidate and amend the law relating to Buddhist Temporalities in the

Island. By it, the earlier Ordinances were repealed. Provincial Committees were abolished and the election, appointment and disciplinary control of trustees and *Basnayake Nilames* of *vihāras* and *devāles* respectively were vested in District Committees which were themselves elected bodies. In the election of the *Diyawadana Nilame* of the *Dalada Māligāwa*, the electorate was comprised of the District Committees of the Central Province, the *Maha Nāyaka* Theros of Asgiriya and Malwatta temples, the *Ratemahatmayas*, (being Buddhists) holding office in the revenue district of Kandy and the *Basnayake Nilames* of *devāles* situated within the revenue district of Kandy. The *Diyawadana Nilame* and the *Basnayake Nilames* were to hold office during their lives, while trustees of temples were to be elected for a period of three years only. It was also provided by this Ordinance that a large measure of control should be imposed on the management and supervision of lands belonging to *vihāras* and *devāles*, and the purposes for which funds of these institutions could be utilised were defined.

Later, it was found that Ordinance No. 8 of 1905 failed to give adequate protection to the Buddhist Temporalities. Hence it was repealed, and the Buddhist Temporalities Ordinance, No. 19 of 1931 was enacted. This Ordinance with its amendments[1] has given the Public Trustee control over the trustees and *Basnayake Nilames* of *vihāras* and *devales* respectively.[2]

The District Committees which were a feature of the earlier Ordinance of 1905 were abolished and new electorates were created for the election of the *Diyawadana Nilame* and of *Basnayake Nilames* of *devāles*. Trustees of temples brought under the operation of the Ordinance, were to be nominated by the *Viharadipatis* of such temples. The terms of office of the *Diyawadana Nilame* and of the *Basnayake Nilame* were limited to ten years, and of trustees of temples to five years. The trustees had to submit half-yearly statements of income and expenditure to the Public Trustee for auditing. Section 26 of the Ordinance recognized the right of a *paraveni nilakaraya* to sell, mortgage or otherwise deal with his *paraveni pangu* lands.

Section 27 of the Ordinance requires that, when a *paraveni nilakaraya* transfers his *paṇgu* or any share thereof, the transferee should within one month of such transfer, send a written notice, in duplicate, of the transaction to the Public Trustee, who thereupon, is directed to take certain other steps. Failure to comply with this requirement makes the transferee liable to a fine of five hundred rupees or, in default, to six months simple imprisonment.

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1. Legislative Enactments of Ceylon (1958 Ed.) Vol. X Ch. 318
2. For a fuller exposition see The Buddhist Ecclesiastical Law in Ceylon by H. W. Tambiah (1962) RAS (CB) Journal New Series, Vol VIII, Part I, pp. 71-107

Nilakārayas are not qualified to vote at the election of a trustee or a *Basnayake Nilame*.[1]

The nature of a panguwa

In the case of *Jotihamy v. Dingirihamy*,[2] it was held that a person who had purchased an undivided share of a *panguwa* in a *nindagama*, that is to say the interest of one of the *nilakārayas*, could not bring an action for the partition of the *nindagama* land. In consequence of this decision, no *paraveni pangu* lands in *viharagam*, *devalegam* and *nindagam* could be partitioned and they continued to be held in undivided shares till the Partition Act, No. 16 of 1951 came into force. Section 54 of this Act enables such lands to be partitioned but any partition action brought under the old Partition Ordinance is null and void despite the consent of the *ninda* lord.[3]

Under Section 34 of the Buddhist Temporalities Ordinance any claim for the recovery of any property, movable or immovable, belonging or alleged to belong to any temple or *devāle*, or for the assertion of title to any such property, is not barred or prejudiced by any provision of the Prescription Ordinance. Section 34 applies to lands of *vihāras* and *devāles* other than *paraveni paṇgu* lands, to which the law of prescription applies. Prescription to such lands may have resulted in loss to *vihāras* and *devāles*.

General

The *Sannas* and Old Deeds Ordinance, No. 6 of 1866, enacts that all persons holding or claiming title under deeds, *sannas*, olas or other instruments on which title to land or other immovable property is founded, which bear date on or before 1st February, 1840, should produce them before the Competent Authority on or before 1st February, 1875, for registration; those failing to register them were debarred from relying on such documents in proof of their title to lands unless sufficient cause was shown for the failure to register them. Several lands comprised in *vihāragam*, *devālegam* and *nindagam* were the subject of proceedings under the Waste Land Ordinance and the Land Settlement Ordinance and some of the lands claimed as parts of such *vihāragam*, *devālegam* and *nindagam* were declared the property of the Crown.

In *Fernando v. Municipal Council of Kandy*,[4] it was held that property belonging to a Buddhist temple (except such property as is especially exempted under Section 127 of Ordinance No. 7 of 1887, as amended by Section 2 of Ordinance No. 16 of 1900) is liable to pay assessment tax imposed by the Municipal Council under the provisions of Ordinance No. 7 of 1887. It was further held that

1. Buddhist Temporalities by H. W. Tambiah (1966) RAS (CB), Vol. VIII, Pt. I, p. 71
2. 3 Balasingham's Law Reports, p. 67
3. *Kasturiaratchi v. Pini* (1958) 61 N.L.R. p. 167
4. (1904) 9 N.L.R. p. 374

Section 21 of the Proclamation of 21st November, 1818 referred only to taxes then existing or to similar taxes substituted for them, and not to taxes imposed by statute after the Proclamation.

It was later found that the working of the Buddhist Temporalities Ordinance was not satisfactory. A Commission was appointed (1) to inquire into the tenure of lands of *vihāragam*, *devālegam* and *nindagam* and the law applicable to such tenure; (2) to investigate whether any change in such tenure and law are needed and, if so, to determine the nature and extent of the changes; and (3) to make such recommendations as may be considered necessary in the light of such inquiries and investigations into the aforesaid matter.

The report of the Commission is embodied in Sessional Paper I of 1956.[1] The following recommendations were made.

(1) That an Act be passed to enable the appointment of a Special Commissioner to inquire into claims to lands in *vihāragam* and *devālegam* in which services have been registered and claims to lands within them by the Crown have been disposed of.

(2) That the inquiry be confined to the ascertainment of the shares of ownership of *nilakārayas* in the various lands comprising each *paṇgu*.

(3) That a survey of such lands be undertaken by the Surveyor-General on specifications to be supplied by the Special Commissioner.

(4) That the Special Commissioner should next proceed to fix the shares of ownership of each *nilakāraya*.

(5) That the Special Commissioner should also revise the services and assess the total commuted value of the services of each *paṇgu*.

(6) That a register be prepared and authenticated by the Special Commissioner setting out the particulars specified in paragraph 279.

(7) That Assistant Public Trustees be appointed to certain Provincial Kachcheries, with the Government Agent of such province functioning as Deputy Public Trustee.

(8) That the Assistant Public Trustees should assess the proportionate share of commuted dues payable by each *nilakāraya*. Such assessment should be based on a system of weightage according to the nature of the land owned. Relevant entries regarding the assessment should be made by the Assistant Public Trustee in the register referred to at paragraph 279.

1. Sessional Paper I of 1956, p. 94

THE LAW OF SUCCESSION

CHAPTER XV

TESTAMENTARY SUCCESSION

Evolution of Wills

The Kandyans had a form of testament which was informa in character. Although a will, understood in modern times as a secret disposition of one's property to take effect at death, was unknown to the Kandyans, it will be incorrect to assert that testamentary bequests were unknown to them.

There are recorded instances of oral bequests by persons at their death-bed.[1] Armour refers to a case where a person, at his death-bed, made an oral bequest of a portion of his lands to his adopted child.[2]

Another instance is recorded where a person, being very ill, verbally transferred his lands to his wife and children and also delivered *mal talpot* (the talpot leaf containing the grant in his favour) to them, followed by placing a mark on a stone with an axe in the presence of several witnesses.[3]

Marking a tree with an axe is a Vedda custom. The Vedda demarcated boundaries of *chenas* and asserted ownership to newly discovered hives of honey in this way.[4] The Sinhalese too followed this custom for these purposes.[5] Hence, when a person made an oral gift or bequest at the point of death, and followed it by cutting a notch on a tree with an axe, he confirmed his testamentary act.

Often, the testator pronounced curses and imprecations on those who would defy his wishes. Lawrie refers to a case where a person called Ungu nursed and attended on a person called Akkuwa for six months. When the latter was at the point of death, he bequeathed his property to Ungu stating "those who descend from me shall suffer calamity and the seven ordeals, but the niece of Akkuwa Ungu shall suffer no calamity and the seven ordeals".

At other times, a dying man bequeathed his properties by giving the devisee a token gift (*ketta sakia*) which served as evidentiary value to prove his bequest. Thus, a person may give a betel purse saying "if any dispute arises, take this betel purse and show it", but this may not be sufficient to prove a testamentary bequest, as another formality, namely the disherison of heirs, was not proved.[6]

1. *Navempitiye Atthukorale v. Wattewe Vidane* 9.5.1819 (23/5)
2. P. A. p. 2
3. Lawrie's *Gazetteer* p 590
4. Seligman's *The Veddas* (911)
5. Parker's *Ancient Ceylon* (1909)
6. *Maskeliyagedera Ungappu v. Maskeliyagedera Keeralle* 28.9.1821 (23/8

Disherison of Heirs

The Kandyan will, therefore was open, and could either be oral or written. It was usually accompanied by some formality which confirmed the testamenary disposition. Where there were heirs, custom imposed another formality. In the event of a testator bequeathing his properties to a stranger after passing his heirs, he had to disinherit the heirs if his bequest is to be valid. Despite the long and learned dissertation of Hayley to establish his thesis that disherison of an heir was not necessary to effect a valid testamentary gift, the institutional writers and the decisions of the court postulate this requirement. This requirement in any event applied if the devisor gave all his properties to a stranger.[1]

A devisor who wishes to disinherit his heirs, must expressly disinherit them in writing,[2] stating the cause of disinheritance such as the commission of a crime,[3] failure to render assistance, ill-treatment, or generally such conduct as displeasing to the testator.[4] If he did not conform to this formality, the heirs-at-law were entitled to inherit.[5]

The right to disinherit appears to be a relaxation of an earlier rule of customary law that an heir had an interest in the family property. Such a concession was necessary in a feudal society where old age and infirmity would impel a person to grant lands which he held under a service tenure to persons who were ready to render succour and assistance to the donor and also perform the necessary services. Such a course also became necessary when the heir-at-law either became disabled, or was unprepared to shoulder the burden of performing the customary services to his overlord and to support his aged and feeble ancestor. Economic necessity also could make a person gift his property to a stranger under such circumstances, with a promise from the stranger to render succour and assistance to him.

Once the principle of donating property to a stranger is recognized, its extension to testamentary bequests could easily be understood. When the principle of disinheriting the heir and bequeathing the property to a stranger acquired the hard lineaments of law, even oral disherison was permitted. It may at times take the form of striking a blow on a rock, tree or doorstep with an axe or hatchet and pronouncing the usual imprecations. Such acts, however, must show a clear intention to disinherit an heir.[6] Where

1. D. C. Kandy 27150, Collective Court, Nov. 19, 1856, Austin, p. 192
2. *Vellegoda Gammehallage Dingiralle v. Dantura Talepota Waduna Appu* 12.5.1819 (23/5)
3. Jud. Comm. (23/15) at p. 112
4. D. C. Kandy 27150, Collective Court, Nov. 19, 1856; Austin, p. 192; *vide* also Jud. Comm. Diary 20.6.1827 and 8.9.1828. Lawrie's MS.
5. *Dingirihamy v. Modelihamy* 11.9.1817 (23/3)
6. *Medahena Appu Naide v. Medahena Mohandiram* 17.8.1822 (23/7)

a man smites a rock in a fit of anger saying that he disinherited his son, it amounts to nothing.[1]

A consideration of the texts of the institutional writers and the early decisions show that the Kandyan did not distinguish between a *donatio mortis causa* and a testament. A form of will was evolved which was hardly distinguishable from *donatio mortis causa* but the incidents of it are not the same. It may be surmised that the Roman-Dutch Law had some influence in the development of the will, but in view of the seclusion of the Kandyans within their mountainous regions, such influence may be imperceptible. As adoption served the purposes of a testament, and as a Kandyan deed of gift was itself revocable, a testament, as a secret disposition which is revocable, was hardly necessary; nevertheless the authorities reveal the gradual evolution of a testament among the Kandyans. Later, due to British influences, the concept of a will, as understood in the English law, imperceptibly seeped in, and the modern will, as a secret document executed by a testator to take effect after death, gradually made its appearance.

Statutory Changes

By Proclamation of 28th October, 1820, the Kandyan forms and ceremonies affecting execution of deeds and bequests and testamentary dispositions were abolished.

The Frauds and Perjuries Ordinance, No. 7 of 1840, made the law uniform. This Ordinance made it obligatory that a will should either be notarially executed in the presence of two witnesses, or should be executed in writing before five witnesses. An exception was, however, made for a soldier in active military service.

Revocation of Wills

The Kandyan testament, as it was understood in customary law, was revocable, as were all deeds. This indeed was the distinguishing feature of all gifts, whether testamentary or *inter vivos*, under the Kandyan customary law.

The Wills Ordinance made specific provisions governing the revocation of wills. A will is not revoked unless a subsequent will is made or the original will is torn with the intention of destroying it. Section 1 of the Wills Ordinance, No. 21 of 1844[2] also enacts that no will made either within the limits of this dominion or beyond, is liable to be set aside as invalid or inofficious, either wholly or in part, by reason that any person who by any law, usage or custom is entitled to a share or portion of the testator as being excluded from such share or portion or wholly disinherited or omitted in such a will.

1. Jud. Comm. Diary 9.10.1819
2. *Vide* Section 2, Cap. 60, L.E. (1956 Ed.)

After this Ordinance came into operation therefore, a Kandyan could leave a will bequeathing all his property to any devisee without the necessity of disinheriting his heirs ; but could not effect a donation without such formality.

Testamentary Capacity

A Kandyan minor had active testamentary capacity at the age of ten years provided he had sufficient understanding,[1] but by statute, the age of majority has now been raised to twenty-one years. The Roman-Dutch principle that marriage conferred majority on a minor, does not apply to Kandyans as there is no trace of a similar rule in Kandyan law. Hence, a Kandyan in all events attained majority at the age of twenty-one but for purposes of making a will, the Wills Ordinance gave him active testamentary capacity at the age of eighteen years.

Since alienation of property under a will does not entail any penal consequences to a minor, a Kandyan minor, like his counterpart in the Maritime Provinces, had passive testamentary capacity to receive any benefits.

1. S. p. 31; P.A. p. 94; *Nīti*, p. 46

CHAPTER XVI

INTESTATE SUCCESSION

Fundamental principles

The Kandyan law of intestate succession is fascinating and has had a long and honourable history. The customary usages governing intestate succession have existed not only in Ceylon but also in the sub-continent of India. Wherever the impact of the *Dharmasastras* have not obliterated these pre-Dravidian customs, they could still be seen in their pristine purity. The Tamils of Pondicherry and certain parts of South India and North Ceylon, in common with the Kandyans of Ceylon, have preserved their customary usages governing intestate succession. These usages have not been in any way adulterated by the principles of the *Dharmasastras*. A study of these customary usages is of extreme interest to a student of law who wishes to have some knowledge of some pre-Dravidian customs which had prevailed in these parts.

Before one delves into a discussion of the rules of intestate succession, it is necessary to understand the social structure of the Kandyan Sinhalese. Without such an examination, the intricate system of Kandyan intestate succession may appear to be, in the words of Tennyson "a wilderness of single instances".

Kinship

The closest family group is the *gedara*. The Sinhalese often speak of their *gedara*, and their *ge* names indicate the 'household' to which they belong. The economic necessity to live together in a feudal society which enforced on peasants the burden of performing services to his overlord, would induce them to live with their sons, their brothers and their sons. The core of an effective *gedara* would naturally consist of a person and his family. The next circle of a man's relations would consist of his brothers and their sons. Beyond this, the vertical and lateral dimensions of the family may become variable.

The structure of kinship terminology among the Sinhalese is almost identical with that of the Tamils,[1] and the system of kinship both among the Sinhalese as well as among the Tamils has been described in the words of Morgan as "Turanian",[2] but the Sinhalese and Tamils had no Turanian ancestry.

In terms of kinship, five generations are distinguishable, namely, grandparents, parents, the person concerned, own children, and

1. Hayley, Chap. IV. also *The Laws and Customs of the Tamils of Jaffna* by H. W. Tambiah, p. 153; also Ariyapala's *Medieval Society*, p. 379, and Ralph Peiris's *Sinhalese Social Organization*, p. 112

2. *Systems of Consanguinity and Affinity of the Human Family* by Lewis Morgan, p. 387 (Washington)

grandchildren. A distinction is made between father's and mother's relations. The father's brothers' and the mother's sisters' children are treated as brothers and sisters among whom marriage was taboo, whereas marriage between the children of a brother and sister were not only frequent but also encouraged. The father's brothers' children and the mother's sisters' children became rivals whereas cross-cousins and their parents came within the selective relationship which may be called the effective family or the *paula*. Patrilineal relationship by descent and its ramifications became more formal, whereas affinial relationships became more real.

The cross-cousin marriage is an institution which is prevalent both among the Sinhalese and the Tamils. It is an attempt not only to preserve property in the family but also to cement and weld relationship. A sister who married in *diga* may go away to a distant village and may be forgotten, but a marriage of a brother's child with her child would again strengthen the relationship between the brother and sister.

Next to these persons who come within the close group of *gedara*, a person may have his *paula* (family), which may be scattered not only in the same village but also may be found in other villages. Leach, in a sociological survey of the Pul Eliya village (a few miles north of Anuradhapura which formed part of the Kandyan kingdom), has decisively shown that kinship in this district was based not so much on descent but on occupation of defined territory.[1] This observation not only applies to this village but also to other villages which form part of the Kandyan kingdom. Next to the *gedara*, the Sinhalese consider the *paula* their close relations. A Sinhalese peasant would also associate with his *variga* (cf. Tamil '*varusai*') and *kula* (cf. Tamil '*kulam*').

After having examined the structure of the Sinhalese family it is possible to visualize the laws of succession when a man dies. The man might have married in *diga* or in *binna*. If he had married in *diga* then his wife would have left her household or *gedara* and become a member of the *gedara* of her husband. A *binna* husband, however, would not cease to be a member of his own household, but has a precarious existence in a *binna*-married woman's ancestral home (*mulgedara*). He does not inherit any of the *binna*-married wife's ancestral property. On her death, he is only allowed to take whatever movables he might have acquired during the subsistence of the marriage. In the case of death of a *diga*-married husband, his wife was entitled to be maintained out of the ancestral estate of her husband. This is one of the incidents of the joint family system. The Kandyan law, in common with the *Thesawalamai* and many other customary laws of South India, have this feature

1. *A study of land tenure and kinship—the Pul Eliya Village in Ceylon* by E. R. Leach (Cambridge Press) Chap. VI

in common. Over the acquired property of her late husband, the widow has a life-interest.

She loses her interest in her husband's estate if she marries another husband in *diga*, since by contracting such a union, she ceases to be a member of her husband's *gedara*. However, as a concession, she is allowed to take her share of the movable property.[1] By contracting such a *diga*-marriage, she even loses her right to succeed to her child's property,[2] but if she marries in *binna* with the assent of her husband's relations, and lives in her husband's property, she does not lose her rights in the husband's estate as she does not cease to be a member of her husband's *gedara*.[3] She, however, loses her rights to the husband's estate if she squanders her husband's estate, or if she leads a life of profligacy which brings disgrace to her husband's *gedara*. This disqualification was imposed on her to save the property and the fair name of the *gedara*.

A *diga*-married widower has much greater rights than a *binna*-married widower. He could be in possession of that property till his children attain majority. He is also given the right to grant dowries to his daughters out of such property, This again, is a feature which the Kandyan customary law has in common with the *Thesawalamai* and other customary usages of India.

In a family where there are several children, the father has the right to give away his daughters in *diga*-marriage. Once a daughter marries in *diga*, she ceases to be a member of her father's *gedara* and becomes a member of her husband's *gedara*. Usually, she is given a dowry on the occasion of her marriage and has no interest in the father's inheritance. But, if she keeps a close connection with her father's *gedara* and is also accepted by the other members of her father's *gedara* as a member of their household, she does not lose her right to the paternal inheritance.

If a man has daughters, all of whom are married in *diga*, then although they cease to be members of his *gedara*, still on grounds of natural affection his properties will go to them. Eliminating the *diga*-married daughters, a father would be left with his sons, unmarried daughters and *binna*-married daughters. In the case of unmarried daughters, their interests in the paternal estate are only transient, since not only the father but also the brothers have the right to give them in *diga*-marriage. When such a marriage takes place, she ceases to be a member of her father's *gedara* and has no more rights of inheritance to his estate.

In the case of a *binna*-married woman, she has a vested right, along with her brothers, in her father's *gedara*, because by contracting a *binna*-marriage, she remains a member of the *gedara*

1. Jud. Comm. 27.9.1823, Lawrie's MS.
2. *Ganhalle Maduwe Aratchilla v. Wereke Megasuri Mudiyanselagedera Aratchilla* 15.8.1822 (23/7)
3. Jud. Comm. 30.11.1822, Lawrie's MS.

in spite of her matrimonial alliance. A *binna*-married daughter may marry in *diga* and go away to her husband's *gedara*, in which event she is treated as a *diga*-married daughter.

Children of several marriages

The division of a father's property among children of several marriages was *per capita* according to customary law, since they were all members of the same *gedara* and therefore, were entitled to share the inheritance equally.[1] But, as will be shown later, the Courts after a great deal of vacillation, took the view that the distribution should be *per stirpes*—a conclusion which is not warranted by the Kandyan customary law.

In this connection, the right of children of associated marriages to succeed to their father also should be discussed. In early Kandyan society, a peasant had to tread through hilly regions and winding paths in order to work in a distant *chena*, or to perform services either for his overlord or for the king, In these circumstances, it was necessary to leave an elderly male in charge of his family. If such a peasant happened to have brothers, the choice would naturally fall on one of them. Natural instincts would make these brothers to live with the wife of the brother who had gone away to a distant place for the purposes of his work. When the brother who had gone away returned, the other brother took his turn and did the work in the *chena* or for his overlord. In this manner, associated marriages came into vogue in Sinhalese society. It has been said that polyandry has vestiges of matriarchal society. It could also be asserted that economic necessity might have developed this form of union, without the impact of a matriarchal society.

In dealing with succession to children, they were all treated as children of the different brothers who lived in association with their mother. But, if it was possible to determine paternity, then such a child had a preferential right to succeed to his father's estate. The grandchildren represented their parents and therefore took *per stirpes*.

Succession to illegitimate children

As has been shown earlier, illegitimacy in Kandyan law does not have the same connotation as in other systems of law. An illegitmate child, in Kandyan law, succeeded to his mother's estate as the mother makes no bastard, but he had no rights to succeed to his father's estate as they were not members of the *gedara* of the father. For the same reason they did not also succeed to the father's relatives' property.

1. Jud. Comm. 23.8.1824, Lawrie's MS.

Buddhist monks

Buddhist monks who had donned the yellow robes, have no claims to the father's ancestral estate as priests are forbidden to have any earthly possession by reason of their vows. But if they cast aside their robes, they are admitted to their father's paternal estate, since by becoming a priest, a person did not cease to be a member of the father's *gedara*. An only child who became a priest was allowed to inherit the father's estate on grounds of equity.

Succession of parents to children

In dealing with this topic, the Kandyan law recognized the principle that property reverts to the source from which it came. Therefore, the property which the child had inherited from his father, would go to the father if he is alive, and to his brothers and brothers' children if he is dead. The mother's ancestral property would go to her if she is alive, but if she is dead, it would go to her close relatives. Here again, the principle on which rules of intestate succession operate is that property should revert to the *gedara* to which it originally belonged. But in the case of an acquired property of a child, as this did not belong to the *gedara* of either the father or the mother, different principles apply. The mother is preferred to the father. In this rule one may find the remnants of a matrilineal descent in Kandyan law. If the mother is not alive, then such property devolves on the father, and failing him, on the maternal uncles. The maternal uncle has a privileged place in Kandyan society. This again shows the influence of some customary law prevailing in a matriarchal system which has impinged on the Kandyan customary law at an early stage of its development. Leach however has a sociological answer for the preference of the maternal uncle. He states that "the effective *paula* or family of a person could not be his father's brothers or their children, or the mother's sisters or their children, but his maternal uncles and their children".[1] A person had to contract a marriage among the children of the maternal uncle or paternal aunt and hence the maternal uncle was preferred to the others.

The principle of contracting a marriage among cross-cousins made the position of an *ewessa* cousin (cross-cousin) differ from other cousins Hence, if a wife happened to be the *ewessa* cousin of the deceased, then she had special claims to his property (this will be discussed later). When one deals with succession to distant relations, there arises a conflict, but the two principles which should be borne in mind are that the property reverts to the source from which it came and that the nearest relative excluded the remote.

Succession to Females

Children succeeded equally to the property of their mother. The question whether they are *diga*-married daughters, or *binna*-

1. Leach, p. 113

married daughters or unmarried daughters is irrelevant, since they, together with the unmarried sons, shared equally in the maternal inheritance as the family estate of the father's *gedara* does not come into conflict in this context.

Hence, throughout the texture of Kandyan law, the web of the connection to the father's *gedara* could be seen. With these observations, the rules of intestate succession may be discussed in greater detail with the aid of precedents.

CHAPTER XVII

SUCCESSION TO MALES (1)

The Widow's Interest

The nature of the widow's interest in her deceased husband's estate has been a matter of controversy among the institutional writers on Kandyan law. Such a difference of opinion appears to have existed even among the Assessors who functioned during the early British regime. To settle this uncertainty and bring about a clarification of the law on this tangled subject, Turnour, the then Government Agent of the Sabaragamuwa Province, summoned the chiefs with the view to clarifying a widow's interest in the estate of her intestate deceased husband.[1] In response to Turnour's invitation, the chiefs assembled and considered this matter, but there appears to have been a diversity of opinion among the chiefs themselves on this topic.

The difference of views among the chiefs was so great that Turnour resolved to solve this tangle by exhorting the chiefs to frame clear and definite rules on this subject. Although the chiefs yielded to Turnour's request, the rules framed by them, far from settling the disputes of the institutional writers, only accentuated them.[2]

The law on this subject became even more obscure by the growth of precedents. In studying this topic, one must avoid many quicksands and sandbars which are bound to confront a student, and steer a clear course. In common with the customary laws of India and Ceylon, the right of the widow to manage and possess her husband's estate after his death, appears to have been recognized in early Kandyan law. His right, however, became modified later. The widow was given a life-interest over the acquired property if there was insufficient paternal inheritance of the husband to sustain her. She was also given the right to maintenance from the ancestral property of the husband.

In the evolution of the law giving a widow rights in the property of her deceased husband, two principles emerge. Firstly, her right to be supported from her husband's property and not to be left destitute, and, secondly, the rule that property should revert to the source from which it came.[3] To the first principle, one should attribute the widow's interest to remain in the husband's house and to be entitled to be supported from his paternal estate. This obligation fell even on the heirs who had to provide her sustenance from the hereditary property of her husband.

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1. D'Oyly, p. 318
2. Sawers's Letter, Hayley's *Kandyan Law*, Appendix I, p. 2
3. Hayley, p. 347

In considering the second rule, a distinction must be drawn between ancestral property (*paraveni*) and acquired property. The widow's claim to the former could only be asserted if there was insufficient acquired property to support her and this principle appears to be a later development in the evolution of Kandyan law.

Owing to the different and uncertain views taken by the institutional writers on this topic over a period of a century and a half, the decisions of our Courts are inconsistent, and so before one delves into the case law on this matter, it is best to consider the relevant passage of the institutional writers.

Sawers states the law as follows: "Where a man dies intestate, his widow and children are his immediate heirs; but the widow, although she has the chief control and management of the landed estate of her deceased husband has only a life-interest in the same and, at her death it is to be divided among the sons, excepting where there is a daughter or daughters married in *binna*." These or rather their children, have a right to a share of their father's and their brothers' lands.

The *Niti Nighanduwa* summarizes the law as follows:[2] "On the dissolution of a *binna* or *dīga* marriage, if the woman continues to live on the same premises as her former husband while he was alive, she can after his death assume the chief superintendence of his landed and other property, take care of, maintain herself from, and even claim as a right any portion of it: (that is to say), if the husband has no descendants, adopted children, parents, grandfather or grandmother or brother, etc., descending from them or any relation worthy of preserving his name and lands, all his lands and other property will devolve on his wife.

"But if there be any relations worthy of preserving the name and lands, unless there be a formal transfer deed in her favour, the wife will not be entitled to the land.

"Even though there are children, grandchildren, &c., worthy to preserve the name and lands, there are occasions in which their right of inheritance may lie dormant and all the estate be possessed during her lifetime by the proprietor's wife; for instance, if the son of a landed proprietor leaves his home, marries elsewhere in *bini* and dies leaving issue, and if in the meantime his father also dies leaving his property to his wife who has no other lands to live in, and if the above mentioned grandchildren &c., have inherited property from their mother's side, they cannot, by paternal right of inheritance, lay claim to any other property of their grandfather, the first-mentioned proprietor. After the death of their grandmother, the proprietor's wife who remains in possession until

1. S. p. 1, also P.A. p. 18
2. *Niti*, pp. 27, 28. cf. P. A. p. 23, Hayley, p. 349

her death, the lands may pass to the grandchildren &c., by the right of inheritance, but until that time their right is dormant.

"But if there be circumstances that justify the wife of the original proprietor in remaining in possession of, and being maintained from a portion only of his land, the grandchildren &c., will, without loss of time, inherit their paternal estate."

In another passage, the *Nīti Nighanduwa* states:[1] "Although we have said that the wife and (adopted) child will inherit, inasmuch as the right of inheritance in the lands is inherent in the adopted child, the wife can only enjoy the lands during her lifetime, and cannot alienate them."

A passage from Armour adds to the obscurity of the law. He says:[2] "If the deceased left any near relations, then the widow will have but temporary possession of the deceased's landed property, that is to say, until such time as her deceased husband's heir-at-law shall be authorised to come into possession thereof; thereupon she must relinquish possession of the lands. But she will continue to have a claim thereon for support."

The trend of the authorities cited show that ordinarily, the property of the deceased husband vests in his children or his heirs on his death, subject to certain rights in the widow. Such a right, however, is in the nature of either a usufruct over the acquired property and if this is not sufficient, a claim to be maintained out of the *paraveni* property; but in the absence of distant relations (the degree of which has not been defined), the wife becomes the ultimate heir of the husband.

An exception, however, is set out in the *Nīti Nighanduwa* in favour of a widow who is an *ewessa* cousin of her husband. The *Nīti Nighanduwa* gives her the right of succession to her husband's property in certain eventualities. It states:[3] "If the proprietor has contracted a marriage with a direct cousin (i.e. a mother's brother's daughter or father's sister's daughter), and has taken charge of and adopted the children and grandchildren of another cousin; on his death, his lands will be inherited by these adopted persons, and the wife, that is, his cousin, or any other relations will not receive them."

In a later passage, the *Nīti Nighanduwa* states:[4] "If the proprietor has a legitimate child or grandson or granddaughter descendant from such a child, on his death, if he leaves a wife, father and mother, brothers and sisters, his acquired lands and other property, and all lands etc., inherited from an adoptive parent will be given over into the charge of the wife. The movable property, however, only

1. *Nīti*, p. 90
2. P.A. p. 26
3. *Nīti*, p. 91, cf. P.A. p. 26
4. *Nīti*, p. 91

will become hers absolutely, but the lands will not. She has only the power to remain in possession of them during her lifetime or until she contracts a *dīga*-marriage; and therefore, she cannot sell or give away any portion of the lands so given over into her charge." This passage indicates that the widow had only a temporary interest in the nature of an usufruct, in the event of her deceased husband leaving either descendants or ascendants. Her interest, in these circumstances, will be in the nature of a right to claim maintenance from her husband's estate.

Armour states that the widow is entitled to receive from the heir-at-law a portion of the produce of the *paraveni* or the temporary possession and usufruct of a suitable portion of it, or if there was acquired property, she would have a life-estate in the whole of it, but no right to dispose of it to the prejudice of her children.[1] After giving instances where the heir's rights remained in abeyance till the widow dies, he adds: "If the deceased left any near relations, then the widow will have but temporary possession of the deceased's landed property, that is to say, until such time as her deceased husband's heirs-at-law shall be authorised to come into possession thereof, thereupon she must relinquish possession of the lands. But she will continue to have a claim thereon for support albeit she had appropriated to herself the goods left by the deceased, it being however premised that the widow, who was not also the *cwessa* or uxorial cousin of the deceased husband."

Hayley, in an attempt to reconcile these passages of the institutional writers, states:[2] "The passages quoted above become intelligible if we understand that the widow only inherited with the children when the latter were minors or were content to allow her the management of the estate, but that, as soon as they were in a position to demand a division of the property, the *paraveni* would vest in them at once, subject to the widow's right to maintenance, if any, whilst she could claim a life-interest in the acquired property."

Turnour, in his *Rules prevalent in the Sabaragamuwa Province*[3] states that the widow remained in the possession of the property till the heirs demanded a partition. Her right to maintenance from the ancestral property of her husband is an incident of the joint family system. This is because in a *dīga*-marriage the widow belonged to the *gedara* of her husband and therefore, she had the right to be supported out of the ancestral property of her husband. The property however, vested in the heirs-at-law, so that when they were majors, they were entitled to ask for a division of the property. In these rules, one could see the rudiments of a joint family system, which Kandyan law had in common with the customary laws of the Tamils and Indians.

1. P.A. p. 26
2. Hayley, p. 351
3. D'Oyly, p. 320

The Decisions of the Courts

The decisions of the Courts show that no clear course was steered for a long time in view of the conflicting and uncertain views of the institutional writers. The Courts vacillated from time to time until certain definite rules were established.

But many cases decided during the early British regime reflected the true view of Kandyan law and gave the widow the right of superintendence and control of the estate during her lifetime,[1] but she could not make an uneven distribution of her husband's property among his heirs.[2]

Later decisions curtailed her right and disabled her from disposing of or gifting her husband's property,[3] but if she had no means of sustenance, then her right to temporarily alienate or mortgage his family lands for her support was recognized.[4] In another case,[5] the Supreme Court enunciated the principle as follows: "The general rule, it is true, is that a widow has only a life-interest in the estate of the deceased husband but then she is supposed to have the chief superintendence and control of the whole estate for life."

After a period of vacillation, where the courts failed to distinguish between ancestral and acquired property, and to determine the precise interest of the widow in her husband's estate,[6] the principle emerged that a surviving widow could not claim both maintenance from the *paraveni* property as well as life-interest over the acquired property, but had the option to claim either of these rights.[7]

Ultimately, the matter received the atention of the Full Court in *Unguhāmy v. Kittia Unnānse*[8] in which, after a review of the authorities on this topic, it was held that the widow was only entitled to maintenance and support out of the ancestral property (*paraveni*), for which purpose she might receive from the heir a portion of the produce or might be given temporary possession and

1. Hayley, p 35 , Ratnapura 7044, per Marshall, C.J., where the view was taken that the widow has a life-interest in the estate of her deceased husband and the chief superintendence and control of the whole of the estate for life (26.10.1833, Marshall's Judgments, p. 324)
2. *Watteraantenna Basnayake Nilame v. Mullegama Dissawa* 23.8.1831 (23/27)
3. *Ukkuwa v. Ungu* 6th July 1827, Hayley, Appendix II, p. 62, note 55
4. *Uduwatagedera Ukkurāla v. Punchi Etena* 5th Aug. 1824, Hayley, Appendix II, p. 69, note 73
5. Ratnapura 7044 (1834) Marshall's Judgements, p.324; Morgan's *Digest*, p.2
6. *Appuhamy v. Banda* (1858) 3 Lor. p. 102; D.C. Kandy 15769 (1846) Aust. Rep. p. 74; D.C. Kandy 17748 (1846) Aust. Rep. p. 88; D.C. Kandy 24094 (1851) Aust. Rep. p. 163; D.C. Kandy 26329 (1854) Aust. Rep. p. 184; D.C. Kandy 25939 (1957) Aust. Rep. p. 176; D.C. Kandy 2822 (1856) Aust. Rep. p. 202
7. For the formulation of this view see per Creasy, C.J., and Stuart, A.J., in D.C. Kandy 56750, 10th June 1873, 2 Grenier Rep. p. 25
8. (1860–62) Ram. Rep. p. 112

usufruct of a suitable portion sufficient to maintain her. It was also held that if a widow was otherwise provided for, then she was not entitled to any further maintenance from the ancestral property. In this decision there is a tacit assumption that she was entitled to a life-interest in the property acquired by the husband during coverture.

This decision became the foundation for the enunciation of clear principles on this topic.[1] With the exception of a few *obiter dicta*,[2] the principle enunciated in *Unguhāmy v. Kittin Unnānse*[3] and *Wegoddepolle v. Andiris Appu*[4] has been consistently followed in subsequent cases.[5]

When there is insufficient property to sustain a widow, then two modes exist to enforce her right of maintenance. She could ask the heir to support her, or demand from the heir an adequate portion of the estate out of which she could support herself. In the latter case, the heir-at-law was under an obligation to perform services to his overlord if the land happened to be under service tenure.[6]

The customary grant for the maintenance of a widow is set out by the *Nīti Nighanduwa* as four and a half amunams of paddy and two pieces of cloth.[7] This custom was also followed in the early British period.[8] The widow, however, need not wait till the heir makes his tardy decision; she could take possession of the ancestral land if she has no other means of subsistence, until such time as the heir steps forward and offers to support her. Her interest in such property was, however, a temporary one and was defeasible. Hence, a lease granted by her is void as against the heirs-at-law.[9]

Later, a more convenient practice developed when the heir transferred a usufruct of a portion of the estate sufficient to support the widow which she would possess till re-marriage or death.[10] Further, to ensure her right, a bond or other form of security for the due payment of the maintenance was often executed by the heirs in favour of the widow.

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1. Subsequent cases: D.C. Kandy 28756 (1865) Legal Miscellany, p. 63; *Wegoddepolle v. Andiris Appu* (1866) 1863–68 Ram Rep. p. 190; Legal Miscellany (1866) p. 32
2. For example the dictum of Bonser, C.J., in *Kandappa v. Rankiri* 1896) 3 N.L.R. p. 145
3. (1860–1862) Ram. Rep. p. 112
4. See Footnote 1.
5. For later cases, *vide Paranatale v. Punchy Menica* (1868) Ram. Rep. (1863–68) p. 325; D.C. Kandy 28756 (1877) Ram. Rep. p. 54; *Giranga v Harmānis* (1879) 2 S.C.C. p. 191; *Welayudem v. Arunasalam Pulle* (1881) 4 S.C.C. p. 37
6. *Nīti*, p. 32; P.A. p. 70 also the cases cited in Hayley, Appendix II, note 2
7. *Nīti*, p. 29
8. *Kewelhena Dingiri Menika v. Godagedera Dissawa* 13.11.1829 (23/25) Part II; Lawrie's MS.
9. *Dingiri Amma v. Mudianse* (1890) 1 S.C.R. p. 207
10. *Kandappa v. Rankiri* (1895) 3 N.L.R. p. 145

The right to maintenance granted to a widow cannot be equated to a right to possession. Hence, if a widow was out of possession of the estate of her husband, she could not sue the heirs or their representatives and claim ejectment but could only bring an action for maintenance. On the other hand, if she retains possession, the right of the heirs to eject her is conditional upon their making adequate provision to maintain her by suitable settlement of the property of her husband, or by making some other provisions for her support.[1]

As stated earlier, the right to maintenance out of the *paraveni* property is only a conditional one and took effect only if the widow either had insufficient acquired property or had no acquired property to maintain her.[2]

The widow's interest over the acquired property

The widow was entitled to a life-interest in the acquired property of her deceased husband.[3] The earlier cases restricted her rights to a life-interest only in the properties acquired during her coverture, but a more generous rule was applied later and it was established that her right extended over all the acquired property of her husband.[4] Her interest over the acquired property when the husband leaves children by earlier marriages, is not set out clearly by the institutional writers. Sawers opines that the widow must "depend on the share of her children, unless such a share is insufficient for her support".[5] This view is endorsed by the *Niti Nighanduwa*.[6] The extent of the widow's interest in such cases is naturally coloured by the conflict of views on the moot question as to the method of distribution of her husband's acquired property among the issue of two or more marriages. The earlier decisions did not set out any definite principle on this matter; each case appears to have been treated on an equitable basis according to its merits. Thus, in *Helagalla Lat Etena v. Menik Etena*,[7] the widow was declared entitled to subsistence on the share of her own child alone. But, in *Ambuangalla Vidāne v. Kirihāmy*,[8] the widow was allowed to subsist on lands allotted not only to her own son but also from a share allotted to a son by a former marriage of the husband. There is also a dictum that the second widow may claim

1. *Bandulahāmy v. Ran Menika* (1902) 6 N.L.R. p. 90
2. P.A. pp. 17–18, *Niti*, p. 96
3. *Ausadahāmy v. Tikiri Etana* (1901) 5 N.L.R. p. 177
4. For later cases, see *Kalu v. Lami* (1905) 11 N.L.R. p. 222; *Josinona v. BatinNona* (1908) 4 A.C.R. p. 11; *Re Sundara Rankiri v. Ukku* (1907) 7 N.L.R. p. 264; *Rankiri v. Ukku* (1907) 10 N.L.R. p. 129; *Ranhāmy v. Menik Etena* (1907) 10 N.L.R. p. 153; *Dingiri v. Undiya* (1918) 20 N.L.R. p. 186
5. S. p. 15
6. *Niti*, p. 76
7. (12th March 1824) Hayley, Appendix II, note 3
8. (1819) Hayley, Appendix II, note 4

interest in half the acquired property if there are children by an earlier marriage.[1] In *Ausadahāmy v. Tikiri Etena*,[2] the claim of the children by the first marriage to possess the acquired property was postponed, and the wife was given possession of the whole estate.

In this state of the law, the matter was treated as *res integra* in *Tikiri Menika v Menika*,[3] in which Ennis, and de Sampayo, JJ., after a review of all the authorities on this topic, held that the widow can only claim a life-interest to half the acquired property if there were children by an earlier marriage of her husband. This view has been followed in subsequent cases.[4] When the ruling in *Tikiri Menika v. Menika*[5] was given by the Courts, it was already established that where there are children by different marriages, the father's acquired property is divided *per stirpes* and not *per capita*. Hence if the widow had a life-interest over the interest of her children, it followed that she could not have anything more than a life-interest in the properties which devolved on her children.

A concession was granted to children by a former marriage in a case where their father had left *paraveni* property of negligible value, and considerable acquired property. In such cases, the issue of the first bed were given half-share of the entire property, both *paraveni* and acquired, subject to the equitable rights in favour of the second widow and her children.[6] Bertram, C.J., after re-iterating that the Kandyan widow is entitled to an absolute life-interest in the acquired property of her husband, observed as follows: "These principles are subject to modification where there have been two marriages and there are children surviving by a former marriage. In such a case, it would appear to be settled that the issue of the first marriage are entitled to one half of the property immediately on the death of their father; the issue of the second marriage being entitled to the remaining moiety, subject to the widow's right of maintenance out of this moiety."

Where a husband leaves only illegitimate children by a former marriage, the lawful widow is entitled to a life-interest in the whole of the acquired property of her husband to the exclusion of the illegitimate children. The attempt to extend the rule laid down in *Tikiri Menika v. Menika*[7] to illegitimate children was successfully repelled.[8]

1. (1877) Ram. Reps. p. 54
2. (1901) 5 N.L.R. p. 177
3. (1917) 20 N.L.R. p. 12
4. *Muthu Menika v. Heen Menika* (1917) 4 C.W.R. p. 268
5. *supra*
6. *Hapu v. Esanda* (1924) 26 N.L.R. p. 298
7. *supra*
8. Dicta of de Sampayo, and Shaw, JJ., in *Dingiri v. Undiya* (1918) 20 N.L. R. p. 186 at p. 188; also *Rankiri v. Ukku* (1907) 10 N.L.R. p. 129

The widow's interest in the acquired properties of her associated husbands when there were children by such marriages, was also considered by the Courts. After her death, it was held that she had a life-interest in the properties of all her associated husbands, and her property devolved on her children.[1]

Forfeiture of the widow's rights

The widow's life-interest in the acquired property of her husband and her right to maintenance out of the *paravcni* are conditional rights which terminated in certain circumstances. The widow lost her rights if her husband's heir made other suitable arrangements for her support,[2] or if the husband left a will depriving her of her interests in the property.[3] She also lost her rights to her deceased husband's property if she married against the wishes of her deceased husband's relations.[4] But she did not lose her life-interest in her husband's estate by merely quarrelling with her husband's family and quitting the premises before her husband's death, provided the husband has made no special bequest in another's favour.[5] She also lost her right in such property if she was guilty of glaring profligacy or if she squandered her husband's property.[6]

The widow, however, did not forfeit her rights if she married her deceased husband's brother or if she married in *binna* in the husband's house with the consent of his relatives.[7] This rule is easily understood, since by contracting such a union, she did not cease to be a member of her husband's *gedara*. The earlier view was that even a mere departure from the husband's *gedara* worked out a forfeiture. Thus, D'Oyly states that the property belonged to the wife for life "provided that she remains in her husband's house".[8] But Armour[9] and Sawers[10] are more generous when they state that the widow will not lose her interest by mere departure.

The tendency of our Courts is to discourage forfeiture. In *Menika v. Horetale*,[11] Lawrie, A.C.J., with Withers, J., held that her life-interest in the acquired property of her first husband was not affected by a second marriage. This ruling became the starting-point of many subsequent decisions which firmly established the principle that by a re-marriage a widow did not lose her rights to

1. Morgan's *Digest*, pp. 337 and 777
2. *Dingiri Amma v. Mudiyanse* (1890) 1 S.C.R. p. 207
3. *Unguhāmy v. Kittia Unnanse* (1860-62) 3 Ram. Reps. p. 112
4. Hayley, p. 366
5. Hayley, Appendix II, note 2; *Kitalpe Mahatmeya v. Elyhelyagoda Mohottale* B.J.C. Kandy per Simon Sawers.
6. S. pp. 2, 24; *Niti*, pp. 31, 96; P.A. pp. 17–18, 27–28, 86; *Dingeralle v. Punchi Etena and Appuhāmy* (1860) B.S. p. 109
7. P.A. pp. 26, 28
8. D'Oyly, p. 309
9. P.A. pp. 26–28
10. S. p. 12
11. (1894) 3 S.C.R. p. 167

her first husband's estate.[1] The rule established by these decisions however, is contrary to the principles of Kandyan law as set out by the institutional writers and the early decisions.

Statutory Amendments

The Kandyan Law Commission examined the question of the widow's interest over her deceased husband's property and also the circumstances which worked forfeiture, and recommended that the widow's interest in the *paraveni* property should be confined to maintenance only, and if the widow was in possession of the *paraveni* property she should not be ejected by the heirs unless the latter made adequate provision for her support.

After a review of all the authorities, the Commissioners postulated that the widow's interest consisted of her right to maintenance out of the *paraveni* property of her deceased husband and also a right to a life-interest in the acquired property.[2] The Kandyan Law Declaration and Amendment Act, No. 39 of 1938 gave effect to these recommendations. Section 11 of this Act makes the following provisions :

(1) When a man shall die intestate after the commencement of this Ordinance leaving a spouse surviving, then—

(*a*) the surviving spouse shall be entitled to an estate for life in the acquired property of the deceased intestate, and if there be no acquired property, or if such property be insufficient for her maintenance, then to maintenance out of the *paraveni* property ;

provided that if the deceased intestate shall have left a child or descendant by a former marriage, the surviving spouse's life-estate shall extend to only one half of the acquired property ;

provided, further, that the surviving spouse shall out of her estate for life in the acquired peoperty be bound to maintain the legitimate children of the deceased

(i) if such children are minors and in need of maintenance, and

(ii) if the deceased left no *paraveni* property or if such *paraveni* property is insufficient for the maintenance of such children ;

(*b*) if the surviving spouse shall contract a *dīga*-marriage, she shall cease to be entitled to maintenance out of the *paraveni* property of the deceased but shall not by reason

1. *Nila Henaya v. Dissanāyāke Appuhamy* (1903) 6 N.L.R. p. 214; *Hudi v. Rangi and others* (1916) 19 N.L.R. p 260

2. The Report of the Kandyan Law Commission, sections 150 & 151

of such re-marriage forfeit her aforesaid life-interest in the acquired property ;

(*c*) should the surviving spouse be an *ewessa* cousin of the deceased intestate, she shall not thereby become entitled to any share in the estate larger than that to which she would otherwise have become entitled.

(*d*) in the event of the deceased leaving him surviving no other heir, the surviving spouse shall succeed to all his property both *paraveni* and acquired.

(2) In this section 'maintenance' when used with reference to any property whether *paraveni* or acquired, means maintenance out of the income of such property.

On the question of forfeiture, the Commissioners pointed out that the decisions of the Supreme Court were at variance with the writings of the institutional writers and, having made special reference to *Ukku Banda v. Heenmenika*,[1] which re-establishe the law that a widow in certain circumstances forfeited her rights to her deceased husband's estate, the Commissioners were of the view that this decision did not finally set out the circumstances in which the forfeiture attached, and the case was remitted to the lower Court for evidence as to the nature of the re-marriage of the widow, but indicated that the circumstances under which a forfeiture would take place were those that were set out by the institutional writers. Hence, they recommended that the widow should not forfeit her right to maintenance out of the *paraveni* property of her deceased husband merely by contracting a subsequent marriage in *dīga* and in no circumstances should she forfeit her life-interest in the acquired property of her deceased husband. They also disapproved of the ruling in *Hapu v. Esanda*,[2] and were disinclined to recommend the rule set out in that case. The Commissioners also suggested that where a deceased husband had left children by a former marriage, the wife's life-interest should be confined to half the acquired property.

Enlargement of the widow's interest

The widow's right to maintenance over the *paraveni*, and her life-interest over the acquired property of her husband, became enlarged into full ownership under certain circumstances. The *Nīti Nighanduwa* states that the widow became the owner of such properties "if there are no relations of the deceased's property worthy of preserving his name and lands".[3] The "worthiness" referred to, means nearness of kinship and not moral worth.

The exception referred to in the *Nīti Nighanduwa* conferring ownership on her husband's lands if there are no near relations

1. (1928) 30 N.L.R. p. 181
2. (1924) 26 N.L.R. p. 298
3. *Nīti*, pp. 91, 92

than a sister's grandson, only gives a life-interest to the wife in the *paraveni*.[1]

Sawers and Armour, while dealing with succession to a husband's acquired property, state that the widow would inherit such property absolutely in preference to the remote relations of the deceased husband.[2] If the widow happened to be an uxorial cousin of her husband's (his paternal aunt's daughter, or his maternal uncle's daughter), she inherited in preference to her husband's first cousin. If she was not an uxorial cousin, then she only inherited the acquired lands if the husband left no brothers and sisters and children.[3] Armour states:[4] "If the deceased proprietor left not a nearer relation than his father's cousin (father's maternal uncle's son) and if the said proprietor received all assistance from his wife and her family until his death, and (had been) neglected and disregarded by his kinsmen aforesaid, in that case the widow will be entitled to the deceased's entire estate, including his *paraveni* or ancestral lands, to the exclusion of the cousin aforesaid, as well as of more distant relations."[5] In another passage, he states: "In the event of a married man dying intestate and without issue, and if he left not an adopted child, nor a parent nor any near relation, the widow will, by *lathimi* right, succeed to the possession of the deceased's entire estate, including his *paraveni* or ancestral lands." Armour adds:[6] "If the deceased proprietor left no issue, and had survived his parents and full brothers and sisters and their children, then his widow will have an absolute *lathimi* right to such lands as belonged to the deceased by right of acquest to the exclusion of the deceased's more distant relations (for instance, paternal aunt's children)."

The first passage of Armour deals with a case where assistance is given and this factor might have modified the normal rules of succession. The second and third passages of Armour support the view that the widow, who is an *ewessa* cousin of her husband, inherit the husband's property absolutely after the full brothers and sisters and their children. On the strength of the first and third passages of Armour, the Supreme Court held that the widow became vested with the absolute title in preference to the husband's maternal aunt's grandchildren.[7] The widow's claim to her husband's half-brother's in regard to the acquired property, was also recognized by the Supreme Court.[8] The widow was also given a

1. *Niti*, p. 92
2. S. p. 24; P.A. p. 26
3. P.A. p. 26
4. P.A. p. 22
5. ibid.
6. P.A. p. 23
7. *Punchirala v. Punchi Menika* (1879) 2 S.C.C. p. 44
8. *Tittewelle Sangi v. Tittewelle Mohotta* (1903) 6 N.L.R. p. 201; for a criticism of this judgment, see Hayley, p. 365

life-interest in the *paraveni* property of her husband in preference to the deceased's half-sister.[1]

The Kandyan Law Commission recommended that the widow's interest should enlarge into full ownership only in the case where the property would otherwise have escheated to the Crown for lack of heirs. They also recommended that an *ewessa* cousin should not be placed in a more favourable position than a widow. The Commissioners indicated that their suggestion should however, in no way prejudice the right of a widow to inherit the property of the deceased husband on the ground of her relationship to her husband, apart from the relationship as husband and wife.[2] These recommendations were given effect to by the Kandyan Law Declaration and Amendment Act, No. 39 of 1939.[3]

1. D.C. Kandy 28221 (1856) Austin Reports, p. 202
2. Sections 166 & 167, Report of the Kandyan Law Commission Sessional Paper XXIV of 1935
3. Sections 11(*c*) and (*d*) on p. 233

CHAPTER XVIII

SUCCESSION TO MALES (2)

The Rights of Descendants

General Principles

The rule of primogeniture finds no place in the Kandyan system of intestate succession. The members of each successive generation are called to the inheritance. The first line of heirs consist of the sons, their children by representation, and the *binna*-married daughters and their children, and also unmarried daughters who take only a defeasible title. The *binna*-married daughter's issue has a vested interest in her grandfather's property and in view of this interest, the *binna*-married daughter's rights acquire an added importance. Hence, a *binna*-married daughter's rights exceed those of the other daughters and have some similarities to the appointed daughter of the Hindu law. Mayne attributes the position of the appointed daughter in Hindu law as the first step in the recognition of the daughter's rights.[1] But, as stated earlier, her importance in Kandyan law may be attributable to economic causes.

It is not the *binna*-married daughter so much as their sons who have real interest in the property of the deceased. Hence, although one should treat the sons and the issue of *binna*-married daughters as heirs of the same degree, the writers on Kandyan law have made it a practice to stress the status of a *binna*-married daughter and to discuss her rights separately.[2] It will be more convenient if the rights of the sons and daughters are considered separately. Illegitimate children, children by different wives, and adopted children also have certain rights which have to be considered.

The Sons

The sons, whether they were married in *dīga* or in *binna*, or are unmarried, are entitled to succeed to the inheritance of the parents equally, subject to the interest of the widow. This has already been discussed.[3]

The position of a son who has been adopted into another family to succeed to the property of his natural father, presents some difficulties. The *Nīti-Nighanḍuwa* states:[4] "The sons succeed to the paternal estate even when they have been adopted into another's family or have been married in *binna* elsewhere. His

1. *Early Law and Custom* by Sir H nry Mayne, pp. 94–95
2. Hayley, p. 369
3. S. pp. 6–7; P.A. p. 56; *Nīti*, pp. 36, 62
4. *Nīti*, p. 36

children will succeed to his interest, but it is doubtful whether the children of a son, who has left his father's house and was married in *binna* and dies without resuming possession of his paternal estate, should be called to any portion of the land of the paternal grandfather."

Sawers, in a note,[1] states that the chiefs who were consulted, were of unanimous opinion that a son adopted into another's family loses his right of inheritance to his natural father's estate proportionately; and if the estate which he acquires from his adopted parent is larger than the portion which he is entitled to from his natural father's property, he will be entitled only to take such a share of his natural parents' property as will be sufficient to preserve to him the name of his ancestors. The exact proportion of the share which enables him to preserve the name of his ancestor is not stated but there is one principle which is clear, and that is, if a son who is adopted into another's family, does not obtain possession of the natural father's estate and dies, his children may not be in a position to lay any claim to his paternal inheritance after a lapse of time.[2]

Under the modern law, the children may be debarred from claiming such property by the acquisition of title to such property by prescription.

The Daughters

A few principles may succinctly be set out in discussing the rights of daughters to succession.

(a) Unmarried daughters share their father's inheritances equally with sons but, as will be seen later, their interest is only transient, being defeasible by a subsequent *dīga*-marriage.

(b) Daughters married in *binna* share the inheritance of the father equally with the sons and, although their title, in certain circumstances, may be defeasible, they transmit an absolute interest to their issue.

(c) Daughters married in *dīga* are not entitled to any share of their father's property, if there are sons, or *binna*-married or unmarried daughters, or the issue of the first two surviving. In default of such heirs, they are entitled to succeed.

Although these principles are clear enough, there are many controversial matters which present considerable difficulties.

(*a*) The Unmarried Daughter

An unmarried daughter's position may be first considered. As stated earlier, an unmarried daughter, in the first instance, shares equally with her brothers and *binna*-married sisters.[6] Her

1. Modder's *Kandyan Law* (2nd Ed) p. 484; Marshall, p. 336, Sec. 76
2. *Nīti*, p. 36
3. S. pp. 2–3; P.A. pp. 55, 86; *Nīti*, pp. 62–64; D. p. 323

title, however, is a defeasible one. In other words, she has "a temporary joint interest"[1] which she loses on a subsequent *dīga*-marriage.[2]

Her brothers have a reversionary interest, so much so that she does not even have the power of insisting on a division of the property,[3] or the right to alienate such property either *inter vivos* or by will. The underlying reason for this principle is that the brothers or her mother have the power to give her in *dīga*-marriage at any time to a husband of their choice.[4] When she is given in *dīga*-marriage, she has to be content with the dowry which is ordinarily given to her. Having received the dowry, she has no more claim on the paternal estate. On her return, however, she has the right to maintenance from such estate.[5] She forfeits her interest in the father's estate by conduct which brings disgrace upon the family,[6] although the particular nature of the act which amounts to disgraceful conduct is not specifically set out by the institutional writers. It is not a far-fetched surmise to presume that it is conduct similar to that which deprives a widow of her interest.[7]

If on the father's death, there are no sons or issue of sons, the unmarried daughter inherits the whole estate along with her sisters other than those who married in *dīga*. In such circumstances she takes an absolute title which is in no way affected by a subsequent *dīga*-marriage.[8]

(*b*) Succession by Daughters married in binna

The general rule that a *binna*-married daughter has the same rights of succession as the sons to the father's estate, is subject to certain qualifications. Since the object of such a marriage is not to confer a benefit on her but to raise up heirs to her father by creating an artificial relationship, it is the children who acquire a vested right in the property of their grandfather.

The sons of a *binna*-married woman have an analogous relationship to their grandfather as the appointed sons under the Hindu law. Although the mother's interest may be a defeasible one, the son's interest is a vested one. Thus, the mother's interest may come to an end if she subsequently leaves the family and contracts a *dīga*-marriage during the lifetime of her father and is conducted away from the *mulgedara*, but her subsequent *dīga*-marriage does in no way affect the rights of her children by the *binna*-marriage.

1. S. p. 2
2. P.A. pp. 55, 63, 86; D. p. 307
3. P.A. p. 59
4. S. p. 4; P.A. p. 35
5. *Nīti*, p. 65
6. S. p. 4
7. Hayley, p. 37
8. *Nīti*, pp. 62–63

The transient interest of a *binna*-married daughter is set out as follows.[1] "These or, *rather their children*, have the same right to a share of their father's land as their brothers." The emphasis on the words "rather their children", clearly show that it is the children who have vested rights in their grandfather's property and not the mother. The nature of the transient interest of the *binna*-married daughter in her father's estate is more clearly elucidated by D'Oyly, who says:[2] "Daughters shared equally with the sons in the estates of their parent; they only forfeited their rights on marrying in *dīga*—they had not however the right, (as widows had) of disposing of their portion before quitting the village in *dīga*—which portion reverts to her children born in *binna* and if she had none, to her brothers."

The *Nīti-Nighanḍuwa* explicitly states that if a *binna*-married daughter, after her father's death, contracts a *dīga*-marriage with another man and she has no children by the husband of the first *binna* marriage, her right of inheritance to the paternal estate lapses and all the paternal lands go to her brothers.[3] But if she has children by the *binna*-marriage, she forfeits her rights in their favour.[4]

Thus, there is general agreement among the institutional writers that a *binna*-married daughter's estate is a defeasible one but there appears to be considerable uncertainty and confusion as to the exact nature of the interest which she has in her father's property. In discussing this tangled question, there appears to be a failure to distinguish between cases in which the subsequent *dīga*-marriage took place before her father's death and cases where such a marriage took place after.

Confusion is created when no distinction is made between a *binna*-married woman going away in *dīga* with her husband whom she had married in *binna*, and her marrying a different husband in *dīga*. These two aspects must be borne in mind if clear principles are to be enunciated.

During her father's lifetime, a daughter who was married in *binna*, may elect to go away in *dīga* as a result of some arrangement with her father. In such instances, the father would normally arrange to give her something in the nature of a dowry, and her subsequent departure from the house, accompanied by the grant of a dowry, would convert the original *binna*-marriage into a *dīga*-marriage. The *Nīti Nighanḍuwa* states:[7] "If a daughter is first married in *binna* and lives on her father's premises but subsequently goes away with her husband and lives on his premises,

1. S. p. 1
2. D. p. 323
3. *Nīti*, pp. 35–36
4. *Nīti*, p. 99
5. *Nīti*, p. 35

and if in the meantime her father dies, the marriage will then be considered a *dīga* marriage and she will not be entitled to a share in the father's lands, which will be inherited by the other children."

This passage makes no mention of her children. But Sawers, referring to them, states:[1] "Her own and her children's rights are forfeited unless one of the children at least stayed behind in her parents' home." He adds, in a note, that the object of her leaving the child behind in the parental house is to preserve her interests by visiting her parents and rendering them assistance and succour in times of need.

When a *binna*-married woman who later goes away in *dīga* from her parental home, leaves a child behind, the father recognizes the right of the grandchild, and therefore, such a child would share the inheritance with the sons, unmarried daughters and *binna*-married daughters.[2]

A statement of Solomon, however, requires qualification. He states:[3] "If a daughter, married in *binna*, left her parents' house with her children in order to contract a second marriage in *dīga*, she forfeited for herself and her children all right to inherit any portion of her parents' estate unless she left one or more of her children of the *binna*-marriage at her parents' house." This passage was cited with approval in *Tikiri Kumarihami v. Loku Menika et al.*[4] The validity of Solomon's statement has been questioned.[5] Apparently, Solomon was relying for his information on a passage from Sawers who was referring to a case of the departure of a daughter in *dīga* with her husband whom she had married in *binna* earlier during the lifetime of the father.[6]

If a *binna*-married daughter leaves her father's *mulgedara* with her *binna*-married husband after her father's death, then her interest having crystallized into vested right, cannot be lost except by the acquisition of prescriptive title by others.[7] The proposition in the *Nīti Nighanduwa* that a daughter, if she lives in her husband's village without taking the produce of her inherited share of her father's land and without performing the services due for them, may lose her inheritance in favour of her brothers and sisters who may come into possession of that share,[8] means nothing more than the

1. S. p. 3: Hayley, App. I, p. 6
2. Hayley, p. 375
3. Solomon, p. 17
4. (1875) 1872-76 Ram. Reps. p. 106
5. Hayley, p. 374
6. *ibid.*
7. *Nīti*, pp. 35, 61, 63; P.A. p. 59; also *Siripaly v. Kirihame* (1917) 4 C.W.R. p. 157; *Dissanayake v. Punchi Menike* (1953) 55 N.L.R. pp. 108-111; *Ran Etana v. Nekappu* (1911) 14 N.L.R. p. 289; *Ranhamy v. Kirihami* (1934) 34 N.L.R. p. 379
8. *Nīti*, pp. 35, 61

fact that the members of the family may prescribe against her. In Kandyan law, the law of extinctive prescription was in force though in modern law, this topic is governed by the provisions of the Prescription Ordinance.[1]

When a *binna*-married daughter contracts a second *dīga*-marriage with another husband after her parents' death, she forfeits her rights in favour of her children previously born of the *binna*-marriage, if there are any, and in their absence, she forfeits her rights in favour of her brothers and sisters.[2] The decision in *Tikiri Kumarihami v. Loku Menika et al.*[3] is to the contrary; apparently the court in that case did not appreciate the fact that the second marriage was after the father's death, and therefore the dictum of Solomon which was cited had no application to the facts of that case.

A *binna*-married daughter who leaves her father's *mulgedara* with a *diga*-married husband after her father's death, forfeits her life-interest, but if she has any children by the *binna*-marriage, then they become entitled to the properties of their grandfather by representation. If she has no such children, then she forfeits her rights in favour of her brothers and sisters.[4]

(*c*) The Interest of a Daughter married in diga

As stated earlier, a *dīga*-married daughter forfeits her rights to the paternal inheritance as she ceases to be a member of the husband's *gedara*. The basis of this rule is set out by Lawrie, J., as follows :[5] "In olden times, land in the Kandyan kingdom did not belong to the individual in separate shares; the unit was the family, not the individual members of the family. All the members who lived in the house had a right in the share of the produce, which was the product of the labour of all, and all the males living in the house were bound to perform the services due to the king. It was contrary to Kandyan custom that the produce of the land should be removed to other houses and eaten by other families. Those who lived in the house had the right to share and eat. Those who left the house could not demand that the shares they formerly enjoyed should be sent after them. On this rule rests the principle that the priest in robes had no share: if he threw off the robes and rejoined the family, his right revived."

Lawrie, J.'s dictum has been cited with approval in *Kawwaumma v. David Singho et al.*[6]

1. Vol. III Cap. 63 Legislative Enactments of Ceylon
2. *Nīti*, pp. 35, 99; P.A. p. 55; D. p. 32
3. (1875) 1872–76 Ram. Rep. 106; (1875) B. & S. p. 4
4. *Nīti*, pp. 35, 99; P.A. p. 55; D. p. 323; also the observations of Gratiaen, J. in *Dissanayake v. Punchi Menikke* (1963) 55 N.L.R. p. 108 at 111 where he states: "In such circumstances, the vested right of a *binna*-married sister cannot be extinguished except by prescription, unless, apparently, they are forfeited by her contracting a second marriage in *dīga* with another man."
5. D. C. Kurunegalle 434/140 S.C. Minutes 5.1.1894
6. (1945) 46 N.L.R. p. 54 at 55

Exceptions to this Rule

The general rule that a *diga*-married daughter ceases to have any interest in the father's property is whittled away by many exceptions.[1]

The exception to the general rule of forfeiture is when a *dīga*-married daughter re-acquired *binna* rights in her parental estate. This exception is illustrated by the case of *Dingiri Amma v. Ukku Banda*,[2] in which a daughter who lived with her husband in her father's house thereafter registered her marriage. Then both the husband and wife lived at times at the father's ancestral house (*mulgedara*) and at other times in the husband's house till the *mulgedara* was pulled down, when the daughter's husband built a new house in the same garden and the daughter and her husband lived there for a period of twenty years. On these facts, Pereira, A.J., held that although she might have been married in *dīga* (on which matter he entertained a doubt) yet, she had re-acquired her right of a *binna*-married daughter.[3]

She was however returned to her father's house during the life-time of her father and if both her parents consent to her getting married in *binna* either to the previous husband who had married her in *dīga*, or to another husband, then she re-acquires *binna* rights and had the full status of a *binna*-married woman.[4]

The *Nīti Nighanḍuwa* sets out this proposition clearly as follows:[5] "If the father dies leaving four children, a son, a *binna*-married daughter, a daughter originally married in *dīga* and who returned during the father's lifetime to his premises and was married in *binna*, and the daughter living in a *dīga* village, his lands were inherited by the first mentioned three."

The re-acquisition of *binna* rights may also be inferred by permitting her to dwell in the *mulgedara* with the intention of taking her back. Evidence of re-acquisition of *binna* rights may also be found if a subsequent *binna*-marriage had taken place in the *mulgedara*.[6]

1. For the general rule, *vide* also S. p. 2; P.A. p. 20; *Nīti*, pp. 35,37, 64; D. C. Ratnapoora 63 (1834) Morgan's Digest, p.13; *Kalu v. Howwa et al.* (1892) 2 C.L.R. p. 54; 1 S.C.R. p. 140

2. (1905) 1 Bal. p. 193

3. *vide* also Perera's *Collection of Cases on Kandyan Law*, p. 173; and Marshall's Judgments, p. 329

4. S.p. 2; P.A. pp. 64–65; *Nīti*, pp. 36–40, 64, 66; also D.C. Kandy 18457 (1849) Austin Rep. p. 96; *Babanissa v. Kaluhami* (1909) 12 N.L.R. p. 105; *Samarakongedera Punchyralle v. Punchy Menika* (1828) Hayley, Appendix II, note 10

5. *Nīti*, p. 65

6. *Walpoladeniya Tikiralle v. Madawalagedera Pulingoo Naide* (1824) Hayley's Appendix II, notes 12 & 18; *Herathgedera Mulhamy v. Belikotoowe Punchiralle* (1828) ibid. *Batterangedera Horatala v. Her Full brother Kalua* (1828)Hayley, Appendix II, note 12; D.C. Kurunegalle 19107 (1873) 3 Grenier, pp. 111, 115; *Siripala v. Kirihamy* (1917) 4. C.W.R. p. 157

The second exception is when a *diga*-married daughter maintains a close and constant connection with the *mulgedara*. This proposition is laid down in a series of cases. In *Ukku v. Pingo et al.*,[1] Wendt, J., and Hutchinson, C.J., held that a daughter who married in *dīga* after her father's death, retained her share by leaving behind in the *mulgedara* a child previously born to her when she was a mistress to her brother-in-law. Their Lordships appear to have based their decision on a passage in Sawers's *Digest*,[2] which, however, does not refer to a *dīga*-married daughter but to a *binna*-married daughter. Hence, the citation does not bear out the proposition laid down by the Court. But relying on this decision, and also on certain passages which dealt exclusively with the position of a *binna*-married daughter, the Supreme Court held, with some hesitation, in *Appuhamy v. Kiri Menika et al.*,[3] that where a woman married in *dīga* lived about two miles away from her father's *mulgedara* in which she had left one of her children and with which she maintained a close and constant connection, she did not lose her share of the inheritance. The hesitation expressed by Lascelles, J., in this case appears to be well founded. It is submitted with respect that the rule laid down in these cases is an undue extension of the law, and in subsequent cases the Courts have denied the *dīga*-married daughter any rights to the father's property unless she had maintained a close and constant connection with the *mulgedara*.[4]

A casual visit by a *dīga*-married daughter to her parents, either for the purpose of her confinement or for the purpose of attending on her father's illness during his last days, does not give her the right to re-acquire *binna* rights.[5] On the death of her father, the properties would have vested in the *binna*-married sisters and brothers and unmarried sisters, and on principle, she cannot acquire title to property which she had already lost by going away in *dīga*, unless there is positive evidence that the other heirs agreed to share the inheritance with her. For this reason, if after the father's death the mother brings back the daughter who had earlier quitted the parental home after a *dīga*-marriage, and had left her *dīga*-married husband or had divorced him, she acquires no *binna* rights in her father's inheritance.[6]

But if the brothers brought their sister back and married her in *binna*, or after her voluntary return expressly consented to her

1. (1907) 1 L. R. p. 53
2. S. p. 3
3. (1912) 16 N.L.R. p. 238
4. *Appuhamy v. Kiri Banda* (1926) 7 C.L. Rec. p. 176 at 180, per Dalton, J.
5. *Eminona v. Samanapala* (1948) 49 N.L.R. p. 140
6. P.A. pp. 66–67; *Niti*, pp. 40, 64–66; *Boombure Kalu Etena v. Punchyhamy* Hayley, Appendix II, note 10; *Mahenegedera Baale Etena v. Ridiloowegedera Ukkuralle* (1823) ibid.; *Ramkongedera Kirri Menika v. Meddumaralla* (1827) ibid.; *Dingiri Menika v. Appuhamy* 4 Bal. Notes, p 66; *Simon v. Dingiri et al.* (1916) 3 C.W.R. p. 55; *Ranmenika v. Pincha* and another (1917) 4 C.W.R. p. 359

contracting such a marriage and allowed her to live on the parental property, then she may acquire her *binna* rights. In such a case, it is not necessary that she should return to the same house.[1] On her return under such circumstances, she recovers her rights to succeed to her father's estate.[2] In such cases, an acid test has been suggested by De Silva, J., who stated in *Mudiyanse v. Punchimenike*:[3] "The textbooks on Kandyan law state that *binna* rights are acquired by a daughter who had been married in *dīga*, in the following circumstances: (a) by being recalled by the father and remarried in *binna*; (b) by her father, on her return to the *mulgedara* along with her husband, assigning to them and putting them into possession of a part of his house and a specific share of the land; (c) on her returning home along with her husband and attending on her father and rendering him assistance until his death; (d) on her coming back and attending on and assisting her father during his last illness and the father on the death-bed expressing his will that she should have a share of his lands."

Wood Renton, C.J., in the case of *Punchimenike v. Appuhamy*,[4] was of the view that the four sets of circumstances set out above are illustrative and not definitive. He stated: "The ancient standard textbooks on the Kandyan law consist for the most part of reports or comments upon particular decisions, rather than legal treatises in the modern sense of the term. It is therefore not correct to regard them as though they had been set out in a statute, as necessary conditions for the acquisition of *binna* rights. On the one hand, these sets of circumstances are not exhaustive, but mere instances illustrating the principles under which a *dīga*-married daughter acquires *binna* rights. On the other hand, I doubt whether the fact that one or more of these sets of circumstances exist is conclusive in law of the question that a *dīga*-married daughter had acquired *binna* rights. They appear to be of evidential value and to create strong presumption that *binna* rights have been acquired." The principle underlying the acquisition of such rights has been enunciated by Wood Renton, C.J., in the following passage in the above-mentioned case:[5] "A daughter married in *dīga* forfeits her interest in the paternal inheritance, not by virtue of that marriage, but because it involves the severance of her connections with her father's house. But if that connection is re-established on its original basis, and if the *dīga*-married daughter is once more received into the family, as a daughter, it is only reasonable that she should enjoy a daughter's rights of inheritance."

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1. D.C. Kurunegalle 19107 3 Grenier Rep. p. 15
2. *Fernando v. Bandi Silva* (1917) 4 C.W.R. p. 9; *Ran Menika v. Pincha et al.* (1917) 4 C.W.R. p. 359; *Nīti*, p. 64; P.A. p. 69
3. (1933) 35 N.L.R. p. 179 at 180
4. (1917) 19 N.L.R. p. 353
5. at p. 355

It appears from the observations of Wood Renton, C.J., and de Silva, J., in the above cases, as well as from the observations of the learned judges in later decisions, that emphasis must be laid on the words "on its original basis". The basis existing before marriage in *dīga* is that the daughter is entitled to certain rights of inheritance in her father s property. The question to which the Court has to address its mind specifically is whether relations with the daughter have been resumed on this basis or are there circumstances from which such basis can be inferred?

Therefore, the correct test seems to be, as laid down in *Mudiyanse v. Punchimenike*,[1] that in order to establish that a *dīga*-married daughter has re-acquired *binna* rights, it must be proved that the father in his lifetime, or the family after his death, had manifested an intention to admit her to *binna* rights either by express declaration or by conduct from which such an intention may be inferred. Such an intention may be proved by evidence of a course of dealing with property recognizing such rights. The underlying principle seems to depend on whether she was admitted as a member of her father's *gedara*.

This test has been applied in recent times in the case of *Perera v. Aselin Nona*[2] by Basnayake, C.J., who stated: "The reluctance to recognize the claims to the re-acquisition of *binna* rights after the death of the parents, where rights to property were vested in others, without clear proof that those who succeeded to the property have signified their intention expressly or by unequivocal conduct to part with their rights to the property to the extent of giving the *dīga*-married daughter who has returned, the share she would have got had she not gone out in *dīga*, run throughout our decisions. Any other rule would throw succession to property among Kandyans into a state of confusion." To recognize *binna* rights it must be shown that a *dīga*-married daughter was not only received by the father and those who are entitled to the inheritance, but that they had acquiesced in her re-acquiring *binna* rights.[3]

Where a Kandyan permits his sisters, in spite of their *dīga*-marriages, to possess their share of the land for a long period of time, he acquiesces in their rights and will not be permitted to deny such rights to them.[4]

Where forfeiture had taken place as a result of a *dīga*-marriage, it is not the mere connection with the *mulgedara* which restores the right, but rather the waiver of the forfeiture of which the connections with the *mulgedara* is evidence. The execution of a series of deeds for a period extending to a number of years by other

1. (1933) 35 N.L.R. p. 179
2. (1958) 60 N.L.R. p. 73 at 76
3. *Dingiri Amma v. Ratnatilaka* (1961) 64 N.L.R. p. 163 at 167 per Tambiah, J.; Hayley, p. 385
4. *Appu Naide v. Heen Menika et al.* (1948) 51 N.L.R. p. 63

members of the family on the footing that a *dīga*-married woman still had rights in the inheritance is sufficient evidence of such waiver.[1] In order that the rights of a *dīga*-married daughter be restored, the test is whether she had been re-admitted into the family.[2]

The re-acquisition of *binna* rights of a *dīga*-married daughter who returns to her father's household, does not however alter the character of a *dīga*-marriage so far as her husband's rights are concerned, Consequently, if she leaves the husband and child, the husband, as a *dīga*-married spouse, is entitled to the property which she acquires through her mother.[3] Further, as a *dīga*-married husband, he can also inherit from his wife the property which she had acquired during coverture.[4]

The proposition that she re-acquires *binna* rights, however, does not in any way confer legal title to property which had already been alienated by her brothers or unmarried sisters.[5]

If a *dīga*-married daughter is the only child, then she succeeds to her parents' estate in preference to collaterals or ascendants.[6]

A diga-married daughter's right to maintenance

A *dīga*-married daughter who has been reduced to poverty by her husband's misfortune, neglect or bad conduct on her part, is entitled, on her returning to her parents' *mulgedara*, to live there and to be supported out of the family estate.[7]

Her right to maintenance is not taken away from her even after her father's death since it is the duty of the brothers to maintain her if he was in indigent circumstances.[8] This right she had even against her half-brothers,[9] or even against those into whose hands the ancestral property had passed by lucrative title. Under the earlier Kandyan law, even a purchaser for value into whose hands the property had passed, was under an obligation to support her. This incident of Kandyan law reminds the student of the obligation of the family to support all members of the family who are in indigent circumstances.

Statutory provisions such as the Registration of Documents Ordinance[10] however, now protect the *bona fide* purchaser for

1. *Banda v. Angurala et al.* (1922) 50 N.L.R. p. 276
2. Wood Renton, C.J. in *Fernando v. Bandi Silva* (1917) 4 C.W.R. p. 12
3. *Chelliah v. Kuttapitiye Tea Rubber Co.* (1932) 34 N.L.R. p. 89
4. *Seneviratna v. Halangoda et al.* (1921) 22 N.L.R. p. 472
5. *Appuhamy v. Kumarihamy* (1922) 24 N.L.R. p. 109
6. S. p. 2; P.A. p. 45; *Niti*, pp. 59; 73; D. p. 323
7. S. p. 2; P.A. pp. 64–66; *Niti*, p. 62; also *Waettaewe Bandi Appu and Kiri Menika v. Ismail Naide*, Hayley, Appendix II, note 7; *Galgamegedera Alens Naide v. Weykelageniya Etana* (1828) Hayley, Appendix II, note 8
8. S. p. 2
9. S. p. 3
10. Cap. 117, Vol. V, Legislative Enactments of Ceylon

value, and hence it is sufficient that if the property passes into the hands of a *bona fide* purchaser, he is under no obligation to support a *dīga*-married daughter who is in indigent circumstances.

Summary

A *dīga*-married daughter's right to the parental estate may, therefore, be set out as follows: Firstly, if there are no sons, *binna*-married daughters or unmarried daughters by the same wife or the issue of any of them, the *dīga*-married daughters inherit the parental estate. Secondly, if there is a son, *binna*-married daughter or unmarried daughter by the same wife or the issue of any of them, the daughters married in *dīga* are normally excluded. Thirdly, if the *dīga*-marrried daughter returns during her father's lifetime, and was allowed to settle on his estate in *binna* with her former husband or with a new husband, then she acquires all the rights of a *binna*-married daughter. Fourthly, if the *dīga*-married daughter returns after her father's death, she does not recover her right to succeed unless the other heirs themselves give her in *binna*-marriage or expressly consented to a *binna*-marriage either with her former husband or a new husband, and also admit her to a share of the parental estate. Fifthly, the *dīga*-married daughter who returns to the *mulgedara* in destitute circumstances is entitled to maintenance out of the family estate in the hands of the brothers and sisters, and although even a purchaser for value of such property was under an obligation to support her in Kandyan custom,[1] such a right is now modified by statute.

Adopted Children

A daughter who is adopted by another family, loses her rights in the parental estate. Even a daughter who is married in *dīga* after her father's death, is entitled to succeed to her father's estates in preference to another daughter who is adopted for purposes of inheritance out of the father's family during the lifetime of the father, and who was given away in marriage by her own adoptive parents after her father's death.[2]

Similarly, a daughter who is brought up after her father's death in the house of her maternal grandfather and who is adopted by the latter, forfeits her interest in the father's property in favour of her brothers. Likewise, she forfeits her share of her paternal grandfather's estate.[3]

The rule of forfeiture by adoption has no application to sons, and therefore a son who has been adopted into another family, and his issue do not forfeit any rights in his natural father's paternal

1. Hayley, p. 390
2. *Re Wickramasinghe* D.C. (Testy) Kandy 2360 (1907) 1 A.C.R. XIV
3. *Godamunara Punchimenike v. Government of Ceylon* (1825) Hayley, Appendix II, note 53

estate. Such a son has the benefit of succeeding to both the property of the adoptive parents as well as to that of his natural parent.[1]

The right of a Buddhist priest to succeed to the property of his father

A person who becomes a Buddhist priest during his father's lifetime loses all rights of inheritance to his father's property. The *Nīti Nighaṇḍuwa* states the rule as follows:[2] "If a man has several children one of whom he has made a priest, all the movable and immovable property will be inherited by his other children to the exclusion of the robed son." This appears to be the law not only from the writings of the institutional writers but also according to the decisions of the Courts.[3]

A priest does not lose his rights in his maternal inheritance. The *Nīti Nighaṇḍuwa* expressly states:[4] "A son, whether he be a layman or a priest, or a daughter, whether married in *dīga* or living in *binna* on her mother s property, be it the male or female, will all have an equal right to the maternal inheritance."

But the son who discards his priestly robes, and comes back to the *gedara* with his father's consent, regains the rights which he had lost in his father's property.[5] Sawers contradicts himself on this matter.[6] In one passage he states that when a son becomes a priest he loses all his rights of inheritance of his parents and, in the same he states that the son shall not be restored by throwing off the robes after his father's death.

A Buddhist priest however, is not excluded from succession to his father's property in the following circumstances:

(a) A priest, who is the only child, inherits his father's estate.[7]

(b) A priest, who disrobes himself during his father's lifetime with the consent of his father, recovers his rights.[8]

(c) A priest who is destitute is entitled to maintenance from the parents' property.[9]

1. *Eyheliyagoda Punchy Mahatmaya v. Eyheliyagoda Dessave of 3 Korales* (1826) Hayley, App. II, note 28
2. *Nīti*, p. 34
3. *Girigama Unnanse v. and his sister Rang Etana* (1825) Hayley, Appendix II, note 30; *Etoolgama Sonoottera Unanse v. Hannekgedera Aratchela* (1825) Hayley, Appendix II, p. 4, note 30; D. C. Kandy 24783 (1852) Aust. Reps. p. 169
4. *Nīti*, p. 106
5. P A p. 52; *Nīti*, p. 34
6. S. p. 7; Hayley, Appendix I, p. 11
7. *Nīti*, p. 59
8. *Nīti*, p. 34; *Dehigama Kumburugedera Appu v. Do Aratchela* (1824) Hayley, Appendix II, note 31
9. *Nīti*, p. 34; P.A. p. 51

(d) A priest does not forfeit his rights if the father is also in robes and had lived with the son and had received assistance and support from him.[1]

(e) A priest, who even after his father's death, disrobes to prevent the property from going to an only daughter who is married in *dīga*, can claim the estate.[2]

(f) A priest who disrobes at the unanimous request of his brothers can claim such a share of his parents' property as would have fallen to him if he has never taken to the robes.[3]

Succession of Children by Several Marriages

With regard to a man who had contracted several marriages and has children by the different wives, the rights governing the children of the respective marriages have developed on erroneous lines. The Kandyan customary law favoured a division *per capita* but the texts are obscure on this topic. The better view, however, favours a division *per capita* and not one *per stirpes* among the children of the different marriages.[4]

Armour states:[5] "(1) The father left a son and an infant daughter by one wife, and a son by the second wife: his lands devolve to all three children in equal shares. (2) The father died leaving a son by one wife and two daughters by another...: his landed property was divided into three equal shares. (3) The deceased left two sons by one wife and a son and a daughter by another wife, the daughter having been married off in *dīga* in the father's lifetime, was excluded from the inheritance and the deceased father's landed property was divided in three equal shares to the three sons. (4) The father had a son and a daughter by the first marriage and a son and a daughter by a second marriage, the first-mentioned daughter was married in *binna* in the father's house, a second daughter was married out in *dīga*, the first-mentioned son died having become a priest previous to his father's demise..... the whole of that estate, consisting of *paraveni* lands, and of lands recently acquired by the father, devolved in equal shares to the surviving sons and to the *binna* daughter and eventually to their children; a daughter by the second wife was totally excluded from the inheritance by reason of her *dīga*-marriage. (5) The father's estate devolved in three equal shares to his three sons of whom two were the issue of one bed, and the other son was the issue of another bed; and a brother having subsequently died, without issue, his share devolved to the surviving full brother to the exclusion

1. P.A. p. 51
2. *Nīti*, p. 40
3. P.A. p. 51
4. Marshall, pp. 333, 334
5. P.A. pp. 69, 72

of the half-brother. (6) A man dies intestate leaving issue by the first wife, two sons by his second wife and by his last wife, a son and an infant daughter: his landed property was divided into five equal shares, one share of each of the said block."

The above illustrations given by Armour favour a division *per capita* among all the children by the different beds. The *Nīti Nighanduwa* supports Armour on this matter. It states:[1] "If the father dies leaving two sons by one wife and a son and an infant daughter by the other, his lands will be divided into two parts and the children of each bed will inherit one half." This passage does not contradict the proposition that the division in such circumstances, should be *per capita*, because in the illustration given, there were an equal number of children by both marriages.

The *Nīti Nighanduwa* states in another place:[2] "If, therefore, at the time of death of the landed proprietor, this daughter has been married in *dīga*, the lands will be divided into three parts and each of the three sons will inherit a part."

Other passages also support the view that the distribution is *per capita*.[3] One passage in the *Nīti Nighanduwa* however, tends to support the proposition that the divison is *per stirpes*. It states:[4] "If the father dies leaving two sons and a daughter by one wife and three sons by the other, his land will be divided into two parts and the children of one bed will receive one half and the children of the other bed the other half and even though the daughter is married in *dīga*, the division will be the same." No explanation however has been offered by the author (or the authors) for this contradictory view.

Sawers also contradicts himself on this matter. At one place he states:[5] "The daughter being the only female child of a man's first or second or third marriage, will have equal rights with her brothers of the half-blood in their father's estate even if given out in *dīga*." In another passage, he states:[6] "When a man has children by different wives, his landed property should be divided into two or more shares according to the number of wives by whom he has children, and each family should have one share without reference to the number born of each bed; that is to say, supposing a man had two wives, the first wife's family consists (*sic*) of three children and the second wife's of one; three children of the first wife will have one moiety of the estate, and the only child of the second wife the other moiety."

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1. *Nīti*, p. 78
2. *Nīti*, p. 79
3. *Nīti*, pp. 75–82 and the illustrations at p. 89
4. *Nīti*, p. 80
5. S. p. 3
6. S. p. 5; for a fuller discussion, *vide* Hayley, pp. 396–397

The decisions of the Courts

These contradictory passages of the institutional writers gave rise to a series of decisions which cannot be reconciled. The Courts, however, have ultimately adopted the rule that succession of children by different marriages should be *per stirpes* and not *per capita*.[1] An attempt to resuscitate the old view that succession was *per capita* and not *per stirpes* was repelled recently.[2]

Issue of Associated Marriages

As stated earlier, Kandyan customary law recognized associated marriages till monogamy was established by statute. In dealing with the right of the issue of associated marriages sanctioned by customary law, the Courts had to recognize the principle that monogamy had been sanctioned by statute. Hence, the Courts took the view that an only child succeeded to the father whose marriage is registered and to the property of the other associated fathers.[3]

Succession of Illegitimate Children

The Kandyan law draws no distinction between illegitimate children born in adultery and mere natural children.[4] Illegitimacy rested on the impropriety of marriage from difference in caste, or otherwise if there are formal defects or absence of ceremonies. While penalizing the children by preventing them from inheriting the father's paternal inheritance, it gave illegitimate children the right to share the acquired property of their father with the legitimate children.[5]

The Kandyan law, however, is as severe as the Roman-Dutch Law in excluding children born of incest from inheriting any portion of their father's estate.[6]

The theory of recognition and adoption of illegitimate children has been succinctly set out by Middleton, J., in *Rankiri v. Ukku*

1. Matale 19159 (1843) Austin Rep. p. 105; 20898 (1851) Aust Rep. p. 122; *Rang Menica v. Rang Menica* (1857) 2 Lorensz, p. 27; (1870) Vanderstraaten Reps. C. E Nuwarakalawiya 604 p. 43; *Banda v. Lebbe et al.* (1916) 2 C.W.R. p. 108; *Nanduwa v. Punchirala* (1922) 24 N.L.R. p. 240

2. *Mohotihamy v. Animona* (1949) 50 N.L.R. p. 317

3. *Dingiri Menike v. Heenhamy* (1907) D.C. Ratnapura 1365 per Wood Renton, J.

4. Per Dias, J., in *Silva (Harmanis) v. Mudalihamy* D.C. Kandy 97916 Civil Minutes 12th August 1887, cited with approval in *Re Estate of Sundara v. Ukku* (1903) 7 N.L.R. p. 364 at p. 368; also *Rankiri v. Ukku* (1907) 10 N.L.R. p. 129

5. S. pp. 7–8;; P.A. pp. 8, 34; *Niti*, pp. 14, 171; *Heypane Kirry Menika v. Bamberadeniya* (1827) Hayley, Appendix II, note 32; *Silva v. Carolina Hamy* D.C.Kandy 23067 (1856) 1 Lor. p. 189; Aust. p 147; *Mahatmaya v. Banda* (1893) 2 S.C.R. p. 142; *Kiri Menika v. Mutu Menika* (1899) 3 N.L.R. p. 376; *Re Sundara Rankiri v. Ukku* (1903) 7 N.L.R. p. 364, 10 N.L.R. p. 129; *Appuhamy v. Lapaya* (1905) 8 N.L.R. p. 328

6. *vide* Per Dias, J., in an *obiter dictum* in *Silva (Harmanis) v. Mudalihamy (supra)*; *vide* also 4 Burge pp. 36, 58; P A p. 34

where he states:[1] "If the mother, acknowledges and is maintained as a concubine, was of equal caste, such concubinage was taken to be a marriage, and the offspring had the privilege of legitimate children, if not stigmatized by some decisive act on the part of the man's family or by the man himself. If the woman, though of inferior caste, was taken into a man's house and treated like and acted as a wife, then, if there were no widow and no legitimate children, her children succeeded to the acquired landed property of the man; a portion if she was of equal caste. A legal widow would in either case bar the vesting of the *dominium* until her death. But, where a cooly woman of inferior caste was not taken into a man's house nor acknowledged, but simply visited elsewhere as a mistress, I can find no authority in Kandyan law for saying that the offspring were to succeed as a right to any of the property of their deceased father. In my opinion, they would not be issue either in the sense contemplated by section 26, page 22, paragraph 3 or page 23, paragraph 2 of Armour." Middleton, J., observed that the word "illegitimate" did not necessarily imply the non-existence of a marriage, and added: "The curious thing, however, is that concubinage with a woman of equal caste resulted in fully legitimate issue; while, upon a marriage with a low-caste man, the issue will be deemed illegitimate and only capable of sharing in the acquired property of their father."

Middleton's view was also confirmed by the two other judges who heard this case in review. The Courts, however, adhered to the old view that children born out of lawful wedlock were illegitimate. Thus, de Sampayo, J., in considering the meanings of the expressions "unacknowledged husband" and "unauthorized intercourse" in a passage in Sawers,[2] was inclined to the same view as Middleton, J. Recent decisions, however, have adopted Middleton, J.'s view on this matter. In *Asirvatham v. Guneratne*,[3] where a Sinhalese woman lived with a Tamil man with the approval of her family, it was held that the issue were not precluded from succeeding to the property of their maternal grandfather. The Court observed that the word "illegitimate child" did not mean a child born out of wedlock. If a father and mother of the same caste married, even without the formalities of a legal marriage according to custom, but agreeable to the wishes of the kinsmen, then the children of such a union are legitimate.[4]

Succession of Illegitimate Children to the acquired property of the father

The formal defect in a marriage or the absence of a regularly constituted marriage did not prevent illegitimate offspring from

1. (1907) 10 N.L.R. p. 139
2. *Raja v. Elisa* 112 C.R. Gampola 613 S.C.M. of May 26, 1913
3. (1950) 52 N.L.R. p. 73
4. *supra*, p. 74

inheriting the acquired property of their father. They shared such property with those born in lawful wedlock.[1]

Where a father left both legitimate as well as illegitimate children, his acquired property was shared between them, each taking a moiety. Succession in such cases is *per stirpes* and not *per capita*.[2]

If a father died leaving legitimate children as well as a sole illegitimate daughter, the illegitimate child did not forfeit her right to a moiety of the acquired property of her father by marrying in *dīga* after his death even where the parents of both the legitimate and illegitimate children are the same.[3] If there are no legitimate children and the widow survives, then the illegitimate children succeeded to the whole of the acquired property of their father.[4] If, however, such an illegitimate daughter is married in *dīga* during the lifetime of her father, she has no more claims to the acquired property of her father. In this matter, even section 15 of the Kandyan Law Amendment Act does not restore the right she had lost when she was married in *dīga*.[5]

Succession to the paraveni property

The illegitimate child, however, is debarred from claiming the *paraveni* property of his or her father if there are other relations, however remote, surviving;[6] but the illegitimate child has the right to maintenance out of such property if she is in indigent circumstances.[7]

As observed earlier, a grandfather's acquired property is *paraveni* property in the hands of the father, and therefore, an illegitimate child cannot hope to succeed to his or her grandfather's property where there are other relations surviving. Armour states:[8] "If a man who lived in direct opposition of his family, espouse a woman who, on account of the inferiority of her birth, or on account of her bad reputation, was unworthy of the alliance, their connection will not be recognized as a lawful wedlock and their issue will be declared illegitimate. Therefore, in a case where a man died before his parents, the children by that woman will have no rights to any share of his parents' estate. The said children will be entitled to inherit only such property as their father had himself acquired by purchase or other means of acquisition."

1. S. pp. 7–8; P.A. p. 34; *Nīti*, pp. 14,71; *Silva v. Caralinahamy* D.C. Kandy 23067 (1856) 1 Lorenz p. 189; Aust. p. 147; *Mahatmaya v. Banda* (1893) 2 S.C.R. p. 142; *Kiri Menika v. Mutu Menika* (1899) 3 N.L.R. p. 376; In *Re Estate of Sundara Rankiri v. Ukku* (1903) 7 N.L.R. p. 364, (1907) 10 N.L.R. p. 129; *Appuhamy v. Lapaya* (1905) 8 N.L.R. p. 328
2. *vide* the observations of Basnayake, C.J., in *Mallawa v. Gunasekara* (1957) 59 N.L.R. p. 157 at 158
3. *Mallawa v. Gunasekara* (1957) 59 N.L.R. p. 157 D.B.
4. *Mahatmaya v. Banda* (1893) 2 S.C.R. p. 142
5. *Ran Menika v. Nandohamy* (1956) 57 N.L.R. p. 453
6. S. p. 7; *Re Estate of Sundara Rankiri v. Ukkuwa* (*supra*)
7. *Bandulahamy v. Ranmenika*(1902) 6 N.L.R. p. 90
8. P.A. p. 8

In spite of the unequivocal statement of the law on the subject by Armour and other institutional writers, the Supreme Court held in *Appuhamy v. Lapaya*[1] that a grandson who is illegitimate, inherited the property acquired by his grandfather. The passage cited in Armour (referred to earlier) was not cited and this ruling is not only against the weight of authority, but is contrary to the spirit of the Kandyan law.

The acquired property in this context, according to Sawers,[2] consists of property acquired by purchase or of gifts from strangers. The *Nīti Nighanḍuwa*, however, limits it to "newly-acquired" property.[3] Armour, in one passage, confines this term to property acquired by purchase,[4] but in a later passage, includes all types of property acquired by any means.[5]

If there are no other relations, however remote, to succeed to the parents' property, the illegitimate children are entitled to succeed even to the *paraveni* property of their parents. An exception, however, is noted by the *Nīti Nighanḍuwa* which states that "in a village in which the Mudaliyar ranks were attached for generations, on failure of legitimate heirs, the estate escheated to the Crown, and excluded the legitimate children as they were unfit to bear the surname and to possess the village".[6] As villages which have the exclusive prerogative of conferring titles of Mudliyars exist no more, this distinction is obsolete in modern times.

In dealing with the rights of illegitimate children it may be noted that the children of an incestuous union are debarred from inheriting the estate of their father,[7] but they are not debarred from claiming maintenance.[8]

Adulterine bastards are not treated differently from other illegitimate children in Kandyan law.[9]

The right of Illegitimate Children to succeed to the property of their mother

As a mother makes no bastards, it is a well-established rule of Kandyan law that where a mother is either unmarried or married in *dīga*, then her illegitimate children are entitled to succeed to her properties; if there are both legitimate as well as illegitimate children, then all her children succeed to her properties *per capita*. Armour states:[10] "If a woman died intestate, leaving issue a son and

1. (1905) 8. N.L.R. p. 328
2. S. p. 7
3. *Nīti*, p. 71
4. P.A. p. 4
5. P.A. p. 8
6. *Nīti*, p 1
7. P.A. p. 34
8. *Nīti*, p. 14
9. *Re Estate of Sundara Rankiri v. Ukku* (*supra*)
10. P.A. p. 83

a daughter, born out of wedlock, and if neither of the children have an acknowledged father, the whole of the mother's estate will devolve in equal shares to the son and daughter, and that, even if the daughter were married and settled in *dīga*." Sawers reiterates the same principle and states:[1] "Property given to a concubine or acquired by her, if she dies intestate or without issue, follows the same rules of inheritance as the property of an unmarried woman, but if a concubine or a prostitute leave issue, they inherit their mother's property."

The *Nīti Nighanduwa* enunciates this principle as follows:[2] "The children of a woman married to a man of her own caste, according to the usual rites and customs, or of a woman who after cohabitation with a man of higher or lower caste than herself, and still in an unmarried state, has intercourse with a man who is not known, all inherit the estate equally." In *Raja v. Elisa*,[3] de Sampayo, J., after referring to the authorities, said: "It is settled law that the illegitimate children of a woman inherit the acquired property equally with the legitimate children."

The right of the illegitimate children to succeed to their mother's property is not merely confined to the acquired property of the mother but also extends to her ancestral property, subject to a certain exception which will be considered later. The property of a Kandyan woman acquired before her marriage is inherited by her illegitimate children, and a *dīga*-married husband has neither title nor life-interest in such property.[4] In stating this principle, by means of two guiding beacons the Court steered clear of dangerous quicksands which beset the student of Kandyan law. One is a passage from D'Oyly,[5] and the other a rule laid down by the decisions of the Courts which gave the husband only a life-interest over the property of the deceased wife acquired during coverture.

The Illegitimate Children of a binna-married woman

The illegitimate children of a *binna*-married woman are excluded from the ancestral (*paraveni*) property. The *Nīti Nighanduwa* states that where a woman is married in *binna* her illegitimate children are excluded from her *paraveni* property but they are entitled, along with her legitimate issue, to share her acquired property.[6] This rule applies whether the *binna*-marriage was in the father's or mother's property. The Kandyan Law Commission was of the opinion that the rights of succession of illegitimate children, as set out by the institutional writers, admitted of no ambiguity.[7]

1. S. p. 18
2. *Nīti* p. 15
3. 112 C. R. Gampola 613 S. C. M. of May 26, 1913
4. *Ellen Nona et al v. Punchi Banda* (1943) 45 N.L.R. p. 11
5. D. p. 308
6. *Nīti*, p. 114
7. Kandyan Law Commission Report, Sess. Paper 24 of 1935, Sec. 281 et seq.

Hence, subject to this exception, *dīga*-married children appear to have the same right of succession as the illegitimate children to the *paraveni* property of a *dīga*-married woman, despite a passage in Modder to the contrary. Modder states:[1] "An illegitimate child does not succeed to the inherited property of its parents, which devolves on their blood relations." The reference given by Modder to the various texts and the decided cases suggest that when he was giving an illustration, what he had in mind was the inheritance to the property of the illegitimate child's father only and not to that of the mother.

The Kandyan Law Declaration Amendment Ordinance, No. 39 of 1938 defined "legitimate children" as "those born of parents married according to law", and further defined "illegitimate children" as "those born of parents not married according to law". It reformed the law by making illegitimate children procreated between two persons before marriage, legitimate by the subsequent marriage of the parties, unless such children were procreated in adultery. It placed the illegitimate children on a less advantageous position than under the Kandyan law. It enacted as follows: "When a man shall die intestate after the commencement of this Ordinance, leaving any illegitimate children—(*a*) such child or children shall have no right of inheritance in respect of the *paraveni* property of the deceased; (*b*) such child or children shall, subject to the interest of the surviving spouse, if any, be entitled to succeed to the acquired property of the deceased in the event of there being no legitimate child or the descendant of a legitimate child of the deceased. Any such child shall, subject to the interest of the surviving spouse, if any, be entitled to succeed to the acquired property of the deceased, equally with the legitimate child or children, as the case may be (1) if the deceased intestate has registered himself as the father of the child when registering the birth of the child; or (2) if the deceased intestate had in his lifetime, been adjudged by any competent court to be the father of the child."

1. Modder, Section 227, p. 39

CHAPTER XIX

SUCCESSION TO MALES (3)

Grandchildren and their Descendants

Generally, children are represented by their issue *ad infinitum*. The division among grandchildren is *per stirpes* and not *per capita*, but since a *dīga*-married daughter transmits no rights in her father's estate to her issue, if there are other heirs of the first degree, her children will not be entitled to succeed to the property of her father.

Thus a grandson by a *dīga*-married daughter will not succeed to his maternal grandfather if his mother has brothers or *binna*-married sisters, but if the share would devolve on a daughter, the fact that the grandchild is married in *dīga* may not deprive the grandchildren of her share,[1] if she was his only daughter or if she had only sisters who were married in *dīga*. But if the grandchild who is married in *dīga* has brothers or *binna*-married or unmarried sisters, she loses her rights to them.

The rule that has to be followed in these cases is to determine in the first instance what portion of the grandfather's estate will devolve upon his son or daughter had he or she survived, and divesting a moiety among the son's or daughter's children exactly in the same way as if the son and daughter had not predeceased the grandparent.

To this general rule, there are two exceptions. Firstly, if the *dīga*-married granddaughter who is the only child of her father or *binna*-married mother is given in *dīga*-marriage by the grandfather who provides a dowry for her, she is excluded from his inheritance if there are other descendants entitled to inherit.[2] The rationale of this principle is that by providing a dowry, the estate is diminished and hence the dictates of natural justice would exclude such a granddaughter if there are other descendants entitled to inherit.

Secondly, if a *dīga*-married daughter who is the only child predeceases her father, her issue is postponed to the brothers of the deceased, but inherits before the brother's children.[3]

Although other writers do not echo the view of Sawers on this point, this rule is perhaps a survival of an earlier rule that succession among the *gedera* (family) should prevail over the later principle of distribution among all living descendants.[4]

1. S. p. 4; *Nīti*, p. 74
2. S p. 4; P.A. pp. 63, 73, 79, 80; *Nīti*, pp. 72–74
3. S. p. 2; also *Undirallegedera Kiri Etena v. Undiyrallegedera Dingiri Menika* (1828) Hayley, Appendix II, note 13 cited in Hayley, p. 405
4. Hayley, p. 406

Grandchildren by a Son married in binna

The *binna*-married son did not lose his right to inherit his father's estate but his sons, being members of their maternal family, had no claim to his grandfather's estate on his father's side.[1]

This rule of the customary law had disappeared at the beginning of the nineteenth century. The *Nīti Nighanduwa* is doubtful on the point but states that if the grandchildren did not put forward their claim, they were debarred.[2] Armour bases their loss of rights to such inheritance on prescription.[3] Sawers states that such claims are destroyed by the neglect of the *binna*-married son.[4] In his note, Sawers states[5] that the chiefs are generally agreed that such children should be received by the paternal grandfather as heirs presumptive before they could claim.

Grandchildren by a Son adopted by another family

Hayley states that grandchildren of a son who has been regularly adopted by another family, are treated in the same way as children of a *binna*-married son. Their title is dependent on the recognition similar to that required in cases of grandchildren through a *binna*-married son.[6] In *Eyheliyagoda Punchy Mahatmaya v. Eyheliyagoda Dessave of 3 Korales*[7] it was held that a son does not lose his own or his children's right of inheriting the property of his father by being adopted into another family and also succeeding to the property of his adoptive father.

Succession by parents to acquired property

In dealing with succession to acquired property, although there is a conflict of views, the better view is that both parents had a life-interest over such acquired property. D'Oyly supports the view of Sawers referred to earlier, and recognizes the right of both parents in the acquired property of their children.[8] Armour, however, strikes a dissentient note and states that the mother is the heir to the acquired property of her child who dies intestate and issueless.[9]

The difference of opinion between institutional writers on this point becomes explicable when one considers the evolution of Kandyan society and the customary law. Under the early customary law, traces of matriliny were still lingering, and therefore the mother was preferred to the father in the succession to the acquired property of the child, but later when father-right became

1. Hayley, p. 40
2. *Nīti*, p. 36
3. P.A. p. 56
4. S. p. 6
5. Hayley, Appendix II, note 27
6. Hayley, p. 408
7. Hayley, Appendix II, note 28
8. D. p. 315 et seq.
9. P.A. Ceylon Miscellany pp. 131–132

firmly established in Kandyan customary law, he was placed on an equal footing with the mother. Hence, it would be correct to say that the later customary law set out the principle that both the father as well as the mother were entitled equally to the life-interest of the acquired property of their children who died intestate and issueless.[1]

The decision of the Courts

The conflict of views of the institutional writers is reflected in the decisions of the Courts. In *Kalu v. Kiria*,[2] it was held that the mother became entitled to all the acquired properties of the child in preference to the father. It was further held that this rule applied not only to cases where the mother was married in *binna*, but also to a case where the property had been acquired from a source other than the father.[3]

The mother's preferential right was recognized in several earlier cases,[4] but there are also cases which have recognized the father's rights to the acquired property of his children.[5]

Having considered all these cases, Shaw, J. stated in *Kalu v. Kiria*[6] that the law was sufficiently settled to prevent further rules being applied except by an Act of the Legislature. Shaw, J. based his view on the supposition that there was unanimous agreement among the institutional writers on this point. As observed earlier however, only Armour supports this view, and the view of Sawers was not considered in this judgment. Even D'Oyly who stated that both the father and mother are equally entitled to the usufruct of the acquired property of their deceased child, was not considered. Further, the ruling in *Kalu v. Kiria* is devoid of much merit, since both the cases referred to by Shaw, J. can be distinguished. In the first case referred to,[7] the father had predeceased the mother and therefore the father's rights were not considered. In the second case referred to,[8] the contest was between a mother and an illegitimate child, and presumably the father had died earlier.

The Father's interest over the acquired property when the Mother is dead

There is a conflict of views even as regards the nature of the interests which the father got over the acquired property of his

1. Hayley, pp. 410, 412
2. (1915) 18 N.L.R. p. 465
3. Per Shaw, J., in *Kalu v. Kiria* (*supra*) at p. 468
4. D.C. Kandy 21994 (1850) Aust. Rep. p. 133; *Ranhami v. Menik Etana* (1907) 10 N.L.R. p. 153
5. *Ukkuhamy v. Bala Etana et al.* (1908) 11 N.L.R. p. 226
6. *supra*
7. D.C. Kandy 21994 (1850) Aust. Reports, p. 133
8. *Ranhami v. Menik Etana* (1907) 10 N.L.R. p. 153

issueless and intestate deceased child. It was held in *Ranhotiya v. Bilinda*[1] that where the mother was dead, the father became entitled to the full dominium of the acquired property of his deceased child in preference to the deceased brother. In this case, the District Judge, Mr. F. R. Dias, preferred to follow the view of Armour[2] rejecting the contrary view of Sawers,[3] and also held that the ruling in *Sangi v. Mohotta*[4] was in conflict with his finding. Nevertheless, he preferred to follow the opinion of Armour in preference to that of John or Marshall,[5] and held that the father became entitled to the acquired property of the son to the exclusion of the deceased brother. Grenier, J., while admitting that there was a conflict of views between Sawers and Armour on this question, thought it best to affirm the decision of the District Judge. He said:[6] "But dealing as we are with primitive law and custom, such as is obtained among Kandyans, I am inclined to think that the District Judge is right, following the opinion of Armour rather than that of Sawers. It seems to me to be consistent with natural justice that the acquired property of sons should go to the father rather than to the brothers. In most primitive communities, the father is considered as the head of the family, and whatever the son acquired, he generally acquired with the result of the assistance and help of his father and therefore it seems right to me that in case a son dies unmarried, childless and intestate, his acquired property should go to his father to the exclusion of his brothers." It is submitted with respect that the decision in this case is not in accordance with the principles of a joint family system prevalent among the more developed communities of India and Ceylon. The customary laws of India and Ceylon recognized a joint interest in the family and therefore the more correct view would have been to hold that the father was only entitled to a life-interest. This is in accord with the spirit of the Kandyan law and is further supported by the views of Sawers, Marshall and other authorities already cited. It is hoped that in an appropriate case, in the future, this decision would be reconsidered.

The interest of the Father in the property derived from the Mother

A *diga*-married father has a life-interest in the property inherited from the deceased son from and through his mother.[7] Subject to his rights, the title vests in the mother's relations,[8] but if there are

1. (1909) 12 N.L.R. p. 111
2. Armour, pp. 88-89
3. S. p. 13
4. (1903) 6 N.L.R. p. 201
5. Marshall's Judgments, p. 344, section 96
6. *Ranhotiya v. Bilinda* (1909) 12 N.L.R. p. 113
7. *Appuhamy v. Hudu Banda* (1903) 7 N.L.R. p. 242
8. S. pp. 9, 12; C.R. Matale 3069 (1877) Ramanathan Rep. p. 260

only remote relations such as, for example, the mother's grand-uncle's son,[1] the father takes the property absolutely in the absence of other children.

Despite the consensus of authorities and the general scheme of distribution in the Kandyan law, the ruling in D.C. Kandy 23620,[2] lays down a general proposition which cannot be supported. In this case, the relationship was as follows: Sarada and Pusampa were brother and sister respectively; the property in question had descended from Sarada to his daughter Rankiri, the plaintiff in the case, and thence to Belinda, the daughter by the union of Rankiri with plaintiff. On Belinda's death, her father was held entitled as against Sarada's sister's children, who were the defendants. No reasons have been given for the decision in this case, and it can be scarcely taken as any authority for any general proposition. If Pusampa was married in *dīga*, her children would be considered too remote to succeed to such property. The proposition laid down in his case, however, was followed in *Dingiri Menika et al. v. Appuhamy*.[3] In that case, a Kandyan whose parents were married in *dīga*, died intestate and issueless, leaving as survivors his father, his mother's mother and two uterine half-sisters of his mother, and the intestate estate consisted exclusively of land inherited by him from his mother who in turn had inherited the same from her father. The District Judge, Mr. J. H. de Saram, held that the intestate father was the sole heir to such property. In the Supreme Court, Wendt, J., after referring to the conflict of authorities on this matter, said:[4] "In this unsatisfactory state of the authorities, the learned District Judge whose long administration of the Kandyan law in the District Courts of Kandy and Kurunegalle, entitles him to an opinion of converted point of very great weight, has accepted the view adopted in the case in Austin.

"No decisive case distinctly negativing the father's right, which was there recognized, had been brought to our notice and I think that the judgment of the Court ought to be affirmed."

This case, therefore, did not consider the authorities on its merit but purported to follow the decision in D.C. Kandy 23620, reported in Austin's Reports,[5] and laid down the general principle that a father became the sole heir of the property which his child derived through his mother with reference to his mother's relations. It is submitted with respect, that this authority did not lay down the correct principles of Kandyan customary law. D'Oyly was not cited; the assertion of Sawers that inherited property reverts to the source from where it came was not given heed to, while a parent

1. P.A. p. 77
2. (1852) Aust. Rep. p. 155
3. (1907) 10 N.L.R. p. 114
4. at p. 117
5. (1852) Aust. Rep. p. 155

who has only a usufruct of the acquired property was completely overlooked and the ruling in C.R. Matale 3069[1] was not taken into account in laying down this general proposition which is against the fundamental principles of Kandyan law. Wendt, J., largely depended on Armour who stated:[2] "The father is entitled to inherit the lands and other property which his deceased infant child had inherited from the mother in preference to the relations of the person from whom that property had been derived to the said child's mother." This passage does not go to the extent of stating that the father inherited in preference to the mother's relations, but in preference to the relations of *the person from whom that property had been derived to the mother*. In such cases, the heir of the last person who was seized of the property must be looked for, and not the heir of the last purchaser. The illustration referred to by Armour is apparently based on the ruling in *Marassena Pusselmankanda Menik Etena v. Araamegedera Appuhamy*,[3] where the facts were set out as follows:

The property belonged to Y's first husband A, and descended to C; on C's death it devolved upon his mother Y, from whom it again descended to D, her only child by a second husband B. If D dies, the property would go to B in preference to the relations of A, the original owner. This illustration no doubt sets out the correct principle of Kandyan law. On the death of C, the property would naturally vest in the mother, since there is ample authority for the proposition that the mother inherits absolutely even the paternal *paraveni* in preference to the father's relations. On the death of Y, the property naturally descended to D, and on D's death, the father being the nearest relations, would inherit such property. Hence, it is submitted that this ruling is not only against the weight of authorities, but is also contrary to the spirit and scheme of the Kandyan customary law governing distribution of the intestate's property.

In *Chelliah et al. v. Kuttapitiye Tea & Rubber Co.*,[4] a bench of two judges consisting of Wendt, J., and Garvin, A.J., held that the weight of judicial decisions favoured the view that the father is the absolute heir of the property of his child who had inherited it from his mother, when the child died intestate and without issue, and the father's interest is not merely confined to a life-interest but was an absolute interest. Garvin, J., in arriving at this conclusion, conceded that this proposition was contrary to the true principles of Kandyan law which only gave him a life-interest in such property, but it was too late in the day to resuscitate a rule which has been

1. (1877) Ram. Rep. p. 266
2. P.A. p. 76
3. (1825) Hayley, Appendix II, note 37
4. (1932) 34 N.L.R. p. 89

laid down by the Court.[1] However, in *Bisona v. Janga et al.*,[2] the controversy was again resuscitated and it was held that the father was only entitled to a life-interest over the property of his child derived through his mother. This ruling, although justifiable on the principles of Kandyan customary law, upset a long line of decisions to the contrary. Hence, in *Appuhamy v. B. S. de Silva et al.*[3] a bench of two judges consisting of Gratiaen and Sansoni, JJ. refused to follow the earlier ruling in *Bisona v. Janga et al.*[4] and preferred to follow the ruling in *Chelliah v. Kuttapitiye Tea & Rubber Co*,[5] and held that the father took an absolute interest. Gratiaen, J., in the course of his judgment, stated that although according to the true principles of Kandyan law, the father's interest was only one for life, yet it was undesirable to disturb a long and established ruling on a question of law affecting rights of succession.[6]

1. *vide* the observations of Garvin, J. at p. 97
2. (1948) 41 C.L.W. p. 40
3. (1955) 56 N.L.R. p. 246
4. *supra*
5. *supra*
6. *vide* observations of Gratiaen, J., in (1955) 56 N.L.R. p. 247

CHAPTER XX

SUCCESSION TO MALES (4)

Mother's Rights of Succession

Daru-urume or Inheritance by virtue of maternity

If a person had survived his or her father and died without issue and without full brothers and sisters, property of every description not excepting even *paraveni* lands which he or she had derived from his or her father and paternal grandfather, would devolve on the mother, even to the exclusion of the said child's paternal grandmother, paternal uncle, paternal aunt and their issue. In such an eventuality, it does not matter whether the mother had been divorced from her husband or whether she had contracted another marriage in *dīga* after that divorce, either before or after the death of the said child's father.[1]

Hence, if a person dies without children, grandchildren, brothers or sisters, having survived his or her father, the mother is preferred to the paternal aunt even with regard to the properties which derived through the father's side.[2] She is heiress even to the *paraveni* property of the deceased husband through her children.[3]

Applying the principle that property reverts to the source from which it came, any property which the mother had gifted to the children or given by way of dowry to them, would revert to her if the children died intestate and issueless, having survived their father.[4]

With regard to *paraveni* property, the Judicial Commissioner's Court held that the mother is the heiress of her only fatherless child dying without issue, whether such property was *paraveni* property of the child's father or accrued to the child in any other way, and she succeeded to the exclusion of the child's father's family.[5] In the year 1888, this decision was followed by Lawrie, J. who held that the mother was the sole heiress to the *paraveni* lands of her child who had died unmarried and without issue, as against the father's sister, there having been no brothers or sisters of the intestate.[6]

If the deceased had left a full brother or sister, the mother had only a life-interest over the property the intestate had derived from the father's side. In *Ukkurala v. Ewonsia*,[7] Hearne, J, said:

1. P. A. p. 85
2. *Nīti*, pp. 105, 113
3. S. p. 11
4. S. p. 16
5. *Vide* citation 8 S C.C. p. 136, also Austin p. 133 Case No. 21994
6. *Punchirāla v. Dingirimenika* (1888) 8 S. C. C. p. 135
7. (1941) 43 N. L. R. p. 166

"In *Punchirala v. Dingiri Menika*, Lawrie, J., after quoting from *Niti Nighanduwa* and referring to Armour and the judgment of the Judicial Commissioner in 1824, said: 'These lay down that the mother is sole heiress to her child, who had survived his or her father, and died without issue, and left neither full brother nor full sister; but if the deceased child left a full brother or sister, that brother or sister will be entitled to the deceased's share of his or her paternal *paraveni* land in preference to the mother.' A difficulty in the way of the learned judge was a passage in Sawers's *Digest* to the effect that a mother had only a qualified life-interest in her deceased child's property. He expressed the opinion that Sawers must be taken to have been dealing with a mother's rights when her deceased child had left full brothers and sisters. Dias, A.C.J. concurred in the judgement and in *Ukkuhamy v. Bala Etana*[1] Wendt, J. said that he had no hesitation in accepting the authority of Sir Archibald Lawrie." The law must be regarded as settled on this matter.[2] In this case, the contest was between the mother and the brother of the half-blood.[3]

The Mother's interest over the acquired property

The extent of a mother's interest in the acquired property is not free from difficulty. The *Niti Nighanduwa* states that the mother will "inherit" and that the property will "devolve" on her, thereby suggesting that she had dominium over the acquired property. There is also Sawers's dictum that the mother "is the heiress to the acquired property of all kinds, and the same is entirely at her disposal". Armour impliedly states that the mother is the sole heiress and expressly states that the acquired lands devolve absolutely on the mother. These passages are unequivocal and make it clear that the nature of the interest which a mother acquires is absolute dominium. In apparent conflict with these passages, Armour's general statement that the mother has only a life-interest, has created some difficulty, but in the context, Sawers's statement must only be applied to *paraveni* property and not to acquired property.

The mother is entitled to the acquired property in preference to the father.[4] She becomes entitled to the property even when the intestate died unmarried and issueless, leaving brothers and sisters.[5]

If the deceased died intestate, leaving him surviving a mother and a widow, the mother is only entitled to the acquired property subject to the life-interest of the widow.[6] If the deceased left her surviving a mother and a husband married in *dīga*, the mother

1. (1908) 11 N. L. R. p. 226
2. *Punchirāla v. Dingiri Menika* (*supra*)
3. *Ukkurāla v. Ewonsia* (1941) 43 N. L. R. p. 166
4. *Kalu v. Kiria* (1915) 18 N. L. R. p. 465
5. *Ukkuhāmy v. Bāla Etana* (1908) 11 N. L. R. p. 226
6. *Kalu v. Lami* (1905) 11 N. L. R. p. 222

would be entitled only to the property acquired before marriage; her husband (the widower), succeeded to the property acquired during coverture.[1]

Statutory changes

The Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938 has altered the rights of the mother as follows: When a person dies on or after the presented date 1st January 1939, leaving his or her surviving parents, whether married in *binna*, or in *diga*, or the mother only, but no child or descendant of a child and no surviving spouse, then (1) the mother shall not inherit the paternal *paraveni* unless there be surviving no heir on the father's side.[2] Hence, when a person dies on or after the first of January 1939, the mother succeeds to the paternal property only in a case where there is no heir on the father's side. Where the deceased had left brothers and sisters or their descendants, the mother is only entitled to a life-interest in the acquired property. If there are no brothers and sisters or their descendants, then the mother and the father, if both are alive, would be entitled to an absolute interest in the acquired property and, in the absence of the father, the mother becomes entitled to the dominium of the acquired property.

The Buddhist Temporalities Ordinance[3] has also altered the law by enacting that all *pudgalika* property which is acquired by any individual bhikkhu or for his exclusive personal use should, if not alienated by such bhikkhu during his lifetime, be deemed to be the property of the temple to which such a bhikkhu belonged, unless such property had been inherited by such a bhikkhu.[4]

1. *Seneviratne v. Halangoda* (1922) 24 N. L. R. p. 257
2. Section 16 of Cap. 59
3. Cap. 318
4. Section 23

CHAPTER XXI

SUCCESSION TO MALES (5)

Ascendants and Collaterals, Brothers and Sisters

If a person dies intestate and issueless, his parents having predeceased him, his or her properties will devolve on the brothers and sisters of the full blood equally and on their issue *per stirpes*. In respect of the father's property, the right of inheritance of the half-blood is postponed to that of brothers and sisters of the whole blood.[1] Nephews and nieces of the whole blood (i.e. the children of a brother or sister of the whole blood) succeed before the nephews and nieces of the half-blood (i.e. children of brothers or sisters of the half-blood).[2]

The principle in Kandyan law is that the right of brothers and sisters of half-blood are always postponed to the brothers and sisters of full blood. The principle also is that property inherited by a person from the father should on his death, childless and intestate, pass to the other children of his father by the same wife.[3]

If a man dies without issue and intestate, leaving a sister married out in *dīga* and a brother, the latter would succeed to the deceased's share of the paternal *paraveni* lands to the exclusion of the *dīga*-married sister, whether such a sister has been married in *dīga* either prior or later to the father's death.[4]

A *dīga*-married sister is always precluded from inheriting the *paraveni* property of the deceased sister till she ceases to be a member of the *gedera* to which she belonged.[5] For the same reason, a woman married in *dīga*, is not entitled to inherit jointly with her *binna*-married sister or her children the property of her deceased brother which he had inherited from their common father.[6]

The sisters of the full blood, though given out in *dīga*, or their children, succeed in preference to brothers of the half-blood and their children[7] since the Kandyan law preferred the full blood to the half-blood. However, a full sister, though she was married in *dīga*, would succeed to her brother's share of the paternal *paraveni* (as well as other lands) in preference to their paternal uncle and paternal half-brother and half-sister and their issue.[8]

1. S. p. 12
2. S. p. 14
3. *Appuhamy v. The Doloswela Tea and Rubber Co.* (1921) 23 N. L. R. p. 129
4. P. A. p. 43
5. *Perera v. Setuwa* (1914) 17 N. L. R. p. 37
6. *Rammal Etana v. Heen Appu* (1917) 4 C. W. R. p. 3
7. S.p. 11; P.A. p. 44; *Nīti*, pp. 99-100
8. P. A. p. 45

Failing a brother or sister of the full blood, the deceased's paternal *paraveni* land devolves on his or her paternal half-brother or paternal half-sister in preference to his or her paternal aunt and her issue.[1] As among brothers and sisters of the half-blood, they succeed to the paternal *paraveni per stirpes* and not *per capita*. Therefore, when a person dies leaving two sets of half-brothers, each set would be entitled to a half-share of the estate.[2]

The Kandyan Law Declaration and Amendment Act, No. 39 of 1938 has amended the law by enacting that where a person dies on or after the 1st of January 1939, his heirs, who in relation to one another are of the half-blood, should inherit *per capita*.[3]

Paternal Grandfather and Grandmother

When a person dies intestate and issueless and without a father, mother, brothers and sisters surviving, then the general rule is that in default of issue of collateral relatives, the paternal grandfather succeeds to the property of the deceased person as he would be the nearest ascendant.[4] If only a paternal grandmother had survived in the above eventuality, then the principle that when the line of descent is broken the property goes to the nearest heir would operate, and therefore the paternal grandmother would become entitled to such property.

Paternal Uncles

The right of inheritance of uterine children of the half-blood is postponed to that of paternal uncles and aunts and their issue except to that of the mother.[5] The principle of forfeiture created by a *dīga*-marriage does not extend beyond the father's estate on the ground that unless there is a clear law to the contrary forfeiture should not be worked out.[6] Hence, cousins (paternal uncle's daughters) married out in *dīga* are not disqualified from inheriting merely because of their *dīga*-marriage. Thus, where a person dies leaving as his next of kin the children of his father's brother, namely two sons and three daughters married in *dīga*, all the children become entitled to the *paraveni* property of the deceased.[7]

Failing paternal uncles and their issue, the property would pass to paternal aunts and their issue *per stirpes*; failing heirs on the father's side, the property would devolve on the next of kin on the mother's side.

The Kandyan Law Amendment Act,[8] however, enacted that brothers and sisters *inter se* should inherit as sons and daughters.

1. P. A. p. 43
2. *Silinduhamy v. Mohottihāmy* (1911) 14 N. L. R. p. 85
3. Section 17 of Cap. 59
4. *Dingiri Banda v. Meddun a Banda* (1914) 17 N. L. R. p. 201
5. S. p. 9
6. *Kiriwante v. Ganatirāla* (1896) 2 N. L. R. p. 92
7. *Kiribanda v Dingiri Banda* (1939) 41 N. L. R. p. 2
8. No. 39 of 1938

When a person dies intestate on or after the 1st of January 1939, leaving heirs other than a child or descendant of a child, and if the relationship among such heirs *inter se* should be brothers and sisters of their descendants, such heirs inherit *inter se* in the like manner as they would have done had they been the children of descendants of the deceased intestate.[1]

Maternal paraveni

Under the old law, 'maternal *paraveni*' meant ancestral property which a person had inherited from his or her maternal ancestors. This definition would naturally apply to all estates of person who died before the 1st of January 1939. But the Kandyan Law Amendment Act[2] defines *paraveni* property as follows : "The expressions '*paraveni* property' or 'ancestral property' and equivalent expressions shall mean immovable property to which a deceased person was entitled (1) by succession to any other person who has died intestate or (2) under a deed of gift executed by a donor to whose estate or a share thereof, the deceased would have been entitled to succeed if the donor had died intestate immediately prior to the execution of the deed, or (3) under the last will of a testator to whose estate or share thereof the deceased would have been entitled to succeed had the testator died intestate."

1. Section 17
2. *supra*

CHAPTER XXII

SUCCESSION TO MALES (6)

Acquired Property

Regarding succession to acquired property, a student of Kandyan law is confronted with many difficulties. He has to steer a clear course through sandbanks and shoals. Sawers's statements facilitate the preparation of three different sets of tables which are however inconsistent with one another when one deals with succession to certain remote relations. Sawers states:[1] "A person dying childless, having parents and brothers and sisters, the property, which the deceased may have had from his or her parents, reverts to them reciprocally (if from the father, to the father; if from the mother, to the mother), as does his acquired property whether land, cattle or goods, to his parents. But his parents have only the usufruct of this acquired property, they cannot dispose of it by sale, gift or bequest; it must devolve on the brothers and sisters, the latter having only the same degree of interest in their deceased brothers' acquired property, that they have in their deceased parents' estate; ultimately it is divided among the brothers of the whole blood of the deceased equally, or their sons, according to what would have been their father's share. But failing brother's sons, it goes to the sisters of the whole blood or their sons; and failing them, to the brothers of the half-blood, uterine and their children, and failing brothers and sisters of their half-blood, uterine and their relations, the property goes to the brothers of the half-blood by the father's side and their children; next to the half-blood by the father's side and their children, and failing them, to his mother's sister; next to cousins called brothers and sisters on the mother's side, that is to say, the mother's sisters' children; and failing them, to the mother's brothers and their children; and failing them to the father's brothers and their children; and failing them to the father's sisters and their children."

Later Sawers states:[2]

"An unmarried daughter acquiring property and dying intestate, her property goes to her mother; failing the mother, to the father; and failing the father, to her brothers and sisters of the whole blood,—if there be but one such brother and the whole goes to him, if there are several brothers they shall share equally, failing brothers and sisters of the whole blood, to the brothers and sisters uterine of the half-blood; and failing them to the brothers and sisters of the half-blood by the father's side; and failing them to the maternal uncle; failing him to the maternal aunt; and failing the maternal

1. S. p. 12
2. S. p. 17

aunt, to the maternal grandmother; failing her, to the maternal grandfather; failing him, to the paternal uncle; and failing him to the paternal aunt; failing the paternal aunt, to the paternal grandfather; and failing him, to the paternal grandmother; failing the paternal grandmother, to the maternal uncle's sons and daughters and failing them to the maternal aunt's sons and daughters or grandsons and granddaughters; and failing them to the paternal uncle's sons and daughters, or grandsons and granddaughters; and failing them to the paternal aunt's sons and daughters or grandsons and granddaughters."

In his note Sawers adds: "This is the opinion of the 1st Adigar, Dooleywe Dessave, Dehigama Senior Diwen Nileme and Dodantele, chief of lower Bulatgama; but Mullegama Dessave Asmadaley Basnaike N.leme and Madugalle Senior late Gajenaike Nileme, are of opinion that brothers and sisters of the whole blood should share equally their deceased sister's property and the same should be the case with half-brothers and sisters uterine and half-brothers and sisters on the father's side—in short that the sexes related in an equal degree, should share equally. The chiefs now all concur in this opinion, that the sexes share equally up to paternal uncles and aunts. Child dying intestate, acquired property goes:—

(1) To the mother; (2) father; (3) brothers and sisters of the whole blood; (4) brothers and sisters uterine of the half-blood; (5) maternal grandmother; (6) maternal grandfather; (7) maternal uncles and aunts; (8) paternal grandmother; (9) paternal grandfather; (10) half-brothers and sisters by the father's side; (11) paternal uncles and aunts; (12) maternal aunt's children; (13) maternal uncle's children; (14) paternal uncle's children; (15) paternal aunt's children."

Hayley's Table III is based on this note.

Hayley's Table IV is based on D'Oyly's note which is as follows:[1]

"If a man die unmarried and without Parents or Children leaving a Father's Brother, or Sister—or Brother's or Sister's Son—Also a Mother's Brother or Sister, or their Children, his own property—his paternal to the paternal Relations, his Maternal to the Maternal.

His Maternal Grand Mother, and after that his Maternal Grandfather—failing the Maternal Grandfather, the paternal Grandmother, and failing his paternal Grandfather—Maternal Aunts and Maternal Uncles—failing them to the paternal Uncles and after them to the paternal Aunts and failing them to the Maternal Aunt's children, failing them the Maternal uncle's children, and failing them the paternal Uncle's children and failing them the paternal Aunt's children—failing them the Maternal Uncle's grandchildren,

1. D'Oyly's *Sketch of the Constitution of the Kandyan Kingdom of Ceylon* 1929 Ed.) pp. 104, 105

and failing them to the paternal Aunt's grandchildren and in all the above cases where there is more than one relation on the same degree of propinquity they are to share alike."

Tables prepared from the three passages found in Sawers and also in a passage found in D'Oyly,[1] are set out below :—

Acquired Property of every kind

I

1. Parents (usufruct only)
2. Brothers or their sons
3. Sisters or their sons
4. Half-brothers, uterine and children
5. Half-sisters, uterine and children
6. Half-brothers by father's side and children
7. Half-sisters by father's side and children
8. Mother's sisters
9. Father's sisters and children
10. Mother's brothers and children
11. Father's brothers and children
12. Father's sisters and children

II

1. Mother
2. Father
3. Brothers and sisters
4. Half-brothers and half-sisters, uterine
5. Half-brothers and half-sisters, by father's side
6. Mother's brother
7. Mother's sister
8. Maternal grandmother
9. Maternal grandfather
10. Father's brother
11. Father's sister
12. Paternal grandfather
13. Paternal grandmother
14. Mother's brother's children
15. Mother's sister's children or grandchildren
16. Father's brother's children or grandchildren
17. Father's sister's children or grandchildren

III

1. Mother
2. Father
3. Brothers and sisters
4. Half-brothers and half-sisters, uterine
5. Maternal grandmother

1. D. p. 12

6. Maternal grandfather
7. Mother's brothers and sisters
8. Paternal grandmother
9. Paternal grandfather
10. Half-brothers and half-sisters, by father's side
11. Father's brothers and sisters
12. Mother's sister's children
13. Mother's brother's children
14. Father's brother's children
15. Father's sister's children

IV

1. Maternal grandmother
2. Maternal grandfather
3. Paternal grandmother
4. Paternal grandfather
5. Mother's sisters and mother's brothers
6. Father's brothers
7. Father's sisters
8. Mother's sister's children
9. Mother's brother's children
10. Father's brother's children
11. Father's sister's children
12. Mother's sister's grandchildren
13. Mother's brother's grandchildren
14. Father's brother's grandchildren
15. Father's sister's grandchildren

These tables cannot be reconciled with one another. Table III appears to be an amendment of Table II and it represents the succession of a child whose sex is not known. Dr. Hayley has made an attempt to prepare a Table of succession by scrutinizing the above Tables in the light of principles of Kandyan law.[1] In his attempt to prepare the Table, he sets out the main points on which these Tables are at variance as follows:

(1) whether the mother's sister or the mother's brother is to be preferred;

(2) whether or not cousins represent their deceased parents or postpone their interests until the death of all their uncles and aunts;

(3) whether remoter ascendants are preferred to those less remote;

(4) whether the grandfather is postponed to the grandmother or vice versa.

Succession by mother's sisters or brothers

Table I shows that the mother's sisters are preferred to the mother's brothers. Table IV mentions the sisters first although it refers

1. *Vide* discussion in Hayley, pp. 433-438

to both the brother and sisters. Table III places them on a footing of equality. But in Tables III and IV the mother's sisters' children are preferred to the mother's brothers' children. Table II no doubt prefers the mother's brother. But since the revised edition of Table II is Table III, one must look at Table III as conclusive. After an examination of these tables, Hayley states:[1] "Keeping in view the fact that the father's brother is, except in Table III which places him on equality, everywhere preferred to the father's sister, there can be little doubt that the order of succession between uncles and aunts, was that which is indicated by the system of nomenclature and relationships which we have previously examined. It seems clear that the mother's sisters who were 'little mothers' and their children, who were 'brothers' and 'sisters', were preferred to the mother's brothers who were 'uncles' and their issue who were cousins to the deceased; the corresponding rule being observed on the father's side of the house." Sawers supports this view.[2] It is clear therefore that sisters' children and brothers' children who are regarded as brothers and sisters in customary law were considered to be closer to the deceased than the children of her brothers and sisters who were cousins. The closeness of kinship between the two brothers' children or sisters' children is common both in Sinhalese and Tamil customary law. It is reminiscent of a period in the evolution of the history of both these races that group marriages might have existed where brothers of one family marry the sisters of another family so that the mother's children and her sisters' children were really brothers and sisters.

Representations of uncles and aunts by their children

An examination of Tables II, III and IV shows that on the face of them each successive generation is postponed to the preceding one. Hayley theorizes that it is likely that all members of the family became entitled in the same way as the property of the Mukkuwas of Batticaloa passed to the mother's *kudi*. Therefore the principle was evolved that each successive generation was postponed to the preceding one. On this matter Sawers's first Table is considered to be correct, and the other three giving the order among cousins must be taken to refer to cases where there are no uncles or aunts and does not prevent the children of a deceased uncle or aunt from claiming their parent's share by representation.

The principle is that the child of an uncle or an aunt takes by representation the share that would have devolved on his parents. This is supported by institutional authorities. The *Nīti Nighanduwa* states that the father's sister and the son of a father's deceased sister share equally.[3] It could therefore be regarded as settled law that in respect of each grade of uncles and aunts the children

1. Hayley, p. 434
2. S. p. 13
3. *Nīti*, p. 102

represent their parents.[1] The further question arises whether or not the descendants of the mother's sisters must be exhausted before the mother's brothers and their issue are admitted. For example, if there are no mother's sisters living, the children of such sisters take precedence over the mother's brothers as in Table I, or are postponed to them as in Tables III and IV. Hayley states that there is nothing to enable us to decide this question other than the general principles discussed, and if the mother's sister in the classified system of relationship is to be regarded as the mother, then the mother's sisters' children become the brothers and sisters and therefore would be closer to the deceased than an uncle.[2] For this reason he states that the rights of uncles will be postponed to the right of the mother's children to the inheritance of the deceased.

By analogy from the rule which applies in the case of brothers, nephews and nieces, Hayley states that we may assume that in each grade when one of the earlier generations survive, the distribution is *per stirpes*; but when there are only cousins, they succeed *inter se per capita*.

Grandparents and remote ascendants

In the order of succession found in Table I there is no reference to grandparents. But Table II mentions them and they succeed after the aunts and uncles on their respective sides. But Tables III and IV give them preference. Since later Kandyan customary law reflected the patriarchal pattern of society, it may be assumed that in the case of the paternal grandfather the family would give him preference as the eldest male the control of the property with reference to his own children. But the question may be asked whether the grandmother on the mother's side was similarly entitled to it. Hayley states that it is impossible to state, with certainty, but the probabilities are in favour of such precedence so that with reference to the uncles and aunts the position would be that stated in Table III which follows the order in which guardians are appointed.[3] Between the grandmother and the grandfather on the maternal side it is most likely that the grandmother was preferred while the paternal grandfather took priority over the paternal grandmother as stated in Table II. When there are no grandparents their descendants of the whole blood and his uncles and aunts must be exhausted before the grandparent's collaterals are admitted. This principle is deducible from an example given by the *Nīti Nighanduwa*.[4]

The question arises whether the distinction between a woman's sister's son and the brother's son is recognized in the remoter degree, but from the examples given in the *Nīti Nighanduwa*, they appear

1. Hayley, p. 435
2. Hayley, p. 436
3. Hayley, p. 437; and S. p. 22 for the order in which guardians are appointed
4. *Nīti*, p. 104

to share equally.[1] Therefore the points in dispute that arise as a result of the discrepancies found in Tables I to IV regarding the order of precedence of succession are determined by Hayley as follows: (1) Maternal grandmother; (2) Maternal grandfather; (3) Mother's sisters, the children of the deceased's sisters representing them *per stirpes*; (4) The mother's sisters' children *per capita*; (5) The mother's brothers, the children of the deceased brothers representing them *per stirpes*; (6) Mother's brothers' children *per capita*; (7) Paternal grandfather; (8) Paternal grandmother; (9) Father's brothers, the children of deceased's brothers representing them *per stirpes*; (10) Father's brothers' children *per capita*; (11) Father's sisters, the children of deceased's sisters representing them *per stirpes*; (12) Father's sisters' children *per capita*.[2]

Hayley adds, in a note, that the mother's remoter relations take after Class 6, but it is a matter of doubt whether they are preferred to Classes 7 to 12. But the father's remoter relations take the inheritance after Class 12.

According to Sawers, when only Classes 4 and 10 survive, they share equally.[3]

The Table prepared by Hayley is almost the same as that prepared by Modder, with slight modifications however.[4] Modder's Table may be set out as follows:

(1) Mother
(2) Father
(3) Brothers of the full blood and their issue
(4) Sisters of the full blood and their issue
(5) Brothers of the half-blood, uterine and their issue
(6) Sisters of the half-blood, uterine and their issue
(7) Brothers of the half-blood on the father's side, and their issue
(8) Sisters of the half-blood on the father's side, and their issue
(9) Maternal grandmother
(10) Maternal grandfather
(11) Paternal grandfather
(12) Paternal grandmother
(13) Maternal aunts and their issue
(14) Maternal uncles and their issue
(15) Paternal uncles and their issue
(16) Paternal aunts and their issue

In Modder's classification, Texts 1 & 2 are from the Table compiled from Sawers. Texts 3 to 8 are from Table No. I of Sawers; Texts 9 to 16 are from Table No. III, though it is not in the same order as it is given there.[5]

1. *Niti*, pp. 104, 115
2. Hayley, pp. 438–439
3. Report of the Kandyan Law Commission, paras 222 and 223
4. Modder, p. 608
5. ibid.

CHAPTER XXIII

CASE LAW AND STATUTORY MODIFICATIONS

So far we have considered the various Tables which dealt with the order of succession to acquired property. Conflicts arising out of these Tables were considered and certain rules enunciated. We shall now consider the case law on this aspect and also the statutory modifications brought about by the Kandyan Law Declaration and Amendment Ordinance so far as acquired property is concerned.

In *Mudalihamy v. Bandirala*,[1] Bonser, C.J. and Lawrie, J. were of the view that Table I applied to acquired property. In *Dingiri Banda v. Kiri Banda*,[2] Lascelles, C.J. observed that the latter part of the passage following the words "ultimately" as set out in Sawers, applies to *paraveni* and not to acquired property. He held that Table III should be followed and that it had received the unanimous approval of the chiefs and had been adopted by Sawers himself.[3]

The right of succession of a Widow to acquired property

The right of succession of a widow to the acquired property has already been discussed. If the deceased left neither parents nor full brothers, nor sisters nor their issue or descendants, the widow was entitled to the dominium of the acquired property. She had preference to the acquired property over the half-brother.[3] An *ewessa* cousin was in great favour in Kandyan law. If a widow happened to be an *ewessa* cousin, she succeeded to the acquired property in preference even to the sister's daughter. She inherited the property next to full brothers.

Ordinance, No. 39 of 1938, has altered the law on this matter. It enacts that when a man dies intestate on or after the 1st of January 1939, the surviving widow shall succeed to all his property both *paraveni* and acquired in the event of the deceased leaving no other heir.[4] Her right to a life-interest over the acquired property is not affected by this amendment.

The binna-married Widower

As stated earlier, the *binna*-married widower is not entitled to any interest even in the property acquired by his spouse during coverture, but a *dīga*-married widower has a life-interest over the same, if there were no children. Where the deceased had left no children by him, he is entitled to an absolute interest in the property acquired during such coverture.

1. (1898) 3 N. L. R. p. 209
2. (1911) 14 N. L. R. p. 510
3. ibid. at p 512
4. Section 11

The Kandyan Law Amendment Ordinance, No. 39 of 1938, has made no change in the rights of the *dīga*-married widower.

The Mother

The mother is placed first in the order of succession to the acquired property of a person. When he or she dies intestate without issue, his or her acquired property devolves on his or her mother in preference to his or her brothers and sisters.[1] She was entitled to the acquired property in preference to the father.[2]

If the deceased had left a surviving widow, the mother would be entitled to the acquired property subject to a life-interest in favour of the widow.[3] If the deceased had left behind her a surviving husband married in *dīga*, then the mother will be entitled to property acquired before marriage, but the husband succeeds to the property acquired during coverture.[4]

The Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938, has changed the law and enacts that when a person dies intestate on or after the 1st of January 1939, the mother (and father) will be entitled to a life-interest in the acquired property. If there be no brother or sister or a descendant of the deceased brother or sister, then the mother and father, in equal shares, or, if the father be dead, then, the mother alone, shall become entitled absolutely to such property.[5]

The Father

The father comes next in order of succession; if the mother was dead prior to the death of her child, then the father got an absolute interest in the acquired property of his child to the exclusion of the deceased's brother,[6] but if the deceased's widow was surviving, then the father would be entitled to such property, subject to a life-interest in favour of the widow.[7]

If the deceased was a woman who had left behind her a *dīga*-married husband, then the father would be entitled to the property acquired before marriage and the husband succeeded to the property acquired during coverture.[8]

Ordinance No. 39 of 1938 changed the law on this subject and enacted that when a person dies intestate on or after the 1st of January, 1939, the father and the mother would be entitled to a life-interest in the acquired property. If there be no brother or

1. *Ukkuhamy v. Bala Etana* (1908) 11 N. L. R. p. 226
2. *Kalu v. Kiria* (1915) 18 N. L. R. p. 465
3. *Kalu v. Lami* (1905) 11 N. L. R. p. 222
4. *Seneviratne v. Halangoda* (1922) 24 N. L. R. p. 257
5. Section 16 (c)
6. *Ranhotia v. Bilinda* (1909) 12 N. L. R. p. 111
7. *Kalu v. Lami* (*supra*)
8. *Seneviratne v. Halangoda* (*supra*)

sister, or descendant of a deceased brother or sister, then the father and mother in equal shares, or if the mother be dead, then the father alone would become entitled absolutely to such property.[1]

Brothers of the full blood and their issue

Under Table III, both full brothers as well as full sisters are entitled to succeed in the third step. Under Table I, Sawers expressly prefers males to females in the same degree. Hence, brothers will be preferred to sisters and half-brothers will be preferred to half-sisters etc., if this Table is adopted.

The rule as to exclusion of sisters when there were brothers or the exclusion of nieces when there were nephews, is supported by Armour.[2]

The institutional writers have not set out definite rules governing succession to acquired property and the customary law appears to have preferred maternal over the paternal line and to prefer males before females in the same degree.[3] A widow who is an *ewessa* cousin, comes next to full brothers. Sawers lays down the rule of succession as follows:[4] "If the barren widow is the husband's paternal aunt's daughter or the maternal uncle's daughter, she inherits next to full brothers, the acquired lands." A widow who was an *ewessa* cousin of the deceased, was therefore entitled to succeed to the acquired property in preference to the sister's daughter.[5]

Ordinance No. 39 of 1938 corrected this anomaly and enacts that when a person dies on or after the 1st of January 1939, the surviving widow succeeds to the acquired property only in case the deceased left no other surviving heir.

Sisters of the full blood and their issue *per stirpes* come next in order of succession. As stated earlier, males were preferred to females, but in cases where persons died on or after the 1st January 1939, this distinction has been removed. Both brothers and sisters of the full blood succeed to the estate.

The widow comes next to full brothers and sisters. If the deceased left no issue and has survived his parents and his full brothers and sisters and their children, then the widow has an absolute right (*lat himi*) to the lands of the deceased, which he owned by right of acquisition.[7] The widow therefore, was entitled to be preferred to the half-brother to succeed to such property.[8] The widow would

1. Section 16
3. P. A. p. 46
3. Modder, p. 618
4. S. p. 24
5. *Kirimenika v. Ran Menikā* (1916) 19 N. L. R. p. 221
6. Section 11
7. P. A. p. 23
8. *Sangi v. Mohotti* (1903) 6 N. L. R. p. 201

also be entitled to an absolute right to the acquired property of a person dying intestate on or after the 1st of January 1939 only in case where the deceased had left behind no other heirs.

All the above members failing, the uterine brothers of half-blood share the inheritance equally next. If any one of them should die, then their issue took it *per stirpes*. The uterine half-brothers were entitled to the acquired property to the exclusion of the uterine half-sisters.[1]

The above-mentioned failing, brothers of the half-blood on the father's side shared the inheritance equally and their issue took the inheritance *per stirpes*. Failing the above, sisters of the half-blood on the father's side took the inheritance equally, their issue succeeding by representation. In *Dingiri Banda v. Kiri Banda*,[2] Lascelles, C.J., observed: "Mr. Modder has adopted Table No. 3 without qualification as to be the authority regulating the devolution of the acquired property of a child dying intestate. The plaintiff relies on the rules of descent given in Table No. I, according to which property devolves on brothers and sisters of the father's half-blood, in priority to maternal uncles. It is true that the rules have sometimes been regarded as applicable to acquired property. But this construction warrants serious difficulties. For it can hardly be supposed that Sawers should, without any explanation, or comment, have given two different irreconcilable sets of rules for the devolution of acquired property. I am inclined to think that the latter part of the Passage in Table 3, namely the part following the word ultimately... applies to *paraveni* and not to acquired property."

Following Table III, Lascelles, C.J., held that the maternal uncles was entitled to the acquired property in preference to the paternal half-brother of the intestate.

The above-mentioned failing, the order of succession would be maternal grandmother, maternal grandfather, paternal grandfather and paternal grandmother. These four lines of succession are taken into Modder's Table from Table No. III which sets out the order of succession as follows: Maternal grandmother, maternal grandfather, paternal uncles and aunts and their issue, and then paternal grandmother. Maternal uncles and aunts rank before paternal grandmother, and a paternal grandfather is placed in Mr. Modder's Table after the maternal grandfather and paternal grandmother. These steps in succession, however, are not given in Table No. I.

The general rule, therefore, may be stated that in the absence of issue or collateral relatives entitled to succeed, the property of a deceased man devolves on the nearest ascendant.

1. *Dingiri Menika v. Appuhamy* (1900) 6 N. L. R. p. 133
2. (1911) 14 N. L. R. p. 510

Next in the Tables come paternal aunts who share the inheritance equally, and their issue took it *per stirpes*. Failing them, the maternal uncles shared the inheritance equally and their issue took by representation.

In Table I, it would be noted that after sisters of the half-blood on the father's side, maternal aunts and their children, maternal uncles and their children are said to succeed. In Table III maternal uncles and aunts together rank after the maternal grandfather but before the paternal grandfather, paternal grandmother and half-brothers and sisters on the father's side. Thus, maternal uncles were given preference to the acquired property over the half-brother on the father's side. In Kandyan society, the maternal uncle played a very important part and therefore this rule of succession must be expected. Failing maternal uncles and aunts, paternal uncles succeeded to the property—their issue taking by representation. Failing paternal uncles, the paternal aunts share the inheritance equally.

The Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938, which came into operation after 1st of January 1939, removed any distinction between males and females regarding succession.

CHAPTER XXIV

SUCCESSION TO MALES (7)

Special Cases

The Wife's Relations

Where a person dies intestate without any surviving relations, the question arises whether the deceased's wife's relations are entitled to the property without such property escheating to the Crown. On this matter there is no definite material except the rule that a *binna*-married husband who does not leave his deceased wife's premises is succeeded by the parents-in-law so far as property acquired during the marriage is concerned, in preference to his cousins and half-brothers and distant kin.[1]

Since a *binna*-married husband is in a peculiar position, this rule may be explained. From this, Hayley concludes that even in the case of a *diga*-marriage it is improbable that the parents-in-law and their family are in the last resort entitled to succeed. This conclusion is not however warranted.

The half-blood

The Kandyan law preferred the full blood to the half-blood. The general rule is that the half-blood was postponed to those of equal degree of the whole blood. Therefore brothers and sisters of the whole blood are preferred to the brothers and sisters of the half-blood and their children.[2] A sister married in *diga* would succeed before a half-brother or half-sister.[3]

The nephews and nieces of the whole blood are preferred to those of the half-blood and to a half-brother or half-sister.[4]

Although a relation of the half-blood is postponed to the whole blood of equal degree and the descendant of the latter, according to the general rules of representation he is entitled to succeed in preference to remoter heirs.[5]

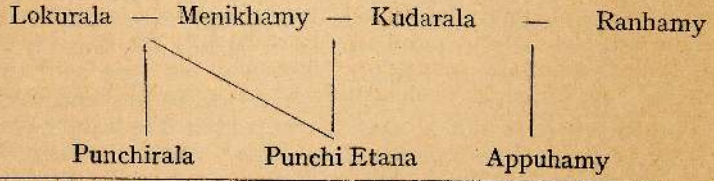
In dealing with paternal *paraveni* property it should be noted that the general tendency of the law is to keep this kind of property in the family. Therefore the claim of the family would override that of the half-blood uterine, and the deceased's uncles and aunts on his father's side take priority over uterine half-brothers and half-sisters. This principle is clear from an example given by Sawers.[6]

1. *Niti*, p. 104; P. A. p. 31
2. S. pp. 9, 10; P. A. pp. 42–44, 47
3. S. p. 11; P. A. p. 44; *Niti*, pp. 99, 100
4. S. p. 10; D. C. Seven Korale 971 (1836) Morgan's *Digest*, p. 101; *Kalugampola Punchyralle v. Midin Bawa and Kapuralle* (1829) Hayley, App. II, Note 40
5. Hayley p. 440. For the ruling in *Dingiri Banda v. Kiri Banda* (1911) 14 N. L. R. p. 510 which was to the contrary, it was held that the maternal uncle was to be preferred to a half-brother on the paternal side
6. S. pp. 9–10

Armour does not definitely postulate this rule but states that if the mother dies after coming into possession of a deceased child's estate, her issue by another husband would succeed through her, in preference to the deceased child's paternal relations.[1] From this, it may be inferred by implication that those relations would take priority if the mother had pre-deceased her child. When there are relations of the half-blood on both sides of the same degree, the rule that inherited property reverts to the source from which it was derived prevails, so that paternal property devolves upon paternal brothers and sisters to the exclusion of the half-blood uterine.[2]

In dealing with succession to acquired property, all the conflicting Tables agree in preferring the maternal relations to the paternal and in particular the half-brothers and half-sisters uterine to those of the father's side.[3]

The Dehigama Diwen Nilame was of opinion that this rule applied even to paternal *paraveni*.[4] This rule may be traceable to a period when polyandry was common. An associated husband may have a family of his own by marrying another woman. In such a case, a separate family was a distinct entity but the children of the common wife have probably little to do with them. The children of the common wife were full brothers and sisters and inherited from each other. Therefore, when the two husbands were successive instead of being contemporaneous, motherhood was still regarded as an important factor and little distinction was made so that even in the case of *paraveni* property the children were preferred to the paternal relations. But later when agnatic succession gained importance the necessity to keep landed property in the family influenced concepts known to the matriarchal family. Different rules were adopted in the case of *paraveni* in the course of time. But no such alteration was necessary in the case of acquired property. Therefore the old usage may have continued to be in force.[5] An example given by *Nīti Nighanduwa* illustrates how notions attributable to associated marriages survived even when such marriages ceased to exist :



1. P. A. p. 88
2. S. pp. 12–13; P. A. p. 89; *Nīti*, p. 103
3. Hayley, Appendix I, p. 14; *Nīti*, p. 75
4. Hayley, p. 442

In the above illustration Punchirala is the son of Lokurala and Menikhamy. Punchi Etana is the daughter of both Lokurala and Kudarala who was the associated husband with his brother of Menikhamy. Appuhamy is the son of Kudarala by a separate marriage with Ranhamy. The *Nīti Nighanduwa* states that on the death of Kudarala, these lands will be inherited by Punchi Etana and Appuhamy. If Punchi Etana contracts a *dīga*-marriage her share of inheritance would devolve only on Punchirala's brother by the associate marriage, and the other brother Appuhamy will not obtain it. But under the modern rule of succession, Punchi Etana being the only child of Kudarala's first marriage does not relinquish her share on going away in *dīga*.

Preference among full brothers and sisters and half-brothers and sisters

Among themselves, the full brothers and sisters inherit from half-brothers according to the usual rule of distribution. The sisters married in *dīga* are excluded by their brothers and sisters who are not so married.[1] When there are two sets of half-brothers and half-sisters by different marriages, the division is *per stirpes*, each set of half-brothers and sisters taking a moiety state. This view was arrived at in *Silinduhamy v. Mohottihamy*.[2] The court followed the analogy of inheritance from the father as set out by the decisions of the Supreme Court.

Associated marriages

In early Kandyan society associated marriages were frequent. The effect of an associated marriage on the succession to property in the case of intestacy becomes more complicated when the associated husbands also had polygamous unions. The rules governing these matters can be reduced to a few simple ones.

The children of an associated marriage are regarded as children of all husbands equally, because it would not be certain as to who the father of the child was. It is based on the irrebuttable presumption of joint paternity.[3] In dealing with inheritance, each husband is regarded in turn as the sole father on whose death the children succeed in precisely the same manner as the issue of any other union. Each husband is regarded as having contracted a separate marriage with a common wife. Therefore, when he dies his share is first determined and then the children succeed to his share as if there was only one marriage. But where an associated husband having a common wife also took a separate wife and he dies leaving children by both marriages, complications arise.[4] When an associated husband who has not contracted a separate marriage dies, the children could ask for the separation of the estate.

1. *Dinigri Menika v. Appuhamy* (1900) 6 N. L. R. p. 133
2. (1911) 14 N. L. R. p. 85
3. *Nīti*, p. 71
4. *Nīti*, pp. 57–58, 60, 85–88; P. A. pp. 74–75; D. pp. 311, 321–322

Where two brothers by a joint wife have two sons and one of the brothers dies and the surviving brother has by the same wife a daughter who is married in *binna*, the two sons inherit the whole of the first deceased father's share of the joint estate and two thirds of the other father's estate, the remaining one-third devolves to the daughter.[1] In this illustration the two sons inherited the half-share of the father who died first. When the other associated father died, there were three children to share his inheritance. The general rule stated is clearly illustrated and when the first brother died the children by associate marriage took his half-share of the joint estate. But by the time the second brother died he had added a *binna*-married daughter to a number of descendants and therefore his share is divided into three.

Another illustration given in *Niti Nighanduwa* illustrates the general rule: Lokurala, Weruwarala and Kudarala had a joint wife and had A, B and C as the children of the union. Kudarala also married a separate wife and had a child D by that union; he also contracted another marriage and had a child E by that union. The property was possessed in common until the death of all the three husbands. On their death it was divided—Lokurala's share and Weruwarala's share devolved upon A, B and C equally. Of Kudarala's share A, B and C took one-third between them and D and E took a third each. An example given by Sir John D'Oyly also illustrates the same general rule. He says:[2] "If a woman bore a son to two brothers and one of the brothers afterwards married another woman and had a son and died, his property was equally divided between the son of the other marriage and his own son. The whole of the property of the other brother goes to the son of the other marriage who thus inherits 3/4th of the joint property of the two brothers." When there is in existence both a joint and separate family, the division is modified to the extent that when marriages are successive the whole of the property acquired during each marriage goes to the issue of that marriage exclusively.[3] Hayley states that this rule is peculiar to the case of associate marriage for the general application appears to be doubtful. Where the *diga*-married daughter appears to be a child of an associate marriage, and if the interest had already vested, the surviving father cannot by giving her away in *diga* deprive her of the share which he derived from the previous deceased father's estate. So long as the children of the deceased brother consent to the other associated father remaining in possession of the property, there will be no division. In this sense it is true to say that the surviving associate is spoken of as inheriting the deceased's joint estate in common with the child of a previous marriage.[4] But

1. P. A. p. 74
2. D. p. 311
3. S. p. 6
4. *Niti*, pp. 58, 62

as Hayley points out, the word inheritance is not accurate. The surviving associate claims his share by right of survivorship rather than by succession.[1]

The Widow

"The general principle is that on the death of an associated husband, his estate is administered as if his marriage had been entirely separate. It is carried to its logical conclusion in the case of a joint wife," says Hayley.[2] So far as the estate of the deceased is concerned, she is regarded as a widow and is therefore entitled to her rights in that estate. Turnour states:[3] "A woman being married to several brothers and one of the husbands dying, acquires all the rights before-defined of a widow, to the said husband's portion of the estate."

The Associated Husband

When there are no children, or children by a separate marriage, an associate marriage has the most marked effect upon the devolution of the estate. Since the property is held jointly the associate husband had a particular interest in it which is recognized by the law. He was preferred to other heirs equally distant in degree from the deceased and sometimes even to nearer relations. As between brothers and sisters the brother associated in marriage was preferred to the other.[4]

An associated half-brother excludes full brothers,[5] but an associated cousin does not exclude them,[6] except as regards property acquired during joint marriage otherwise than by gift or inheritance from parents, brothers or sisters or any member of the family. Even a stranger associated in marriage succeeded to the acquired property independently.[7] However the rights of an associated husband depended upon the continuance of the joint connection up to the time of the death of one. If the marriage is dissolved previously, rights dependent upon it ceased to have any effect.[8] Where there is no issue by a joint marriage and one of the husbands died leaving descendants by a former separate marriage, property acquired during the association devolved upon the husband in preference to the issue of the separate connection.[9] Hayley

1. Hayley, p. 446
2. Hayley, pp. 447–448
3. Turnour's Memorandum, D. p. 321; *Dahanekge Tikiri Etana v. Kudagama Muhandiran and his brother* (1828) Hayley, Appendix II, Note 24
4. S. pp. 5, 6; *Nīti*, p. 83; *Dingiri Etana v. Kooda Ukkurala*, (1821) Hayley, Appendix II, Note 25
5. S. p. 10
6. *Nīti*, p. 85
7. S. p. 6
8. Cases cited in Hayley, App. II, note 25
9. S. p. 6

doubts whether Sawers is correct in stating the rule in such wide terms. He states that it is more probable that lands acquired during the association were looked upon as common property of the associates so that when one of them died, the other may take his share by virtue of its ownership remaining after passing to the deceased's separate children. This view is supported by Armour who states[1] that if a man had divorced his wife and afterwards had shared his brother's wife, in the event of that man dying intestate, his *paraveni* lands and other lands belonging to him prior to the divorce devolved on his issue by the divorced wife, but the lands which they acquired during the period of association with his brother's family, will be divided into two equal shares between his children and those of his brother. The *Niti Nighanduwa* also furnishes another illustration in support of this view.[2] Where Lokurala had married earlier and had a child X and later joined as an associated husband Kudarala, another woman, and when Lokurala died, his ancestral lands and the lands acquired by him before the marriage will be inherited by X but the lands acquired after the joint marriage will be divided between X and Kudarala.

1. P. A. p. 46
2. *Niti*, p. 60

CHAPTER XXV

SUCCESSION TO MALES (8)

Movables

In Kandyan customary law, a distinction is made between heirlooms and other types of movables. Trophies, decorations, rewards in *sannasas*, weapons, gold chains, etc., conferred by the king for loyal service or acts of valour, followed the rules governing succession of ancestral lands.[1] In an agricultural community certain movables were also considered as being attached to the land and thus followed the rules governing succession to immovables. Such are slaves, goods, fixtures (other than money or grain) as are attached to the soil.[2]

With the exception of heirlooms and the movables stated above, other types of movables follow certain rules of succession in Kandyan law. In the first place, it should be remembered that Kandyan customary law does not know of ownership as understood in civil law or Anglo-American jurisprudence. In Kandyan law, it is possible for one person to have the ownership of a thing, while another has the usufruct or life-interest over it. When a person has a life-interest or a usufruct over movables such as cattle, slaves or goods, he may use them but not alienate them. But grain could be used in cultivation in the ordinary course of agriculture; money could also be spent on the upkeep of the estate. But since slaves, cattle, agricultural implements, weapons and household furniture formed the bulk of man's wealth in an agricultural community, the general system of distribution of movables did not differ widely from that which governs the devolution of immovables. Only problems peculiar to succession of movables, which require special treatment, are dealt with in this chapter.

The Widow

In addition to her separate property and paraphernalia such as wearing apparel, jewels and ornaments worn by herself and given to her by her husband,[3] the widow also becomes entitled in her own right to a share similar to that of each child over movables other than heirlooms and agricultural property of her husband. Thus, if a widow has five children, her husband's property is divided into six parts and each child, together with the widow, becomes entitled to a sixth.[4] But Sawers, in his Commentary, says: "The chiefs

1. P. A. p. 21
2. S. p. 24; D. p. 312
3. S. p. 15; P. A. p. 17; Marsh, p. 346
4. *Niti*, p. 80. The translation at page 61 is erroneous. For a correct translation, *vide* Hayley, page 452, footnote (e). D'Oyly states: "If a man dies leaving a wife, a son and a daughter, his movable property goes to his wife, his land to his son....." D. pp.307, 308

do not admit this—they only allow her the usufruct of the movable property, so long as she strictly observes those things which the law enjoins to widows, but if a division of movable property becomes necessary in her lifetime, she gets only an equal share with each of her children."[1] When Sawers referred to the widows strictly observing those things which the law enjoins to widows, he perhaps was referring to her conducting herself with prudence, abstaining from squandering the property or doing anything calculated to cause disgrace to the family.

The *Nīti Nighanduwa* confined the widow's usufruct to cases where the children were minors.[2] From the statement in the *Nīti Nighanduwa* one implies that on attaining majority, if there are sons, the children can demand a division of the property. Sawers however, categorically denies the children's right to a division until the death of the widow or her departure from her deceased husband's house.[3] This rule given by Sawers perhaps correctly sets out the customary law.[4] Sawers's view was adopted in *Rang Menika v. Kalu Rāla*,[5] *Kiri Saduwa v. Sethi*[6] and also *Gamarala v. Manikrala*.[7] In *Kiri Saduwa v. Sethi*, it was held that since the widow is entitled to the custody and administration of the movables, the son could not, during her lifetime, maintain an action upon a mortgage bond in favour of a deceased father, but the children by a former marriage can claim distribution immediately upon the death of their father.

The rule that the widow, in addition to separate property and paraphernalia, was also entitled in her own right to a similar share to that of each child in the movables of her husband except heirlooms was adopted in *Kiri Menika v. Ran Menika*.[8] When there are no children or remoter descendants, the widow is entitled, in her own right, to all the movable property other than those which are attached to ancestral lands. When the widow is the sole heir to her deceased husband, being the absolute owner of movables, she may dispose of them by will or remove them on leaving her deceased husband's house.[9]

Children and their issue

Subject to the rights of the widow, the children inherit in equal shares the movable properties of their father. The question as to whether a *dīga*-married daughter is necessarily excluded from her share of the movables is a moot point. As she received her share

1. S. p. 15; P. A. p. 16; *Nīti*, p. 61
2. *Nīti*, p. 61
3. S. p. 15
4. Hayley, p. 453
5. (1858) 3 Lor. p. 78
6. (1886) 8 S. C. C. p. 26; Hayley, p. 453, footnote, k
7. (1905) Leem, p. 50; 4 Tamb. p. 125
8. (1916) 19 N. L. R. p. 221
9. S. pp. 15, 24; *Nīti*, p. 91

on being given in marriage, she has, according to Sawers, no further claim.[1] But, as Hayley remarks, it is doubtful whether Sawers, in his statement, includes the case of a daughter who was married before her father's death. Sawers says: "At the death of the widow, the movable property (of the husband), is to be divided equally among the children, excepting the daughters who have received their share on being given out in marriage." This passage suggests that the daughter has received her share on marriage, subsequent to the father's death.

From an example given in the *Niti Nighanduwa*, it is clear that a daughter who was given in *dīga*-marriage before the father's death is not excluded from inheriting the movables of her father. The *Niti Nighanduwa* states that where there are three sons and two daughters married in *dīga*, the property should be divided into six parts of which the wife would receive one and the children one each. It is probable that when Sawers referred to the exclusion of the *dīga*-married daughter from the inheritance, he was referring to the rules governing immovable property. Sawers's assertion should be confined in its context to the case where a daughter was married after the father's death and was given a dowry; it should not be extended to cases where the daughter was married before her father's death. Sawers refers to gifts of their shares on marriage, while in the case of immovables, the brothers may, by giving sisters in marriage deprive the latter of any interest. Sawers, in his note to D'Oyly,[2] states that while lands go to the brothers subject to the support of the sisters if destitute, the "movable property must be equally divided among the brothers and sisters". Despite the views expressed by these institutional writers, the Supreme Court held in the case of *Rodrigo Appuhamy v. Kiri Menika*,[3] that the exclusion of a *dīga*-married daughter from her father's estate extends to movables also. It is submitted that this ruling should be reconsidered in an appropriate case.

Illegitimate children

An illegitimate child's rights with regard to movable property are similar to those which govern immovables.

Children of different marriages

In the succession to movables, there is divergence of authority when there are children by different marriages. Sawers disapproves of D'Oyly's statement that movables must be divided equally and distributed among two or more families *per stirpes*. When speaking of the step-children's right to compel a division, Sawers states that the surviving widow is entitled to no more than a like share as one of the children. If the division is *per stirpes*, she may claim a usufruct of the share descending to her own issue.

1. S. p. 15; P. A. p. 28
2. D. p. 314
3. (1898) 3 Tamb. p. 107

Parents

After the widow and children, the parents succeed to movables in Kandyan law. Property derived from either of them is resumed by the donor. This is not a rule of intestate succession, but is the general rule applicable to Kandyan gifts which enables a donor to resume possession of his gift at any time.

In respect of all acquired property however, the mother is preferred. Sawers states:[1] "The assessors unanimously state that the mother is the heiress to the acquired property of all kinds of her children dying unmarried and without issue and that the same is entirely at her disposal." The two Tables of succession given by Hayley also support this view. Armour makes a similar assertion.[2] D'Oyly also upholds the mother's claim to the movables. He says:[3] "If a man dies leaving a father, a mother and a brother, but no children, his lands, acquired either from his father or mother revert to them respectively, his own acquired land to his father, his cattle, his money and movables to his mother." Here again the old customary law favoured the mother, suggesting traces of matrilineal descent.

If the mother is dead, the father inherits the movables.[4] Referring to movables generally, Sawers in a note to D'Oyly says that if there are brothers or sisters, the father's or mother's interest is only for life, but in the absence of brothers and sisters, the mother becomes the owner. Hayley states that there seems to be no reason to restrict the interest of either the mother or the father to the deceased child's acquired movable property.

Collaterals and Ascendants

Brothers and sisters succeed after parents. Failing them the acquired movables are divided into two parts, half going to the uncles and aunts and their issue on the mother's side and the other half to those on the father's side, while inherited goods return to the side from which they came.[5] The half-blood is postponed to the whole blood. The sexes are treated equally in this respect. The *dīga*-married sister is not postponed to her brother.

Nothing is stated by the institutional writers regarding succession to remoter ascendants, but Hayley is of the view that presumably one half of the property goes to each side of the house, the order of precedence being the same as that governing immovable property. A peculiar rule, however, must be noted regarding the *binna*-married husband of a wife who leaves neither issue nor full brothers, nor sisters nor parents. If such a husband continues

1. S. pp. 16–17
2. P. A. p. 88
3. D. p. 313
4. P. A. p. 89; D. p. 313
5. S. p. 16

to live in the wife's house after her death, the goods and chattels which he acquired during the *binna*-marriage devolve upon the parents of his wife in preference to other relations of his own.[1]

1. P. A. p. 31

CHAPTER XXVI

SUCCESSION TO FEMALES (1)

The Widower

Sawers makes a general statement that the husband is heir to his wife's landed property which, on his death, will devolve on his heirs.[1] But in the example which follows this statement, there is indication that the property only descends to the wife's heirs. In a note, Sawers writes:[2] "The above is the opinion of Doloswela Dissawe of Sabaragamuwa, but the chiefs of the Udarata are unanimously of the opinion that the husband is not the heir to the wife's landed *paraveni* estate which she inherited from her parents nor her acquired landed property. The moment the wife dies, the husband loses all his interest in his wife's estate, which, if she has no issue, reverts to her parents or their heirs. Though a wife is entitled to the entire possession of her deceased husband's estate, so long as she continues single and remains in his house, the husband must quit his wife's estate at the moment of her demise." In these statements, there is no distinction made between a *binna* and a *dīga*-marriage although there is intrinsic evidence that in the passage referred to, the chiefs were referring to a *binna*-married husband. Speaking of movables, Sawers states[3] that the husband has no interest except in the property acquired by them during coverture.

A difference exists between a *binna*-married husband and a *dīga*-married husband. The former is brought into the family to raise up heirs to his father-in-law and is a dependent member of the wife's family. Apart from specific gifts which he might have got, it may be said that he had no title to his wife's properties.[4]

The chiefs who were called by Turnour asserted that on the wife's death, the *binna*-married husband's interest came to an end.[5] Armour, while dealing with the husband's right to movables, states that the *binna*-married husband may remove his own movables and those acquired during coverture. Thereafter he refers to the husband quitting the house of the deceased wife, which can only refer to a *binna*-married husband, and implies that the *binna*-married widower has no interest in the lands.[6]

The *Nīti Nighanduwa* concedes to the *binna*-married husband the right to the possession of the wife's lands duing his lifetime if he

1. S. p. 8
2. Hayley, Appendix I, page 12
3. S. p. 16
4. South Court Kandy 13411 (1841) Aust. p. 52; *Re Molygodde Tikiry Coomārihāmy* (1860) Legal Miscellany, p. 6; D. C. Kurnegalle 16126 (1864) Legal Miscellany (1865) p. 5; Ram. Rep. 1860-62, p. 5
5. D. p. 322
6. *Nīti*, p. 113

continued to remain in possession of these lands, but it restricts his right to alienate them and further asserts that his interest comes to an end on his departure. The rights set out by the *Nīti Nighanduwa* therefore, may be equated to the rights under a tenancy by leave or licence. In *Uddehawatte v. Naindelagey*,[1] the Supreme Court sent the case back for evidence as to custom which may elucidate the rights of a *binna*-married husband to his wife's properties, as the law on this point was doubtful. But in *Re Molygodde Tikiri Coomarihamy*[2] it was held that the *binna*-married husband had no rights to his deceased wife's property of any kind, except to property acquired during coverture, but as the question of his rights to such acquired property was not decided in this case, the observations seem to be *obiter*. In *Jasingedere Naide Appu v. Palingurāla*,[3] it was assumed that a *binna*-married husband has no interest even in the acquired property of his wife, but as the case only dealt with the rights of a *dīga*-married husband, these observations are once again *obiter dicta*.

The diga-married Husband

The *diga*-married husband succeeds to some interest of his wife's property although the extent of such interests seems to be in doubt. If there were surviving children or grandchildren by the deceased wife, the *paraveni* lands devolved on them.[4] But the *Nīti Nighanduwa* states that the widower may, on behalf of his children, "take care of the lands".[5] Referring to this passage, Clarence, J.,[6] said that this statement does not imply anything more than the custody which the father had, as husband, during the minority of the children. In the same case it was held that on the death of the child, the father did not succeed. The factual position would be that the widower would naturally be in possession of the property on behalf of the children until they demanded their shares. This is particularly true in the case of the lands in the same village. His claim is closely connected to his right as guardian of the children and cannot be elevated to that of a life-interest.[7]

If there are no children, the property would naturally devolve on the wife's relations since the rule is that the property reverts back to the source from which it came. But Armour states that the husband succeeds in preference to the children of the deceased wife's paternal half-sister.[8] This preference to the husband is perhaps based on the further principle that distant relations

1. (1856) Lorenz, p. 208
2. (1860) B. & S. p. 51; Ram. Rep. 1860-1862
3. (1879) 2 S. C. C. p. 176
4. P. A. p. 29; *Nīti* pp. 111–112; D. p. 308; D. C. Kandy 816 (1834) Aust. Rep. p. 11
5. *Nīti*, p. 111
6. *Appuhāmy v. Dingiri Menika* (1889) 9 S. C. C. p. 34
7. *Dingirihāmy v. Menika* (1892) 2 C. L. Reps. p. 76
8. P. A. pp. 28–29

are postponed to him, but the statement in the passage that an uncle would be preferred, though in the ordinary table of inheritance the uncle would be lower down the family tree than the half-sister's children, seems to be irreconcilable.

Acquired property

Regarding acquired property, subject to the limitation of the husband's interest to an estate for life, Sir John D'Oyly correctly summarizes the law as follows:[1] "If the wife dies leaving a husband and children, all the property acquired from the husband reverts to him; by herself (for parents or otherwise) goes to the children; everything acquired during coverture goes to her husband." Armour supports this proposition.[2]

Hence, property acquired before marriage is governed by rules similar to those which regulate the descent of *paraveni* property, whereas property acquired after marriage accrues to the husband before the wife's relations.[3] But if there are children by such a marriage, the husband's interest is only restricted to a life-estate.[4]

From what has been said above, the widower's position may be summarized as follows :

(1) If the marriage was in *binna*, he has no claim to his wife's properties.

(2) If the marrriage was in *dīga*, then three rules emerge namely; (i) he has no right to the property inherited by the wife, or property acquired by her before marriage, unless there are no near relations of the wife to succeed; (ii) he has a life-interest in the property acquired during marriage, if there are children of the marriage; (iii) he is entitled to full ownership of the property acquired during marriage if there are no children.

Descendants

On the death of a woman the rules of intestate succession to immovables governing succession to descendants will depend on the question as to whether she was married in *dīga* or in *binna*. If she was married in *binna*, there is a further distinction as to whether she was married in *binna* on her father's property or on her mother's property.

The general rule that emerges from the tangled growth of the writings of the institutional writers, and the precedents is that where

1. D. p. 308
2. *Nīti*, pp. 114, 115; P. A. pp. 29–30
3. South Court Kandy 15430 (1844) Aust. Rep. p. 66; *Jasingedere Naide Appu v. Palingurāla* (1879) 2 S. C. C. p. 176; *Angooroomulle Muttuwa v. Tissera Dureya* (1827) Hayley, Appendix II, note 47
4. S. p. 8; *Saduwa v. Siri* (1906) 3 Bal. p. 18; *Tikiribanda v. Appuhāmy et al.* (1914) 18 N. L. R. p. 105 FB

the deceased is married in *dīga*, all the children share the inheritance equally.[1]

Although this simple rule, as stated above, is attractive, there are two statements from Sawers and one from Armour which create considerable difficulties. Sawers states:[2] "(i) The same customs regulate the succession to the mother's as to the father's estate. (ii) Daughters having brothers have no superior interest of inheritance in their mother's landed estate to what they have in their father's estate, with this exception however, that where both parents had each an independent estate, the daughters, whether maried in *dīga* or otherwise, have *paraveni* rights to equal shares with their brothers in their mother's estate."[3]

The latter passage was cited as an authority for the proposition that only in case the father has separate property could the *dīga*-married daughters claim a share in their mother's property along with their brothers, *binna*-married and unmarried sisters.[4]

Armour states that where a woman who was first married in *dīga* and had an issue (a son), was subsequently married in *binna* and bore to her second husband a son and a daughter, the latter of whom was married in *dīga* and the mother died afterwards intestate, the landed property devolved in equal shares to the two sons to the exclusion of the daughter.[5]

This passage may be contrasted with a passage from the *Nīti Nighanduwa* which is as follows:[6] "If a woman died leaving several children, her lands and all other property will be divided amongst them all; the sons, the *bini*-married daughter and the *diga*-married daughter and the child adopted into another family, will, without distinction receive equal shares in the property."

The equality of division among children set out by the *Nīti Nighanduwa* is supported by various passages in Armour,[7] but Sawers's statement[8] appears to be irreconcilable with the passages in the *Nīti Nighanduwa* and Armour. Hayley thought that in view of the fact that the bulk of authority was against the proposition stated by Sawers and in view of the second statement of Sawers,[9] the latter was only dealing with the rule that in succession to the *binna*-married woman, the *dīga*-married daughters should be excluded if there are other children.[10] Hayley's reasoning,

1. P. A. pp. 81–83; *Nīti*, pp. 15, 106, 108, 110, 112
2. S. p. 4
3. S. p. 12
4. *Kiriwante v. Ganetirala* (1896) 2 N. L. R. p. 92; *Dinga v. Hapuwa* (1902) 7 N. L. R. p. 100; *Ukkubanda v. Jayasekera* (1918) 5 C. W. R. p. 175
5. P. A. p. 83
6. *Nīti*, p. 108
7. P. A. pp. 81–83
8. S. p. 4
9. S. p. 12
10. Hayley, pp. 466–467

however, was not adopted in *Carolis Silva v. Kiri Banda*,[1] in which Martin and Schneider, JJ., held that the statement of Sawers will also apply to a woman married in *binna*, and where Kandyan parents have separate estates, a daughter married in *dīga* is entitled to succeed to her mother's property equally with her brothers.

When there is an unequal division of the father's property among the children, the less favoured members of the family were declared to be solely entitled to succeed to the mother's property. This equitable principle is also stated in another passage in the *Nīti Nighanduwa*, which is as follows[2]: "If on the marriage of a daughter, all the father's lands have been bestowed absolutely on her as dowry, on her mother's death, all her lands would be inherited by her other children." In another place, the *Nīti Nighanduwa* states:[3] "If the mother dies leaving children that she has had in *Bini* marriages from time to time by two or three husbands, and if the children by one husband have lands to inherit by paternal rights of inheritance; the children by the other husbands, if they have no paternal inheritance, will come into possession of all the mother's lands."

The same principle is also found in the following passage in Armour:[4] "If a *Deega*-married widow died intestate leaving a son and two daughters born to the same father, if one of the daughters were settled in *Beena* in the father's house and had succeeded to the possession of the whole of the father's landed property in right of bequest by the father, and if the other daughter had been married away before the mother's death and remained settled in *Deega*, in that case the son will be entitled to inherit the whole of the mother's lands, to the exclusion of both daughters."

This equitable principle of equalizing the inheritance was specially applied in the case of a *binna*-marriage. As pointed out by Armour,[5] when the father's house and estate are distinct from that of the mother, the marriage of a daughter in *binna* in the mother's house is considered as a *dīga*-marriage in respect of the father's estate, and vice versa. It was very common among the Kandyan girls to be married in *binna* on the mothers' lands with a view to making them heiresses to their fathers' estates. The *Nīti Nighanduwa* gives many instances in which the land was inherited by the *binna*-married females of the family for generations. Hence, one could discern from these instances, the customary rule of female descent similar to the rule that was prevalent among the Mukkuwas of India and Ceylon. The Assessors expressly referred to such a customary rule in the case of *Galgoda Banda v. Girigama Menika*[6]

1. (1926) 28 N. L. R. p. 190
2. *Nīti* p. 109
3. ibid.
4. P. A. p. 80
5. P. A. p. 81
6. (1823) Hayley, Appendix II, note 42

in which the daughters alone were held entitled to their mother's *paraveni*.

If the father had a separate estate of equal value, which the sons alone inherited, the whole of the mother's lands will descend to the daughters.[1] Even if there was no equality in value between the father's property and mother's property, an only son who settles on the father's lands will, according to the *Nīti Nighanduwa*[2] lose the right to the maternal property. A passage in Armour[3] also speaks of the loss of the son's rights in the mother's property but ascribes the loss to prescription. In these examples, it is either expressly stated or tacitly assumed by the *Nīti Nighanduwa* that the mother herself is married in *binna*. But Armour restricts the rule further and postulates that the mother too must have been settled in *binna* in her mother's house. The reason for this extension may be that when a husband is brought to her father's house, the issues of such a union are looked upon as the children of their maternal grandfather and therefore his property is earmarked for them.[4] As such, when it comes to them from their mother as her paternal property, the system of distribution is the same as if the mother had predeceased the father. The *dīga*-married daughters, therefore, are postponed to sons and *binna*-married and unmarried daughters.[5]

Armour states:[6] "A woman who was married and settled in *beena* in her father's house, dying intestate, leaving a daughter married in *beena* in the same house and a daughter married out in *deega* the landed property which was derived from her (the deceased's) father, will devolve wholly to her *beena*-married daughter, to the exclusion of her *Deega*-married daughter. If the mother left a daughter married out in *deega* and a son, the latter will inherit the lands derived from his paternal ancestors, to the exclusion of his *deega*-married sister. If the mother left a daughter married out in *deega*, a son who had quitted her house and was settled elswehere in *beena*, and another son who remained at home, the paternal *paraveni* lands will devolve in equal shares to the two sons to the exclusion of the daughter."

After referring to the passages set out above, and Sawers's second statement, Hayley comments: "The excepting clause in Sawers's second statement really constituted the rule, and the whole can only mean that the *dīga*-married daughters are excluded from their mother's estate when the father has no property: and this possession of the property by the father has in modern cases, been made the criterion for the *dīga*-married daughters being allowed to succeed to

1. *Nīti*, pp. 108–109; P. A. p. 79
2. *Nīti*, p. 109
3. P. A. p. 80
4. *Nīti*, p. 107; P. A. p. 79
5. P. A. pp. 79–80; Ceylon Misc. p. 126
6. P. A. pp. 79–80

their mother if the father has any property of his own. But if the father has no property, and therefore, necessarily no house of his own, and the wife has an estate, the marriage is almost certain to have been a *binna* marriage, so that, consciously or unconsciously Sawers was only stating the rule that in the succession to a *binna*-married woman, the *dīga*-married daughters will be excluded if there are other children." Hayley adds: "Armour's example then becomes intelligible on similar grounds, because he has expressly postulated that the second marriage is in *binna*, and that the *dīga*-married daughter of that marriage has a brother, while in the immediately preceding case quoted by him, in which there were a son and a daughter of a *dīga* marriage, and subsequently two daughters by a *binna* marriage, although all the daughters were married in *dīga*, they were all entitled to a share in the mother's estate."

Sawers's statement referred to earlier to the effect "the same customs regulate succession to the mother as to the father's estate" should, in his context, only refer to the case of a *binna*-married mother, or it may be that he was stating the general rule without going into details. However, this bare statement has no support from the other institutional writers and cannot be taken seriously.

Hayley summarizes the rules as follows:

(1) Where the deceased was married in *dīga*, all the children take equal shares in all her property.

(2) Where the deceased was married in *binna* on her father's property, her paternal inheritance devolves upon her children according to the principles governing succession to males; that is to say, excluding the *dīga*-married daughters and giving unmarried daughters only a temporary interest, her property devolves on all her children equally.

(3) Where the deceased was married in *binna* on her mother's premises and her daughters were married in *binna* on her premises, if her husband has a substantial estate which sons inherit, her daughters alone will succeed. Otherwise, all the children share equally.

(4) Where one of the descendants or a class of descendants have been unduly benefited by a gift, bequest or inheritance from the father's estate, that descendant or the class of descendants would be excluded from the mother's property. In such cases, the Court is given a discretion to apportion the estate on an equitable basis.

There are not many judicial precedents on this matter. The right of the *dīga*-married daughter to succeed to her *dīga*-married mother was recognized in some cases[1] but this rule is subject to the quali-

1. *Udurawela Polwattegedera Punchyralle v. Dukgannarale* (1824) Hayley, Appendix II, note 42

fication that the father had a separate estate of his own.[1] In D.C. Kandy 27254[2] there is a statement that a *dīga*-married daughter has no prima facie right to a share in her mother's paternal property but there is no reference as to the nature of the mother's marriage.

Representation of children by their issue

The general rule that deceased children are represented by their children *ad infinitum* according to the ordinary rules of representation, apply. Hence, grandchildren take *inter se* equally irrespective of their *dīga*-marriages, because the property had descended on the maternal line. Several instances of such representation are given by the *Nīti Nighanduwa* and Armour.[3]

There is however, a notable exception to this general rule. Where children of a *dīga*-married daughter remain in their father's village and are entirely cut off from their maternal grandmother and her family, then they will be excluded by the other descendants who have been keeping in touch with their grandmother's *gedara*. This exceptional rule is perhaps based on the principle that only those who had contact with the *gedara* are entitled to the property of its members. In this connection, Armour states that the *dīga*-married daughter should succeed "if that child were brought up under the care of the grandmother".[4] The *Nīti Nighanduwa*, after stating that the *dīga*-married children succeeded if adopted by the grandmother, adds:[5] "If on the other hand, the aforesaid *dīga*-married daughter dies in her *dīga* village,and a granddaughter born to her, on attaining her majority, is given in marriage by the relations on her father's side, and lived there, on the death of the above-mentioned proprietress, her *binna*- married daughter will inherit all their properties and the granddaughter by the *dīga*-married daughter will not not receive a share.

"Again, if on the death of the proprietress, the *binna*-married daughter is dead too, her rights of inheritance will devolve on her children, and the other above-mentioned granddaughter will have no right of inheritance from her." In another passage, the *Nīti Nighanduwa* stresses that the "grandson by a *dīga*-married daughter who has been brought up by his grandmother inherits".[6] The Kandyan Law Commission recommended that the rule should not be perpetuated and no forfeiture should attach in such a case.[7]

1. D. C. Kandy 27911 (1856) Aust. p. 199; *Kiriwante v. Ganetirala* (1896) 2 N. L. R. p. 92; *Dinga v. Hapuwa* (1903) 7 N. L. R. p. 100; and *Ukkubanda v. Jayasekera* (1918) 5 C. W. R. p. 175
2. (1856) Aust. p. 194
3. P. A. p. 82; *Nīti*, p. 112
4. P. A. p. 82
5. *Nīti*, p. 110
6. *Nīti*, p. 111
7. Ceylon Sessional Paper XXIV (1935) Sec. 280, p. 34

The rights of the descendants are summarized by Hayley as follows :[1]

(1) Grandchildren and great-grandchildren represent their parents according to the ordinary rules and took *per stirpes* with the exception that in the case of a grandchild by a *dīga*-married daughter, who had not kept up any connection with her grandmother she cannot succeed to her grandmother. (2) Grandchildren and great-grandchildren take equally *inter se*, without the exclusion of *dīga*-married women, except with regard to paternal property inherited by a woman married in *binna* on her father's estate, in which case the rules of succession to males are presumably applied.

Children of different marriages

When dealing with succession of children of different marriages, to the property of males, it has been already stated that division should have been *per capita*, although the decisions of the Courts are that the division should be *per stirpes*.

In respect of women's property the old rule that the division was *per capita* obtains, and plurality of marriage makes no difference to the succession of the children. Even when one of the marriages is in *dīga* and the other is in *binna*, no distinction is made. Thus the *Nīti Nighanduwa* states:[2] "If a mother dies, leaving a child by a *dīga* husband and a child by a *binna* husband, the lands which devolve on her by paternal right of inheritance will not be inherited by the children born in *binna* marriage on her father's premises, but both children will have an equal right of inheritance in them. If a woman has two daughters born in *binna* marriage on her father's or mother's premises and a son and daughter born to her in *dīga* marriage and if the son dies before his mother, leaving children, on the mother's death, the lands will be divided into four equal parts and the daughters will receive three parts and the children of the deceased son will receive the remaining part."

Sawers states.[3] "Uterine children, though born of several fathers, have all the rights of inheritance in their mother's peculiar estate."

Despite these clear authorities, in *Appuhamy v. Hudubanda*[4] it was held that the property of a *dīga*-married woman leaving children by two husbands descended *per stirpes*. This decision was, however, based on the erroneous view taken in *Siriya v. Kaluwa*,[5] and *Ran Menika v. Ran Menika*.[6] But the attention of the Court was not drawn to the fact that those cases were dealing with succession to the father and not to the mother.

1. Hayley, p. 470
2. *Nīti*, p. 110
3. S. p. 2
4. (1903) 7 N. L. R. p. 242
5. (1899) 9 S. C. C. p. 45
6. (1857) 2 Lorenz, p. 27

Statutory Changes

In dealing with succession to women, the Kandyan Law Declaration and Amendment Act, No. 39 of 1938, giving effect to the recommendations of the Kandyan Law Commission enacts:[1] "When a woman, unmarried or married in *dīga*, or married in *binna* on her mother's property, shall die intestate after the commencement of this Ordinance, leaving children or the descendants of a child or children the estate of a deceased shall devolve in equal shares upon all her children (the descendants of any deceased child being entitled to his or their parents' share by representation, whether male or female, legitimate or illegitimate, married or unmarried and if married, whether the marriage be in *binna* or in *dīga*).

"Provided that if the deceased was married in *binna* as aforesaid, an illegitimate child or children shall not be entitled to succeed to the *paraveni* property of the deceased. Provided, further, that the descendant of a deceased child shall be entitled to that child's share by representation whether or not he or she had been kept apart from the deceased's estate.

"When a woman married in *binna* on her father's property shall die intestate, after the commencement of this Ordinance, leaving children or descendants of children, such child or children or his or their descendants by representation, shall be entitled to succeed *inter se* in like manner and to the like share as they would have become entitled to the estate of their father. Provided that the deceased was married in *binna* as aforesaid, an illegitimate child or children shall not be entitled to succeed to the *paraveni* property of the deceased."

1. Section 18

CHAPTER XXVII

SUCCESSION TO FEMALES (2)

Illegitimate Children of a diga-married woman

As a mother makes no bastard it is a well established rule of Kandyan law that where a mother is either unmarried or married in *dīga*, then her illegitimate children are entitled to succeed to her properties. If there are both legitimate as well as illegitimate children, then all her children succeeded to her properties *per capita*. Armour states:[1] "If a woman dies intestate leaving issue, a son and a daughter born out of wedlock, and if neither of the children have an acknowledged father, the whole of the mother's estate will devolve in equal shares to the son and daughter and that even if the daughter were married and settled in *dīga*." Sawers reiterates the same principle and states:[2] "If property is given to a concubine or acquired by her, if she dies intestate or without issue, there followed the same rules of inheritance as the properties of an unmarried woman; but if the concubine or prostitute leaves issue they inherit their mother's property."

The *Nīti Nighanduwa* enunciates this principle as follows:[3] "The children of a woman married to a man of her own caste, according to the usual rites and customs, or of a woman who after co-habitation with a man of higher or lower caste than herself, and when still in an unmarried state, had intercourse with a man who is not unknown, all inherit the estate equally." In *Raja v. Elisa*,[4] de Sampayo, J., after referring to the authorities, said: "It is settled law that the illegitimate children of a woman inherit the acquired property equally with the legitimate children."

The right of the illegitimate children to succeed to their mother's property is not merely confined to the acquired property of the mother but also extends to her ancestral property, subject to an exception which will be considered later. The property of a Kandyan woman acquired before her marriage is inherited by her illegitimate children, and a *dīga*-married husband has neither title nor life-interest in such property.[5] In stating this principle, the Court steered clear of dangerous quicksands which beset the student of Kandyan law, by means of two beacons to guide them. One is a passage from D'Oyly[6] and the other, a rule laid down by the

1. P. A. p. 83
2. S. p. 1
3. *Niti*, p. 15
4. 112 C.R. Gampola 613 S.C.M. of 26/5/1913
5. *Ellen Nona et al. v. Punchi Banda* (1943) 45 N. L. R. p. 11
6. D. p. 308

decisions of the Courts which gave the husband only a life-interest over the property of the deceased wife acquired during coverture.

The illegitimate children of a binna-married woman

The illegitimate children of a *binna*-married woman are excluded from the ancestral property (*paraveni*). The *Niti Nighanduwa* states that where a woman is married in *binna*, her illegitimate children are excluded from her *paraveni* property, but they are entitled, along with her legitimate issue, to share her acquired property. This rule applies whether the *binna*-marriage was in the father's or mother's property. The Kandyan Law Commission was of the opinion that the children appear to have the same right to succeed to the *paraveni* estate of a *binna*-married mother.[1]

Hence, subject to this exception, *dīga*-married children appear to have the same right of succession as the illegitimate children to the *paraveni* property of a *dīga*-married woman, despite a passage in Modder to the contrary. Modder states:[2] "An illegitimate child does not succeed to the inherited property of its parents, which devolves on his blood relations." The references given by Modder to the various texts and the decided cases suggest that when he was giving this illustration, what he had in mind was the inheritance to the property of the illegitimate child's father only and not to that of the mother.

The Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938, defines 'legitimate children' as 'those born of parents married according to law', and further defined 'illegitimate children' as 'those born of parents not married according to law'. It reformed the law by making illegitimate children procreated between two persons before marriage, legitimate by the subsequent marriage of the parties, unless such children were procreated in adultery. It placed the illegitimate children on a less advantageous position than the Kandyan customary law in enacting as follows: "When a man shall die intestate after the commencement of this Ordinance leaving any illegitimate children—(*a*) such child or children shall have no right of inheritance in respect of the *paraveni* property of the deceased; (*b*) such child or children shall, subject to the interest of the surviving spouse, if any, be entitled to succeed to the acquired property of the deceased in the event of there being no legitimate child or the descendant of a legitimate child of the deceased. Any such child shall, subject to the interest of the surviving spouse, if any, be entitled to succeed to the acquired property of the deceased equally with the legitimate child or children, as the case may be (1) if the deceased intestate has registered himself as the father of the child when registering the birth of the child; or (2) if the deceased intestate had, in his lifetime, been adjudged by any competent court to be the father of the child."

1. Report of the Kandyan Law Commission, para 292
2. Modder, pp. 227, 394

CHAPTER XXVIII

SUCCESSION TO FEMALES (3)

Movables

When a woman dies leaving a child, her husband is only entitled to a usufruct of the deceased wife's movables during the child's minority. Sawers states that her "peculiar property goes to her children".[1] If there is no issue, the husband succeeds to the movable property acquired by his wife during coverture in preference to her relations. Even a *binna*-married husband was entitled to this preference.[2] The husband is preferred to the wife's uncles and aunts and their issue to succeed to the movables of his wife.[3]

On her death movables gifted by way of dowry by parents, brothers, etc., would revert to the source from which they came. But the brothers are precluded from claiming her movables given as dowry by the parents; the *diga*-married widower was entitled to them.[4] But a *binna*-married widower was postponed to her brothers to the succession of movables given as dowry by the parents. He was only allowed to remove his movables and those acquired during coverture from other sources.[5]

Statutory Changes

On the recommendations of the Kandyan Law Commission a uniform set of rules was brought into force. The Kandyan Law Declaration and Amendment Act, No. 39 of 1938, enacts:

> Heirlooms, live stock and dead stock appertaining to immovable property to which a person has become entitled as *paraveni* property, as defined by Section 10 shall, on his dying intestate after the commencement of this Ordinance, devolve in like manner as immovable property and the following provisions of this Ordinance shall not apply thereto. (Section 20)
>
> When a man shall die intestate after the commencement of this Ordinance leaving a surviving spouse, she shall be entitled to all wearing apparel, jewellery and ornaments used by her or provided for her use by her deceased husband. (Section 21)
>
> When any person shall die intestate after the commencement of this Ordinance leaving a surviving spouse and a child or children or the descendant of any deceased child entitled to

1. S. p. 16
2. P. A. p. 31
3. S. p. 16
4. P. A. pp. 29–30; the word "a right" should be read as "no right", *vide* Ceylon Miscellany, p. 26
5. P. A. p. 31

represent his or her parent, the surviving spouse, whether the marriage was in *binna* or in *dīga*, shall succeed in like manner and to a like share of all the movable property of the deceased whenever obtained, as if he or she had been a legitimate child of the deceased. (Section 22)

Subject to the aforesaid right of the surviving spouse, if any, the movable property of any person who shall die intestate after the commencement of this Ordinance shall devolve in equal shares upon all his or her surviving children (the descendant or descendants of any deceased child being entitled to his or her or their parents' share by representation) whether male or female, legitimate or illegitimate, married or unmarried, and if married, whether the marriage be in *binna* or in *dīga*.

Provided that if the deceased was a male person an illegitimate child shall not succeed if there be surviving any legitimate child or the descendant of a legitimate child.

Provided further that the issue of a legitimate child *inter se* shall succeed in like manner. (Section 23)

When any person shall die intestate after the commencement of this Ordinance leaving no child or descendant of any deceased child, the surviving spouse, if any, shall succeed to all the movable property of the deceased. (Section 24)

CHAPTER XXIX

SUCCESSION BETWEEN ADOPTIVE PARENTS AND CHILDREN

The rules of intestate succession so far stated may be modified by certain events. For example, when there is adoption, the rules are varied slightly to permit the succession of adopted children to the adoptive parent and vice versa. The institutional writers also have given preference to guardians to succeed to the property of their wards when the contest was between them and the other relations. Relations who have rendered assistance and support to an intestate person have also been preferred in certain cases to other relations. These exceptional circumstances are set out in the works of the institutional writers and require consideration.

The rights of the adoptive parent fluctuate between the tendency to regard him in certain respects as a blood-relation, and also not to neglect such blood-relations if there is a conflict of interest between him and them. The resulting position is an amorphous medley of principles setting out the rights of adopted persons. In practice, the adopted child was often given a definite grant of land by a donation *inter vivos* which obviates all difficulties as a result of the uncertainty of the law of intestate succession on this matter. Thus, many references are found both in Armour and the *Nīti Nighanduwa* showing that adopted children were given grants.

When no settlement has been effected, the Kandyan law, like the Hindu law, favoured the succession of an adopted child to an adoptive parent. If the adoptive parent died without direct descendants, then the adopted child succeeded to the estate, subject to the widow's usual interest to the exclusion of other relations.[1]

Simulating rules governing succession to natural children

When there are a number of adopted children, their respective shares are regulated by the same rules which regulate the distribution of an intestate estate among his own children. The analogy is so complete that even an adopted daughter married in *dīga*, was excluded by an adopted son or an adopted daughter settled in a *binna*-marriage.[2]

Cases which came up before the Judicial Commissioners show that a parent who adopts should leave property to the adopted child and disinherit his own children if his intention is to benefit

1. S. p. 28; *Niti* pp. 41-89-90,; P. A. p. 39; *Daaswatte Kirry Menika v. Ārāmē Mudalihāmy* (1826) Hayley, Appendix II, note 59; D. C. Tangalle 240 (1837) Morgan's *Digest*, p. 153
2. *Nīti*, p. 90

the adopted child.[1] Difficult questions arise when the adoptive parent leaves descendants of his own and also adopted children. Although the subsequent birth of a child after adoption renders the purpose of the adoption unnecessary particularly when the child was a son, yet the adopted person may, by reason of adoption, have been prejudiced with respect to the estate of his or her own relations.

In such cases the rights of such adopted children vary accordingly as he or she (as the case may be) was a stranger before adoption or was already related to the adoptive parent. Sawers states that if the adopted person is not related by blood he may claim a small portion, the amount of which he as unable to specify. He vaguely suggests that one-fourth should go to the issue. The *Nīti Nighanduwa* categorically states in one place that the entire estate devolves on the natural child,[2] but in a later passage says that it goes to a ward, an adopted daughter who had rendered assistance. It grants a half-share in distributiing the estate between her and a daughter married in *dīga*. It also states that an adopted son is entitled to a share if he has acted as guardian to the adoptor's children but if he had been deprived by the holder of the superior title of property settled upon him by the adoptor, the other children must make compensation to him.[3] Citing a dictum attributed to Sawers to the effect that an adopted child has no right of inheritance to the estate of a person adopting if the adopting parent had children of his or her own, Dr. Hayley states that this must be understood to apply only where the adopted child was not a descendant of the adopting parent. Although Armour makes reference to this alleged dictum of Sawers, he himself does not accept this proposition, since he has allowed the adopted child to succeed in similar circumstances mentioned in the *Nīti Nighanduwa*.[4]

Remembering that the claim of a child adopted into another's family to share in the distribution of the estate of his or her own parent depends to some extent upon the amount received from the adopted parent, one must note that the same principles apply to the converse case. Hence, any provision for the adopted child out of the estate of an adopting parent who had children of his own, was usually a matter of equitable arrangement. The share which he would get depends on the prejudice which the child would suffer as a result of losing his or her own inheritance from the natural parents.

It is perhaps for these reasons that both Armour and the *Nīti Nighanduwa* favour an adopted daughter who by changing her family, lost her share of the estate of her own parents. When

1. *vide* the answer given by James Gay, J. C. in reply to the question by the Accredited Agent of Kurunegalle in 1818, Hayley, Appendix II, note 60
2. *Niti*, p. 42 and the examples in pp. 42–43
3. *Niti*, p. 43; P. A. p. 40
4. *Niti*, p. 50; P. A. p. 40

the adopted child is a relation, and the adoptor has neither children nor grandchildren, the adopted child inherits the whole of the inheritance.[1] Even where the adoptor has children of his own, the adopted child is entitled to succeed to a share if he is a near relation.[2] In the examples given in the *Nīti Nighanduwa*,[3] the adopted nephew and grandson obtain half-share, but if the adoptor in each case had only a daughter and a son, the adopted child would not have received such a share. In D.C. Kandy 13071[4] the contest was between the daughter married in *dīga* and the adopted daughter settled in *binna*, and the latter was awarded one-third of the estate.

The adopted child forfeits his rights of inheritance if he or she deserts the adoptor and returns to his or her own family[5] or is expelled by him,[6] even though he or she might have succeeded by virtue of relationship.[7]

Succession to property given to adopted children

Lands inherited by right of adoption will be regarded as the absolute property of the adopted heir and devolves upon his death on his own children, parents, brothers and sisters or other issue.[8] But if the adopted child dies without any near relations who are entitled to succeed to his property, the property reverts to the adoptor's family and does not pass to the adoptor's widow unless she too is related to the deceased's adoptor; but the widow, however, would have a claim for maintenance if she is in indigent circumstances.[9]

The *Nīti Nighanduwa* states that in certain circumstances, the adopting parent would succeed to the rights of the adopted child. No clue is given by Armour as to the exact circumstances under which such succession takes place. He says that "if a woman, who was adopted by a maternal aunt, dies without issue and intestate, and left neither brother nor sister, lands which she had inherited from her father, devolved to the maternal aunt who had adopted her, to the exclusion of the paternal aunts and other more distant relations".[10] This passage suggests that succession to an adopted child took place only to the extent of giving preference to an adopting relation over others if they are of equal degree provided there are no descendants, brothers, or sisters, of their issue.

1. *Nīti*, pp. 90, 91
2. P. A. p. 40; *Nīti*, pp. 41-43
3. *Nīti*, p. 43
4. (1841) Aust p. 51
5. *Nīti*, pp. 90–91
6. *Amunugama Kapuaralagedera Punchyralle v. Hoonkevrygedera Tikiralle* (1825) Hayley, Appendix II, note 60
7. P. A. p. 25
8. *Nīti*, pp. 91, 112; P. A. p. 41; *Seyatu v. Muthu Menike* (1880) 4 S.C.C. p 19
9. P. A. pp. 22, 41; *Nīti*, p. 105
10. P. A. p. 41

Succession by guardians

The institutional writers are unanimously agreed that a guardian had the right to inherit the property of the ward[1] but no precise rules have been laid down setting out the extent of such succession. If a parent appointing a guardian, also gave a land and the custody of the minor child to him by a properly constituted deed, the guardian would obtain title to the land by the deed.

Sawers[2] refers to the decision of the *Mahanadu*, confirmed by the king, which laid down the rule that guardians who took charge of children from infancy were regarded as parents, and therefore succeeded to their wards.

The distinction between guardianship and adoption is often a fine one in Kandyan law. The rights of guardians to succeed to the ward's property would arise without a definite gift. The *Nīti Nighanduwa* and Armour give many instances of succession between guardians and wards.[3] From the examples given, the following general principles seem to be clear: firstly, the guardians will only succeed if the ward dies whilst still under guardianship; secondly, when the guardianship results from the appointment by only one parent, the guardian's claim, if any, will be limited only to the property which the ward inherits from that parent, should relations of the other parents survive; thirdly, the position of a guardian is somewhat similar to that of a person who has rendered assistance and support to an adult person. Hence, except in unusual circumstances, a guardian cannot compete with the deceased's close relations such as surviving parents or brothers and sisters,[4] but he was preferred to distant relations.[5]

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1. S. p. 22; *Nīti*, p. 44; P. A. p. 47
2. S. p. 22
3. *Nīti*, pp. 44, 50–51, 116; P. A. pp. 47, 88
4. *Patdalgoda Keeralla v. Atapattuwegedera Punchyralle* (1825) Hayley, Appendix II, note 54
5. *Loonoogama Kiri Etena v. Tawalature Dingiry Menika* (1821) Hayley, Appendix II, note 54

CHAPTER XXX

SUCCOUR AND ASSISTANCE AND RULES OF INTESTATE SUCCESSION

Another doctrine which alters the rules of intestate succession is based on the assistance and support given by a particular relation to the intestate. During the reign of the kings when the circulation of currency was limited and there was no banking system or insurance scheme to fall back upon, it was usual for a person who was advancing in years, to make provision for his old age by transferring his properties to those who were near and dear to him on the understanding that the donees would render succour and assistance to him. In the absence of common relations, it was the practice to transfer the properties to a friend on the same condition. The effect of such deeds of gifts for assistance and support has given rise to considerable controversies. None of the textwriters postulate any definite rules, but give a number of examples. The *Niti Nighanduwa*, amongst others, gives the following examples of relations who claim priority over others: (1) a nephew or niece who has rendered assistance, succeeds to the exclusion of other relations;[1] (2) an aunt who assumes guardianship of an orphan is preferred to other aunts on that orphan's death;[2] (7) if a man commits his wife and child to the charge of his brother, on their death that brother would succeed to their estate in preference to the other brothers;[3] (4) a *dīga*-married daughter who has returned to the father on his death-bed, and rendered him assistance until his death, will receive two thirds while the other daughters, although married in *dīga*, will be entitled to one third;[4] (5) when the intestate leaves a daughter by one wife and a son by another, if the daughter gives assistance in her house, she may claim half the estate;[5] (6) a daughter married in *dīga*, who has assisted the father, shares equally with the daughter settled in *binna*;[6] (7) if a *dīga*-married sister's son has rendered assistance he has equal rights with the intestate brother's son;[7] (8) even a sister's grandson (the intestate grand-nephew), will in similar circumstances, be preferred to a full brother;[8] (9) if an orphan child dies leaving a maternal uncle, a paternal aunt and a paternal cousin, the estate devolves on the person who had assumed guardianship of the child.[9]

1. *Niti*, p. 48
2. *Niti*, p. 49
3. ibid.
4. ibid.
5. ibid.
6. ibid.
7. *Niti*, p. 50
8. ibid.
9. *Niti*, p. 51

Hence, the person who assists the intestate excludes other relations on both sides.[1]

The proposition that relations who have rendered assistance, are preferred to distant relations, is set out by Armour in unmistakable terms. Armour states:[2] "If the deceased proprietor left not a nearer relation than his father's cousin (father's maternal uncle's son) and if the said proprietor had received all assistance from his wife and her family until his death, and had been neglected and disregarded by his kinsmen aforesaid, in that case the widow will be entitled to the deceased's entire estate including his *paraveni* or ancestral lands, to the exclusion of the cousin aforesaid as well as the more distant relations." Armour also gives other examples similar to those found in the *Nīti Nighanduwa*[3] and quotes with approval a note of Sawers[4] in which he states that a daughter married in *dīga*, if she renders assistance and support, would succeed to the whole estate, to the exclusion of another *dīga*-married daughter although equal in rights with one married in *binna*.

Referring to the devolution of movable property, Sawers states again that on the failure of the descendants and parents, the estate must devolve upon "such of his brothers and sisters who have rendered him assistance on his death-bed".[5]

From the examples given, it is apparent that if a testator has only left distant relations, then relations who have rendered succour and assistance were preferred to the other relations of an equal degree. But in the case of near relations such as sons and *binna*-married daughters, they do not lose their claim merely because they had not rendered any assistance to the parents. Thus Armour expressly states that a son who remains at home with his father and supports him, cannot deprive the other sons who have settled elsewhere of their shares, although he may claim reimbursement of his expenditure.[6]

From the examples given by the textwriters, the following rules could be enunciated: (1) Among sons, *inter se*, there is no modification of the principle of equal division, but the son who has rendered succour and assistance can demand reimbursement of the expenses which he has incurred. (2) A *dīga*-married daughter, by rendering assistance to her father, regains her right to succeed, as between herself, her sisters and half-brothers. The question as to whether she could share it equally with her full brother is a doubtful one. If her only surviving sisters are married in *dīga*, she is

1. *Nīti*, p. 104. Further examples are given in *Nīti*, pp. 48–51, 75–76, 87–97, 103, 105
2. P. A. p. 22
3. P. A. pp. 59, 64, 66, 70, 101, 117
4. Hayley, Appendix I, p. 6
5. S. p. 16
6. P. A. p. 117

entitled to a larger share than they are entitled to. (3) If the intestate leaves no child or parent, an heir who has rendered assistance succeeds to the whole estate to the exclusion of others who are even nearer relations, unless such heir is a *dīga*-married woman, in which case she obtains the right to share equally with her brothers. (4) The widow, who has rendered assistance, succeeds to the entire estate in preference to a cousin or remote heir.

The decisions of the courts

Although these examples are given in the texts of the institutional writers, hardly any case has come up before the Courts where the normal rules of succession have been in any way interfered with by the fact of a person giving succour and assistance. Although there are many decisions in which the validity of legacies, gifts or donations *mortis causa* depended on the rendering of assistance, there is very little authority on the question as to whether the rules of intestate succession are altered by these doctrines. In *Katupattwela Kooda Gebeneerali's Estate*,[1] the claim made by the deceased's concubine was allowed, more in the nature of compensation for expenses incurred. But monies expended or amounts given by way of maintenance could be recovered from the deceased's estate by anyone, whether he happened to be a relation or not.[2]

Hence it may be surmised, in view of the dearth of decisions on this matter, that when Sawers and Armour wrote, this refinement of the law of intestate succession had become obsolete and it is doubtful whether the Courts would uphold claims based on succour and assistance in modern times. However such a principle was recognized by the customary laws and in studying the laws of intestate succession, one must carefully scrutinize whether some rules which are exceptions to the general rules, are not based on this doctrine.

Statutory changes

On the recommendations of the Kandyan Law Commission, the Kandyan Law Declaration and Amendment Act, No 39 of 1938, enacts: "A person who has rendered assistance and support or any other benefit to a person who has subsequently died intestate, shall not by reason of such assistance, support or benefit, become entitled to succeed to any interest in the estate of such deceased intestate to which he would not have become entitled had such assistance, support or benefit not been rendered."[3]

1. (1820) Hayley, Appendix II, note 46
2. S. p. 16
3. Section 25

THE LAW OF OBLIGATIONS

CHAPTER XXXI

CONTRACTS IN KANDYAN LAW

In Kandyan society, the social conditions were such that the Law of Contract could not have found any scope for virile development. For an agricultural community hemmed in by the hills, there was very little opportunity for international trade. The development of trade and social intercourse with other countries are necessary for the development of the Law of Contract. Such a state of society did not exist during the Kandyan period. Difficulty and danger of travel prevented people from proceeding beyond their respective villages. Hence, the Law of Contract was in a rudimentary state and the information available on this subject is scanty.

Knox states:[1] "If any man to a bargain or promise gives a stone in the King's name, it is as firm as hand and seal. And if any after this go back of his word it will bear an action." Thus from this statement, it appears that although the law of contracts was not fully developed, still the binding nature of the contract and obligation arising out of a solemn pact was recognized if the contract was entered in the name of the king.

Executory contracts as distinct from executed contracts were in an elementary stage of development. In this chapter, a few types of contracts prevalent in the Kandyan society are discussed.

Sale and Exchange

For the most part Kandyan law dealt with executed sales. Executory agreements for delivery by a seller in consideration of future payment by the buyer were known also at a comparatively early period. Thus, Knox refers to the fact that he and his companions, when making their escape, sold their caps and other wear to be paid for at their return.[2]

Armour speaks of the payment of *atikrama* (equivalent of the Tamil *'athivaram'*) which he defines as "earnest money, a sum payable in a transaction wholly executory where there was neither payment of the price nor delivery of the thing sold". Sir John D'Oyly describes the *atikrama* as the premium or present given by a borrower to a lender to induce him to advance a loan.[3] He surmised that earnest money as understood in modern law, was known in Armour's time. The payment of earnest money might have been

1. Knox, R. p. 164
2. Knox, R. p. 252
3. D. p. 160

influenced by the Dutch or English, but the *atikrama* as known to the Kandyan law, was more in the nature of a present given as a favour or out of respect to a person. Thus, a deed of sale of 1681 recites the gift of a cloth as earnest and at the same time, the payment of the purchase money.[1]

A regular transaction of sale is described in *Dukgannaralle Appuhamy v. Amunugama Lekam.*[2] The buyer conveyed 100 pieces of silver (*ridi*), and a *Talapat* (Ola leaf deed) was written out. The seller paid in the presence of the witnesses, and pointing to the money which had just been counted, the seller stated as follows: "For this money, be all witnesses that I hereby transfer the land Wattapolleye."

It was not necessary, however, that a regular deed of sale should have been executed. The handing over of the original *sannas* appears to have been sufficient. Thus, in *Galladonda and Boramine Punchyralle v. Agara Vidaka Mahaduraya,*[3] a transaction which took place at Ahalapulawalluwa is referred to, in which the plaintiff sold a land for 200 *ridi* to the defendant; without executing a fresh voucher, the vendor handed over the original *sannas* to the purchaser and all formalities were observed in the presentation of the *multalvata* (it was put into the hands of each witness in turn by the vendor and finally handed over to the purchaser).

The Kandyan deed of sale could be retracted and was never considered to convey irrevocable title. Thus, in *Bannekaley Kapurāla v. Uguredepidiya Lekamalay Appu,*[4] it was stated that a contract of a sale of land was not absolute unless the vendor had expressly barred the right of redemption by a clause in the deed of sale. Where such a clause is introduced, the transaction is considered as a complete sale in *paraveni* and, as such, the property vested absolutely in the purchaser.[5]

The inconclusive nature of a sale among the Kandyans is sometimes attributed to the inordinate attachment they had to their ancestral lands. In *Bannekaley Kapurala v. Uguredepidiya Lekamalay Appu,*[6] the chiefs, after due deliberation were unanimously of opinion that the right of redemption of *paraveni* land remains in the vendor and was extinguished only by the death of himself or the purchaser.

The death of either the vendor or the purchaser made the sale irrevocable for all intents and purposes provided the sale was originally made by the written transfer. In this event, the heirs of the seller were estopped from re-emption since the maxim was

1. 2 C. P. G. p. 737
2. 21. 10. 1829 (23/25 Pt. II)
3. 28. 9. 1822 (23/7)
4. 7. 12. 1824 (23/13)
5. also *Attapattu Lekam v. Polgalla Lekam* 7. 5. 1817 (23/2)
6. *supra*

that the death of one party is the lapse of the generation. Hence, every sale of a land was therefore virtually a mortgage, but so far as high land is concerned, it would appear that a sale was treated differently. The Kandyan law appears to have recognized an exception in such cases. Thus, in *Kiriletenna Unnānse v. Hangerangoda Duriya*,[1] the question asked suggests that the sale of high land (*godapil*) was always regarded as a complete and irrevocable *paraveni* sale. Thus to the question posed, "Then you mean to say that if a man delivers to another a piece of his high land and receives payment for it, he cannot afterwards get the land back and offer him the money?" the answer given by the chiefs was "Yes, it is so".

Even where there was a deed of renunciation by which the vendor undertook not to claim back the property, there are numerous cases where the sale was still said to be one which could be rescinded at the instance of the vendor. Every sale therefore, was in fact a veiled mortgage in Kandyan law, and there were numerous disputes as to whether a transaction was a sale or a mortgage.

A perusal of the evidence found in the Archives suggest that even in cases where there was a genuine sale transacted, the vendor sometimes fraudulently dispensed with the legal formalities in order that the transaction may later be construed as a mortgage. Whereas a sale became irrevocable on the death of either the vendor or the purchaser, a mortgage always remained a mortgage, and the heirs were entitled to redeem the property at any time.

In early Kandyan law, the time at which the debt should be repaid and the mortgage foreclosed, was not specified because a mortgage could always be redeemed; time was of no consequence.[2]

One of the tests adopted by the Judicial Commisioners to distinguish between a mortgage and a sale, was to discover who performed the *rajakāriya* for the land since the performance of such service by the proprietor or his representative was a duty arising from the proprietors right to his *paraveni* property. Hence, unless the original proprietor consented to perform the services, the transaction would not be held to be a mortgage.[3] The same test was applied to royal grants.[4]

1. 30. 1. 1818 (23/4)
2. See *Katale Pedeya v. Kolakdeneye Henaye* 2. 7. 1819 (23/5) where the time allowed for the redemption was said not to be for an indefinite period. It was stated here that this was a departure from the old rule although it appeared according to the customs of the country. In this case, the mortgage had not been foreclosed in the lifetime of the mortgagor. Hence, an individual who wanted money, would transfer land to another without a written instrument in consideration of a sum of money received without specifying that the transaction was a sale (*vicca*), mortgage (*ucas*), loan or transfer in trust (*bala*).
3. *Pothuhera Mudalihāmy v. Kurrepotte Aratchilla* (Appeal) 2. 2. 1826 (23/17)
4. *Onelooville Geveneralle v. Guruhamy* 13. 3. 1817 (23/3).

Sometimes a creditor possessed the land and the service was performed by the debtor. In such cases, it was usual for the creditor to take the owner's share of the first crop on account of the debt, but the debtor took the next crop of the owner's share on account of the debt.[1] Unless a new deed of sale was executed, it was held in a case that the transaction was a sale and the surrender of an old deed was insufficient to prove a sale.[2]

Loans

Loans were frequently entered into by the people. The loan may be of grain needed for sowing, of grain, or may be money. Money was chiefly required to pay fees or fines to chiefs or the king himself.[3]

A grant of the year 1735 recites that the grantee, amongst other considerations, fought for release from a lawsuit before the Great Gate.[4] People who had no fields kept themselves alive by lending grain and obtaining interest in kind. Knox himself appears to have gained livelihood by this means of usury.[5] The interest was paid in kind and was returned with the principal in the harvest season at the rate of a bushel and a half for a bushel, which worked out at 50% interest. If the debt was not recovered in the first year the interest was doubled, but in no event could the interest exceed the principal however long the loan may remain unpaid. This rule, according to Knox, was later established by the king to prevent usury because during the Kandyan period, according to Knox, "there have been whole families made slaves for a bushel of corn".

The law governing simple loans is described by D'Oyly as follows:[6]

> "If no land be delivered into possession, nor share of produce assigned, payment of interest in money is stipulated according to one of the following modes. First, an increase of 100 per cent, usually in Kandy, and of 50 per cent, in the country, takes place if the principal be not paid within the year, otherwise no interest is charged, and though payment be protracted for any indefinite term beyond the year, the interest does not increase. Second, a certain rate of interest is stipulated to be paid per month or per annum, and whatever amount may accumulate it admits of no limitation (In 1858, the District Court held that Kandyan law recognized that there was no limitation of interest upon money lent, but in appeal the judgment was modified, the interest being reduced to an amount equivalent to the principal.

1. *Weedaddebedergedera Aractchi v. Heralgey Koralle* 23. 5. 1819 (23/5)
2. *Murrangodda Kiria v. Puttuniala Pakir Tamby* 1. 9. 1825 (23/16)
3. D. p. 156
4. (1735) 2 C.P.G. p. 626
5. Knox, R. p. 163
6. D. pp. 159-162

No grounds for the District Court's decision are stated, but presumably it was based on Sect. 3 of Ordinance No. 5 of 1852; D. C. Kandy 27021, Aust. p. 191). The rate of interest long sanctioned in Kandy by the example of the Royal Treasury from which it (*sic*) was frequently lent to traders was 20 per cent per annum, but as no prohibition existed, the moneyed men who were few and consisted chiefly of Malabars and Moormen, often exacted 3, 4 (An agreement of 1806 recites a pledge of a large amount of jewellery by Ehelapola, Dissawa of Uva, with Pachin Tambi, Ratu Lekam of Borawawidiya, for a loan of 600 *parangipatta* (i.e. Porto Novo) pagodas, with interest at the rate of 4 pice per pagoda for every 30 days; 1 C. P. G. p. 201), 6 and latterly even 8 pice per month for each Porto Novo Pagoda. This having been brought to the King's notice about ten years before the establishment of the British Government, the rate was limited by his order to two per cent per month for each Porto Novo Pagoda, which was then equivalent to 10 *ridi*. But this regulation is not considered to have affected the interest stipulated to be paid according to the first mode.

"Money was usually borrowed according to the former condition by persons in distress, or under immediate pressure, and according to the latter by traders who were almost exclusively of the two classes just mentioned, viz. Malabars and Moormen.

"A premium or preliminary present called *atikarama* was sometimes given for the favour according to the necessity of the borrower and the rigour of the lender. It usually consisted of cattle, paddy, cloths or some gold or silver article, and sometimes stood in the place of interest if the money was repaid within a short stipulated period, but not otherwise.

"It is a very general practice in the country to borrow paddy or other grain for seed and for consumption, payable at the next ensuing harvest. The established rate of interest is 50 per cent and the creditor often goes or sends his people to the field to secure payment. If after receiving it on the spot, he at the entreaty of the debtor, re-deliver it and allow respite till the next season, the whole is considered as principal, and 50 per cent charged upon it next year. This exaction of compound interest was at one time forbidden by the King as oppressive to the poor, but of course could be prevented only partially in the practice. If the debt be suffered to outstand without such receipt and delivery, no more interest is charged than the original 50 per cent. In the Seven Korales and Nuwerakalawiya no interest is charged on paddy because it is an abundant article. In Dumbara no interest is payable on money or on grain but in this District it is often customary to receive a surplus of one or two *lahas* (In Sinhalese dry measure: 1 *amuna* or *amunam* = 4 *pelas* = 8 *beras* = 40 *lahas* or *kuruni*. 1 *pela* =

2 *beras* = 10 *lahas* or *kuruni*. 1 *bera* (*parrah*) = 5 *lahas* or *kuruni*. 1 *laha* or *kuruniya* = 4 or 4 4/5 *neli* (*seers*). The *amunam* is usually taken as equal to 5 bushels but varies in different parts of the the Island) on every *pela* of grain, not on account of interest but in order to compensate the diminution of quantity by drying. The cause of the exception in Dumbara is not sufficiently explained but it is said to have been established by a former king's order.

"For loans of paddy also, the borrower is sometimes, but by no means universally required to give a premium. The common rate was four pice per *pela*, but in times of scarcity I understand it has risen to six and even eight pice for seed paddy. In countries where it is customary to charge interest on paddy, the premium occasions no diminution of the interest. If the debtor dies, the principal is recoverable from his heirs to a extent of the assets of the deceased, but not the interest whether it be a loan of money or grain."

During the Kandyan period usury was mostly practised by the Muslims, but no provisions existed restricting the rate of interest as the money due consisted chiefly of corn.

Naya and Thooraha

In Kandyan law, *naya* means a debt resulting from a contract or an agreement between the debtor and the creditor. Hence, if one borrowed a sum of money or purchased goods on credit, or rented a house or took on lease a garden or a paddy field or other premises, the obligation resulting from any such transaction is called *naya*.

However, if without proper authority and sanction, a person expended money or disposed of the goods that belonged to another which had been entrusted to him, or if owing to his negligence, the money entrusted to him was lost or stolen, or the goods were lost, stolen, damaged or perished, or if by unfair means, a person appropriated to himself another person's goods, or received stolen goods and disposed of the same, or if he carelessly or maliciously damaged or destroyed another's goods, the damages resulting from any such occurrence is called *thooraha*.

Naya signifies also the liability of a surety to discharge an obligation incurred or contracted by the principal. *Thooraha* however means the pecuniary penalty incurred by one convicted of slander or defamation.[1]

The distinction between *naya* and *thooraha* in modern law, may be stated as follows: *naya* appears to be the debt arising from a contractual obligation; debts arising out of quasi-contractual

1. Armour's Notes

and delictual obligations or breach of trust, were designated *thooraha.*

Enforcement of contracts

In ancient Kandyan law, there was self-help which was a recognized method of enforcement of contracts. This took various forms. There was execution against the person, restraint upon property, recovery by moral compulsion and recovery by creating nuisance.

Public sales of property and executions for debts were entirely unknown in Kandyan law,[1] and seldom did the Courts enforce the payment of a debt by the creditor adopting procedure set out for executions. The rule governing restraint could hardly be compared to the principles of English Law governing the same subject, or the *pignoris capio* as known to the Roman Law.

Execution against the person

A person was entitled to seize the person of the debtor or any member of his family if a debt was not paid. This appears to be an unrestricted right. This right was even given to a slave against a free person.[2] There are several deeds from which evidence of such procedure against persons in Kandyan law could be gathered. Thus, in a deed in 1814, a grantor conveying his property to his nephew excluding his daughter, says that she gave no assistance "when the people who lent the money intended to catch me".[3] Another deed of 1773 recites that the creditors "wanted to seize and carry me away".[4]

In D'Oyly's time, the rigour and austerity of the old procedure appears to have been mitigated to the extent that the intervention of the chief was considered a necessity and personal execution was only permitted if the debtor had no property. D'Oyly states:[5]

> "If the debtor has no property, the chief sometimes delivers him to his creditors, who is thereupon authorized to confine him in his house, and if he cannot obtain satisfaction to employ him as a servant, or rather as his slave treating him as such and supplying him with victuals and clothing. In this case an ola is frequently written binding him to serve the creditor till payment of the debt, or sometimes, but more rarely, one of his children is consigned to his service upon the same condition.... It is said that in the distant provinces powerful creditors have sometimes seized by force a child or other member of his debtor's family. This was considered as altogether unjustifiable, but the

1. D. p. 163
2. Knox, R. p. 164
3. 1 C. P. G. p. 79
4. 2 C. P. G. p. 72
5. D. p. 164

instances were not unfrequent, especially in the Disavonies, in which the debtor voluntarily resorted to this mode of relief with intention that the sacrifice should be temporary, but the debt remaining unpaid, the slavery of the consigned person becomes perpetuated."

Restraint upon property

In describing the procedure adopted by a creditor who affects a restraint upon the property of the debtor, Sir John D'Oyly states:[1]

> "Sometimes, on complaint to a chief for recovery, the debtor will be summoned and the claim investigated in regular course, and when after admission or proof of the debt, payment is directed and unreasonably delayed, the chief, on application will sometimes send officers to seize the debtor's property, and deliver to the creditor a pledge sufficient to satisfy his demand .....Frequently without any judicial process, especially if the debt be notorious and the payment evaded, the creditor obtaining leave from his chief or provincial headman, ploughs the fields of the debtor or ties his cattle, or takes possession of his cocoanut trees, or seizes his paddy in the threshing floor, any of which or similar acts soon compels him to come forward and make some satisfactory settlement; and if the creditor is a person of comparative power and influence, he often adopts one of those steps by his own sole authority. This is not held to be strictly legal, but if the demand be admitted the debtor will rarely complain."

Recovery by Moral Compulsion

In Kandyan law, recovery by moral compulsion took various forms. The Indian practice of 'sitting in *dharna*' has its counterpart in Kandyan law in three different forms. These forms could be described as threat to commit suicide, *wælekme damanawa*, and sending a servant to a debtor's house to worry the debtor.

Knox describes the custom of the creditor resorting to a threat to commit suicide as follows:[2]

> "They have an old usage among them to recover their debts. Which is this. They will sometimes go to the house of their debtor with the leaves of the neiingalā, a certain Plant, which is rank Poyson, and threaten him, that they will eat that Poyson and destroy themselves unless he will pay him what he owes. The debtor is much afraid of this, and rather than the other should Poyson himself, will sometimes sell a Child to pay the debt: Not that the one is tender of the life of the other, but out of care of himself. For if the party dyes of the

1. D. p. 163
2. Knox R. p. 167

Poyson, the other for whose sake the man Poysoned himself must pay a ransome for his life."

Describing the procedure adopted in *welekme damanawa*, D'Oyly states as follows: "The creditor whenever he meets his debtor in the street or road, he stops him abruptly, and drawing a circular line around him on the ground with a stick, or something without this ceremony, sits down besides him, and forbids him by the King's command to move from the spot without paying his money. The debtor is obliged to sit himself also, and in respect of the King's name, neither can stir, till some other person approaching and interfering, emgage to be answerable for the debt, or for the person, in the presence of the witnesses, to call both before the proper chief, to have his case investigated and settled. This is called *welekme damanawa* or placing under inhibition".

In the reign of Kirtisri (A. D. 1747 to 1782) a case is mentioned where this procedure is described. A certain Moorman, called Kaloo Lekam, borrowed 3000 *ridis* from the Treasury; having paid no interest he was threatened with prosecution, but the report to the King was delayed. In the meantime, one Mowla Meddema Muhandiram to whom Kaloo Lekam owed 300 *ridis*, invited the debtor to his house, on some pretence, and then inhibited him by *welekme*. The Adigar, hearing of this, reported the circumstance to the King, who declared that, "as the creditor had anticipated him by first securing the debtor's person, his debt should be discharged before the King could bring to account and, as the debtor was unable to pay Mowla Muhandiram; the King directed that the sum should be paid from the treasury, and the debtor be released from his thrall and be brought up to the palace."[1]

The Chiefs and Officials also appear to have used the device of *welekme* for extorting payment of fines, but the procedure in such cases differed from the procedure which was adopted to enforce the payment of private debts. In recovering fines, the procedure adopted by the Chiefs or Officials is set out by Knox as follows:[2]

> "For the taking of Fines from men, on whom they are laid, this is their Custom. The Officers, wheresoever they meet the man, stop him in the place. Where they take away his Sword and Knife; and make him pull off his Cap and Doublet; and there he sits with his Keepers by him, till he pays the Fine. And if he delays paying it, they clap a great Stone upon his back; in which condition he must remain till he pays it. And if he doth not pay, they load him with more Stones, until his compliance prevent further pains ....."

1. D. p. 242
2. Knox R. p. 166

The third method of execution which was often adopted by creditors was to send a servant to the debtor's house to worry the debtor. D'Oyly describes this procedure as follows :

> "Having tried other moderate means in vain, he (the creditor) sends a slave or servant or other person to go and live at the house of the debtor, to make constant demands for the money and to extort by importunities and perhaps abuse, or a sick man to impose additional trouble of attendance and care. The debtor upon this usually returns him with another messenger of his own, bearing a humble entreaty for further time, with assurances of payment, and sometimes obtains a respite, if not, he is obliged to furnish subsistence to the intruder without charging it against the creditor, and patiently to hear his perpetual solicitations and insults, till he can appease his creditor, or find the means of satisfying his demand; or sometimes with the same view of annoyance, the creditor ties up an old sickly unserviceable bullock, cow or buffalo, in the garden, and delivers it to the charge of the debtor, who is obliged to maintain and take care of it, to be responsible for its trespasses, and to give an equivalent perhaps a better head of cattle or its value, if it be lost or die in his keeping."

The practices set out above, have their counterparts in India, but there are certain differences. The Sinhalese customs are more secular in nature and are free from religious influences. In India, the practice of 'sitting in *dharna*' was usually practised by Brahmins. The poison or dagger was a further threat of immediate suicide if the debtor passed him without payment of debt. The debtor was constrained to stay and fast too, in view of the belief that if the Brahmin died as result of his *karma* a heinous sin was committed. In Ceylon, however, the arrest was, in the case of *welekme*, effected in the King's name. No mention is made of fasting, and the fear which compelled payment was not a supernatural sanction, but the threat of the penalty awarded by the court for being, even indirectly, the cause of another's suicide. If the creditor by any chance, committed suicide, then the debtor had to pay for it by sacrificing his life. It is his fear which made the debtor to respect the custom of *welekme*.

Vicarious Liability

Although Armour states that a child's separate property was not liable to seizure on account of his father's debt, execution could certainly be levied upon the child's person.[1] He could be either surrendered voluntarily, or taken compulsorily as a slave.[2] A parent who was not responsible for his child's debt could not be seized in execution.

1. P. A. p. 76
2. S. p. 19

Modern procedure

Decrees are now enforced under the provisions of the Civil Procedure Code. If the estate is insolvent, then the Insolvent Estates Ordinance, No. 7 of 1853 which is mainly adopted from the English Bankruptcy Act of 1849, governs such matters.

Preference among creditors

In Kandyan law, a mortgagee had a claim to the mortgaged property in preference to the secured creditors. Among unsecured creditors, the Crown debt had no priority.[1] There was no way of pooling the assets and distributing them among the creditors, but if the creditor had obtained the property into his possession for the debts of the debtor, then among unsecured creditors he had preference. All other creditors had to share *pro rata*.[2]

1. *Subadar Sawel v. Soorawirage Don Henderick*, D. p. 240
2. D. p. 163

CHAPTER XXXII

DONATIONS UNDER THE KANDYAN LAW

The general rule governing donations under the Kandyan law is that deeds of gift are revocable.[1] But this rule is subject to important exceptions. Armour lists the following grants as irrevocable:[2]

(*a*) Dedications to priests and temples, or for any religious purpose ;

(*b*) Grants made in consideration of payment of debts and future assistance and support, and containing a clause renouncing the right to revoke;

(*c*) Grants in consideration of past assistance, with a renouncing clause;

(*d*) Grants to a public official in lieu of a fee, with a renouncing clause ;

(*e*) Settlements on the first wife and children before contracting a second marriage.

Despite this clear statement by an institutional writer, the rule governing revocation became obscure as a result of judicial decisions and in view of the conflicting views expressed on this topic by other institutional writers.

D'Oyly states as follows :[3]

"Transfers, donations and bequest of land are revocable at pleasure during the life of the proprietor who alienates it. It is held that any landed proprietor who has definitely sold his land may resume it at any time during his life, paying the amount which he received and the value of any improvement, but his heir is excluded from this liberty."

Sawers says :[4]

"The assessors unanimously deny that a definite sale of land was revocable in the lifetime of the seller, at his pleasure. The chiefs say it was not without precedent for bargains of this kind to be broken and annulled, even years after the land had been sold, but it was not done as a matter of course nor justified by law or custom."

These statements which are applicable both to sales as well as gifts were equally applicable to donations. The result was a spate

1. *Sinhalese Laws and Customs* by F. A. Hayley, p. 300
2. P.A. p. 95
3. D'Oyly, p. 15
4. S. p. 20

of decisions expressing conflicting views. Regarding sales, by proclamation of 14th July, 1821, it was enacted that all sales of land should be final and conclusive and the seller has no right to revoke the deed of sale. The decisions on Kandyan deeds of gift draw a distinction between gifts of the whole of the donors property and a part of it, the latter being not revocable.[1] But the exceptions set out by Armour have been recognized in a number of cases. Thus in *Sapalhamy v. Kirri Ettena*,[2] it was held that deeds of gift to priests are not revocable. The exceptions set out in Armour were also recognized in the case of *Molligoda v. Kepitipola*.[3] In *Bologna v. Punchi Mahatmeya*,[4] the earlier cases on this matter were reviewed and a Divisional Bench held that it was impossible to reconcile all the decisions as to revocability or non-revocability of Kandyan deeds and expressed the general view that deeds are revocable. Before a particular deed is held to be an exception it has to be shown that the circumstances which constitute non-revocability appear clearly on the face of the deed itself.[5]

In course of time, influenced by the English ideas of equity, the courts began to apply the English doctrine of consideration to deeds written by way of marriage settlement. Thus it was held that a settlement on a son by the first marriage was irrevocable on the ground that there was consideration and such a deed came within the exceptions set out by Armour.[6] The courts even went to the extent of holding that a gift to a daughter-in-law,executed after marriage and ostensibly out of free will and affection was irrevocable, because it was made in pursuance of a previous promise to the donee on the understanding that the grantor would give the property to her if she married the donor's son.[7] No authorities were cited to support this proposition but the principles set out are based on equity. But there was a set-back to the application of the English doctrine of consideration when Middleton, J. refused to apply this rule in order to give equitable relief in construing Kandyan deeds. He held that a donation made by a person in favour of his daughter-in-law in contemplation of marriage with the donor's son is revocable under the Kandyan law.[8]

The revocability of deeds granted for assistance and support had also been the subject matter of conflicting decisions. It was customary among the Kandyans who were labouring under the burden of performing *rajakariya* services to their feudal lords,

1. *Mudelitamby v. Aratchille* (1849) Morgan's *Digest*, p. 441; Hayley, p. 306; D. C. Kandy 9862 (1938) Aust. p. 43
2. (1844) Morgan's *Digest*, p. 373
3. (1838) Aust. p. 214
4. (1866) Ram. Reports (1863-68) p. 195
5. Hayley, p. 307 and the cases cited in the footnotes
6. *Dingiria Dureya v. Saleloo*, B. & S. p. 114
7. *Ukku v. Dintuwa* (1878) 1 S.C.C. p. 89
8. *Dingiri Menika v. Dingiri Menika* (1906) 9 N.L.R. p. 131

to transfer their lands to the nearest relatives in return for assistance and support when they become feeble and infirm. The grantees in such cases obtained possession either immediately or after the death of the grantor, provided he honoured the undertaking by feeding and clothing the donor and gave him a funeral worthy of his rank. Majority of such gifts were usually executed before death, in consideration of services already rendered and also in respect of future services to be rendered.

It has been held in a number of cases and ultimately by a Full Court in Case No. 28626,[1] that a deed of gift for services previously rendered as well as services to be rendered in future, was revocable.

Despite this authoritative decision, the English doctrine of consideration was again resorted to in order to interfere with the plain rule of revocability. In *Heneya v. Rana*,[2] Phear, C.J. and Dias, J. held that a grant in consideration of past services could not be revoked. But no authorities were cited in support of this proposition. Even according to the English doctrine of past consideration, such contracts are regarded as voluntary conveyances. However, in *Ran Menika v. Banda Lekam*,[3] Perera, J. followed the earlier rule in *Bologna v. Punchi Mahatmeya*[4] and held that any free gift was revocable but stated in a *obiter dictum* that a gift in return for future assistance or other future consideration was really analogous to a sale, and not a free gift, and therefore was not revocable because it would be inequitable to revoke it if the services were rendered in return for the deed of gift.

In *Mudiyanse v. Banda*,[5] the narrow limits within which a deed of gift could be revoked are set out. In that case the deed of gift was granted in consideration of future assistance and a previous payment of a sum equivalent to about 1/10th of the value of property but containing no clause renouncing the right of revocation. It was held to be revocable. Perera, J. modified his earlier view which he held in *Ran Menika v. Banda Lekam*,[6] and held that in his opinion, only where a deed of gift is executed in consideration of something which was to be done in future by a donee and that thing is actually done by him, having been induced to do so by the execution of the deed, it should, on grounds of equity, be deemed to be irrevocable.

There has been a considerable difference of opinion as to whether a deed of gift by a Kandyan becomes irrevocable by the donor who renounces his right to revoke it. Hayley is of the view that the

1. (1857) Aust. p. 207
2. (1878) 1 S.C.C. p. 47
3. (1912) 15 N.L.R. p. 407
4. *supra*
5. (1912) 16 N.L.R. p. 53
6. *supra*

effect of a clause of renunciation is of no avail in law.[1] In expressing this view Hayley was influenced by the Kandyan customary law. But it has been held that a clause renouncing the right to revoke, coupled with the payment of debts, past services rendered and services to be rendered in the future, are irrevocable.[2] Curiously in *Banda v. Hetuhamy*,[3] it was held that a deed of gift containing a clause renouncing the right of revocation is revocable under the Kandyan law, if the donee failed to perform his obligation.

In *Kirihenaya v. Jotiya*,[4] it was held that a Kandyan deed of gift, which expressly renounces the right of revocation and which is not dependent on any contingency, is irrevocable, since a deed of gift is a contract and there is no rule of law which makes it illegal for one of the parties to a contract to expressly renounce a right which the law would otherwise give. This view has been followed in a series of cases.[5]

From these decisions a clear principle has emerged which has been enunciated by a Full Bench of the Supreme Court. The principle may be formulated as follows: If in a Kandyan deed of gift it is stated that the deed is irrevocable and the clause containing irrevocability is not dependent on any condition, then such a deed cannot be revoked.[6]

On the recommendations of the Kandyan Law Commission, the Kandyan Law Declaration and Amendment Ordinance (Cap. 59) section 5 was enacted. This section reads as follows:

> (1) Notwithstanding the provisions of section 4(1), it shall not be lawful for a donor to cancel or revoke any of the following gifts where any such gift is made after the commencement of this Ordinance:
>
> (*a*) any gift by virtue of which the property which is the subject of that gift shall vest in the trustee or the controlling *viharadhipati* for the time being of a temple under the provisions of section 20 of the Buddhist Temporalities Ordinance or in any bhikkhu with succession to his sacerdotal pupil or pupils or otherwise than as *pudgalika* for the benefit of himself and his heirs, executors, administrators or assigns;
>
> (*b*) any gift in consideration of and expressed to be in consideration of a future marriage which marriage has subsequently taken place;

1. Hayley, p. 311
2. *vide Kiri Menika v. Caurala* (1858) 3 Lor. p. 76; also *Tikiri Kumarihamy v. de Silva* (1909) 12 N.L.R. p. 74
3. (1911) 15 N.L.R. p. 193
4. (1922) 24 N.L.R. p. 149
5. *vide Ukku Banda v. Paulis Singho* (1926) 27 N.L.R. p. 449 and *Kumaraswamy v. Banda* (1959) 62 N.L.R. p. 68
6. *vide* dictum of Tambiah, J. in *Tikiri Banda v. Gunawardena* (S.C. 602/'65 (F) D. C. Ratnapura 5264 (1967) 70 N.L.R. p. 203

(c) any gift creating or effecting a charitable trust as defined by section 99 of the Trusts Ordinance;

(d) any gift, the right to cancel or revoke which shall have been expressly renounced by the donor, either in the instrument effecting that gift or in any subsequent instrument, by a declaration containing the words "I renounce the the right to revoke" or words of substantially the same meaning or, if the language of the instrument be not English, the equivalent of those words in the language of the instrument:

Provided that a declaration so made in any such subsequent instrument shall be of no force or effect unless such instrument bears stamps to the value of five rupees and is executed in accordance with the provisions of the Prevention of Frauds Ordinance or of the Deeds and Documents (Execution before Public Officers) Ordinance.

(2) Nothing in this section shall affect or be deemed to affect the revocability of any gift made before the commencement of this Ordinance."

On the principle that a person can revoke only what he gave, it has been held that where a person gave an undivided share to the donee of a land which became the subject matter of a partition action and a partition decree was entered giving a definite portion to the donee in lieu of the undivided share, the donor had no more right to revoke it since the title to the undivided share had disappeared and the donee had been conferred with title to the divided portion by virtue of the provisions of the Partition Act, free from all encumbrances.[1]

1. *vide* the dictum of Tambiah, J. in *Stephen v. Elandi* (1965) 69 N.L.R. p. 492

THE LAW OF CRIMES

CHAPTER XXXIII

CRIMINAL LAW

The question as to whether the Sinhalese had criminal laws is by no means an easy one to answer. Knox, referring to the king's power, says:[1] "As to the manner of his Government, it is Tyrannical and Arbitrary in the highest degree: For he ruleth Absolute, and after his own Will and Pleasure: his own head being his only Counsellor."

The *Lok Raj Lo Sirita*, however, states:[2]

> "If in the past, present or future, in any territory, country or city, the councillors and the inhabitants have appointed or will appoint a king, it is for the purpose of ensuring that inquiry and decision are made between the just and unjust, the right and the wrong, of seeing that injustice is suppressed and justice upheld, the innocent protected and the guilty made to suffer punishment such as fines and indignities, When, however, a person is accused of grave crimes, is on trial for his life, the matter should be fully discussed with the inhabitants and the great nobles that preside over the High Court of Justice, the books where the ancient precedents of such cases are recorded should be consulted, and if the crime is found worthy of death, the person should be so dealt with. Such is the custom in its purity. Where a man has not been found guilty there is no power, according to Constitutional Law, to destroy his property arbitrarily or even with the advice of his ministers."

The *Lok Raj Lo Sirita* further sets out the major and minor crimes as follows:[3]

> Offences punishable with death are murder; grave injury to parents, teachers and holy men; treason against the King and the State; desecration or demolition of dagobas and bodhi-trees, desposition of what is dedicated to the Buddha or to the gods, or the property of the Crown; banditry, highway robbery, and other similar heinous offences.

The penalties for minor offences varied in proportion to the gravity of the offences, The hands, feet, ears or nose of the offender may be cut off; he may be fined or imprisoned or put in chains; or he may be handed over to the town police to be decorated with *ratmal* (red flowers, *hibiscus*), bones of dead oxen, and with his hands tied behind him to be flogged till his skin sticks to the bamboo

1. *An Historical Relation of the Island of Ceylon* (CHJ) Vol 4, p. 68
2. *Lok Raj Lo Sirita*—A translation by Dr. G. P. Malalasekera, as appeared in *The Ceylon Daily News*, July 26, 1930, Govt. Archives Dept., Photo No. 1/1516, Date 8. 8. 60
3. *See The Ceylon Daily News*, July 31, 1930, Govt. Archives Dept

cane, while all the time he is made to proclaim aloud his crime as he is driven through the four streets to the accompaniment of the beating of drums. Or he may be banished to the fever-stricken districts of Bintenna, Badulla and Telipeha.

Criminal justice therefore was not arbitrarily administered but was regulated.

The doctrine of the *Mens Rea* formed no part of the Kandyan criminal jurisprudence. There was no theory of criminal law, but specific crimes were punished. Crimes, as stated before, were classified into grave and minor crimes. Aiding and abetting the commission of a crime was not considered an offence.[1] The distinction between principal and accessories before or after fact, as it exists in English Criminal Law, had no place in the law of the Kandyans.

The punishments meted out were very severe when compared to the punishments given in modern times and compare favourably with punishments meted out in medieval Europe.

The specific crimes recognized by the Kandyan law were:

(1) Offence against the State—Treason

Treason was considered as one of the most heinous offences. Acts considered to be treasonable are as follows: (i) Attempt to dethrone the King: In the last reign of the King of Kandy, Arawe Adigar attempted to dethrone the King in order to make Mampitiya Bandara the King, but his attempts failed and the leading conspirators were put to death. (ii) Waging war against the King was considered to be high treason. (iii) Committing adultery with one or more of the King's wives was considered to be a species of treason. Two instances are cited in both of which the delinquents suffered the extreme penalty.[2] Having illicit intercourse with the King's concubines was not considered to be treasonable entailing death, but the convicted person was given severe corporal punishment and, in addition sometimes his hair was cut off[3] or he was imprisoned.[4] (iv) Practising *huniyam* (sorcery) against the King: the practice of *huniyam* against the King was considered to be treasonable.

The punishment for treason was death.[5]

Sometimes the king punished such crimes by the mutilation of the body of the guilty person.[6] Sometimes the delinquent suffered degradation of caste—a degrading punishment in a caste-ridden

1. Ref. Commissioner's Diary 23. 7. 1819; Lawrie's MS. p. 318
2. D. p. 31
3. ibid.
4. ibid.
5. ibid.
6. *Mahavamsa* XXXV, Geiger, p. 249

society.[1] If the offender could not be brought to justice, his property was confiscated. This punishment was adopted by the British Government after the Rebellion of 1818 was quelled.[2]

Sometimes an atrocious king who was bloodthirsty, destroyed the whole family of the person found guilty of treason. Thus, in 1812, Sri Wickrama Rajasingha executed the wife and children of Ehelapola who, being accused of treason, fled to Colombo. This punishment, however, cannot be taken as an example of the punishment meted out by the Kandyan Kings for treason.

(2) Manufacture or Utterance of False Coins

For uttering or manufacturing false coins, according to a chief the punishment was banishment and confinement in a *gabada* village for life.[3]

(3) Offence against religion—Sacrilege

D'Oyly stated that instances of sacrilege were few but if the offence was reported to the king, the delinquent was whipped through the streets of Kandy and imprisoned. In a case where a priest was assaulted, the fingers of the assailant were amputated.[4]

(4) Offences against the person—Murder

The modern distinction between culpable homicide amounting to murder and culpable homicide not amounting to murder existed in Kandyan law. Wilful and deliberate murders committed not under sudden provocation or in defending the person or property against a violent or unlawful act, was punishable with death. If a person killed another under sudden provocation or upon a sudden quarrel, then the offence was not punished with death but the delinquent might have been whipped or transported to another village.[5] But, if after the quarrel, the parties were separated and one of the parties with a view to take vengeance, killed another, then the person who killed was found guilty of murder and was punished with death.[6] Wilful murder committed in the course of a robbery was punished with death.[7] If a man defended his property and killed a person who came to rob his house by night, it may be a case of self-defence and he commits no offence under the present law, but under the Kandyan law he was given slight punishment.[8] However, in two instances, the person who killed under such circumstances was exonerated.[9] Homicide was justifiable if a husband killed a person who committed adultery with his wife, at the spot.[10]

1. Bertolacci, p. 459
2. Marsh, p. 225
3. Lawrie's MS. p. 324, 24. 3. 1817
4. D. p. 33
5. D. p. 32.
6. ibid.
7. ibid.
8. ibid.
9. ibid.
10. ibid.

(5) Murder of children

Parents, due to poverty, exposed their children to die; sometimes to avoid the bad effects of the star in which the child was born, the child was put to death in order that the parents could be saved. Illegitimate children were also sometimes put to death in order to avoid social disgrace. Such crimes prevailed frequently in Walapane, Uva and Saffragam. The king, in one instance gave severe corporal punishment at the *gabadawa* and then released the person who committed the crime.[1]

(6) Suicide

D'Oyly states that suicides were frequent in the Kandyan Provinces. The motives for committing suicide were often slender. Thus, a person committed suicide because his crop had been destroyed by another's cattle, or that the object of his affection was taken away from him, or because he had been slandered, or because he had failed to get effectual reparation for an injury done by another. In cases of suicide, the victim usually ascends a housetop or treetop and proclaims before he commits suicide that he was taking away his life for the injury done by his opponent whom he names. By this procedure, he got popular sympathy and, in certain cases, an inquiry was held by the authorities and his opponent was asked to make the necessary reparation to the heirs of the deceased. D'Oyly states that in some cases, persons falsely threaten to commit suicide with the hope of getting redress. There is no authority to suggest that an attempted suicide was treated as a crime.[2]

Cases of suicide were frequent in the Uva and Walapane, says D'Oyly.[3] A case is cited where the king confiscated the property of a person who was involved in the rebellion of Pilama Talawwe and who committed suicide.[4] This punishment might have been meted out by an order of the king and it cannot be regarded as a punishment given to every case of suicide.

(7) Killing by Negligence

If a man killed another by misadventure as when he negligently does an act while he was hunting or shooting together with another, he was given slight corporal punishment or was fined or admonished.[5]

(8) Maiming

D'Oyly states that he has not come across a crime of this nature, but it was held to be of such magnitude as to be exclusively tried by the king himself.[6]

1. D. pp. 36, 37
2. D. p. 37
3. ibid.
4. BJC 1 Sept. 1823, Lawrie's MS. p, 327
5. D. p. 32
6. ibid.

(9) Assaults

Assault cases were numerous and were often settled by the Provincial headman in the province and frequently by the Kandyan chiefs. Usually fines were imposed in such cases. In affrays involving the flow of blood (spilling of Blood—*Lay Dade*), the fine was 7 1/2 *ridi*. For inflicting blows and engaging in quarrels not involving the flow of blood, a customary fine was 3 to 5 *ridi*. If the adverse party was found to be in the fault, fines were levied from both.[1]

(10) Offences affecting morality—Rape

The crime of rape was not considered serious in early Kandyan society. D'Oyly states that in two or three cases where the offence was committed upon the female attendants of the palace by persons of high rank, they were given slight corporal punishment by the king's orders and were fined or imprisoned.[2]

(11) Adultery

Adultery was not considered a serious crime although it was prohibited strictly by the Buddhist religion. Below the rank of the royalty, punishment was rarely meted out by the chiefs.

The husband was given self-help and he could either kill the adulterer at the spot the adultery was discovered or he may seize and punish the adulterer thereafter. When complaints were made that another frequents the house of the complainant to have intercourse with the complainant's wife, the person against whom the complaint was made was called up and warned after holding an inquiry.[3]

(12) Public prostitution

Public prostitution was punished by the king's order with dire penalties such as whipping, and mutilation such as cutting off the ears or the cutting of the hair.[4]

(13) Offences against property—Theft

Theft of property belonging to the king was considered to be a serious crime. Lawrie mentions the case of a Kandyan and a Malay who were convicted for committing theft of 2 sacks of rice from the granary of the royal village Wellawita. They were flogged along the streets of Kandy and were transported.[5]

The theft of confiscated property of the public official Mohottala was punished with flogging while the prisoner was taken along the

1. D. p. 34
2. ibid.
3. ibid.
4. Knox, R. p. 146
5. Lawrie's MS. p. 321, Resident's Diary 1815

streets of Kandy and then impaled near Gannoruva in the reign of the last king of Kandy.[1]

In the case of theft of an article belonging to a person, the person who lost it was given the right to seize the thief's lands in satisfaction of his loss.[2]

(14) Cattle theft

In cases of cattle theft, the owner could recover from the thief one head of cattle more in addition to his own and also the value of the services of the stolen animal for the period he had been deprived of it and, in addition, obtain damages of forty *ridi*.[3]

(15) Robbery

Robbery was severely punished in Kandyan law. D'Oyly says that instances in which robbery has been punished with death were few, all of which, according to his information, took place during the life of the last king. Usually, the punishment was in the nature of a fine or corporal punishment, the punishment varying with the circumstances of the case. The most atrocious crimes were robberies of the Treasury or the property of the king or temples.[4]

In the case of 'atrocious robberies', the great Court assumed jurisdiction, punished the prisoners found guilty, sentencing them to be flogged through the streets of Kandy and were ordered in addition, imprisonment.[5]

Minor robberies were tried by the Adigars and other officials and the offender was sentenced according to the discretion of these officials. Sometimes, they escaped with only a term of imprisonment in which event they could free themselves by paying the value of the stolen articles and also damages.[6]

In the reign of the last king, a man convicted of robbery was confined to the great prison and his mother borrowed money and obtained his release.[7] During the early British period, a convicted robber was sentenced by the Judicial Commissioner to twelve months hard abour to serve in chains and at the end of that period was ordered to be flogged along the four streets of Kandy.[8]

(16) Arson

A person found guilty of arson was inflicted corporal punishment and sentenced to serve a term of imprisonment. He was also ordered to make satisfaction to the owner of the property.[9] Berwick

1. Resident's Diary, 1815: Lawrie's MS.
2. 17. 1. 1825 C.G.A. Lawrie's MS. p. 321
3. Ref. Commissioner's Diary 22. 3. 1822; Lawrie's MS. p. 320
4. D. p. 32
5. ibid.
6. D. p. 33.
7. Lawrie's MS. p 320, 11. 3. 1828
8. B.J.C. 8. 7. 1817, Lawrie's MS.
9. D. p. 33

states that he had come across only one case of arson when a person maliciously burnt the sheaves of paddy of another.[1]

(17) Forgery

Forgery was punished and the nature of the punishment varied according to the circumstances and rank of the prisoner. A man of rank who was convicted of forgery of an ola deed was sentenced to one month's imprisonment, deprived of the honour due to his rank and was asked to pay a fine of Rs. 10 and, in default, was ordered to undergo imprisonment till he paid the fine.[2]

(18) *Huniyam*

Huniyam, a kind of sorcery, was held in abhorrence by the Kandyans. It was performed by maiming an image or delineating a figure of the enemy or in writing his name and using diabolical arts, ceremonies and imprecations by persons who were said to be skilled in the art of black magic. There was a general belief that such acts brought about misfortune, illness and even death to the person against whom it was done. Hence, during the Kandyan period, severe punishment was meted out if a person was convicted of the offence. The delinquent was put to death or was made an outcaste. Proof was often presumptive and the suit was tried by appealing to the Gods. Swearing was the usual form of trial.[3] The King in Kundasale made a complainant, Dingiri and the accused Hedaduraya and Kaluwa to swear and the suit was decided by oath.[4] In the reign of King Rajasingha, one Naide was charged with the offence of performing *huniyam* and on being convicted, was flogged through the streets of Kandy and was imprisoned.[5]

(19) Destruction of Animals

The elephant was considered to be a valuable animal and was thus regarded as the property of the Crown. Hence, the slaughter of these animals, in particular the tusked ones and large ones, was regarded as a heinous offence. It was usually punished by whipping the offender through the streets of Kandy and the delinquent suffered imprisonment in the distant provinces. If the elephant was small, light corporal punishment or imprisonment was inflicted.

In the districts surrounding Kandy, independent of any punishment which was given by the Crown, the Kuruwe people of Kegalle (elephant-keepers) were allowed to plunder the house and premises of the delinquent and to appropriate his grain and paddy.[6]

1. Berwick's MS. as cited in Lawrie's MS. p. 323
2. Lawrie's MS. 2. 7. 1820
3. D. pp. 37, 38
4. 22. 3. 1826, Lawrie's MS.
5. Residents' Diary 1825, Lawrie's MS. p. 329
6. D. p. 35

The practice of hunting and killing animals was declared unlawful in the upper districts about 50 or 60 years prior to the British occupation, being contrary to the tenets of the Buddhist religion. The delinquent was whipped through the streets of Kandy and imprisoned in a distant village.

In cases that came under the cognizance of the chiefs, the transgressor escaped with slight punishment. Lawrie states that the practice continued in secret and was even connived at by the chiefs.[1]

(20) Slander affecting caste

The infamy which attaches to the loss or degradation of caste may be occasioned in one of two ways :

(1) By eating at the house of a person who belonged to a lower caste;

(2) By a female having sexual connections with a man of lower caste.

But it was not defamatory to accuse a woman with having had sexual intercourse with a man of a higher caste.[2]

The first act was not considered to be heinous and could be met by denying or falsifying the slander by an order from the Chief and, if necessary, by receiving a *pingo* from them. But the second was considered to be highly degrading and the disgraced family only obtained satisfaction by killing their female who had had sexual intercourse, even if she was raped. The person who killed was usually the father or her brother. All members of the family became her accusers.[3]

This practice however, was forbidden by the subsequent kings who directed that the aggrieved party must seek redress from the Crown. Later, when such cases were brought before the king, the female was detained as a slave in the Royal village of Gampola. D'Oyly states that for many years such cases did not come up but in a few cases the person who perpetrated this offence was brought before the Chiefs and was either imprisoned or discharged with a fine.[4]

1. Lawrie's MS. p. 331
2. Case No. 2936, 12. 1. 1839, Lawrie's MS. p. 333
3. Ribeiro, Lee's translation p. 60; See also Judicial Commissioner's Diary, Lawrie's MS. p. 332
4. D. p. 36

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