

## **Litigation and Crime**

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### **Selected references**

RAB - Annual Report on the Administration of Burma. (Rangoon.)

Ru - Rulings of the Judicial Commission of Upper Burma

Ru.LB. - Rulings of the Chief Court of Lower Burma. (Rangoon.)

Ru.PJ. - Printed Judgments of the Judicial Commissioner of Lower Burma, 1892-9. Ru.SJ.

Ru SJ - Selected Judgments of the Judicial Commissioner of British (or Lower) Burma, 1870-92.

## 6. LITIGATION AND CRIME

*Litigation.* The growth of crime was one aspect of a general growth of litigation. The significance of this cannot be appreciated without an understanding of the difference between British and Burmese ideas on legal procedure and law.

We have noticed that Mr Maingy was quite unable to make sense of Burmese legal procedure. Even an observer so sympathetic and competent as Burney commented on the absurdity of going to law to reach a compromise.<sup>1</sup> The ten judges in the Court of Mergui, whether hearing cases individually or as a bench, did not try to arrive at strict legal decisions on proved facts but to settle disputes. They were arbitrators rather than judges. That continued to be the Burmese system. In 1878 the British representative on the Mixed Court at Mandalay noted that 'in deciding civil suits the principal aim of the judges was, if possible, to satisfy both parties, the usual result being in almost all cases a compromise'. It was still the practice for judges to hear causes through a deputy, and no decision was regarded as final unless both parties signified their acceptance of it by the ceremony of 'eating tea together'.<sup>2</sup> This difference of principle between Burmese and western legal procedure seems to have been overlooked in British Burma until, about 1880, Jardine, as Judicial Commissioner, made a close study of Burmese law. He then suggested that 'the Native system of settling disputes was not by a decree of original jurisdiction, which a Court could enforce irrespective of the will of the parties, but by conciliators, whose duty, expressly stated in cases of matrimony, was to soothe and advise the parties to make a compromise agreeable to both'.<sup>3</sup> In early days of British rule matrimonial disputes, in which the parties obtained a divorce and then shortly afterwards came together again, were a nuisance to British judges until they drove them from the judgment seat by punishing both man and wife. Jardine stated his view more explicitly in a judgment. 'I am convinced that in the Burmese family system the reasonable is to precede the legal, not under the system of the English courts by undeviating arithmetical rules and compulsory decrees, but by contracts and compromises obtained by argument, expostulation among themselves, all parties appealing more or less to what is right (i.e. the *dhammathats*) and more or less allowing

<sup>1</sup> Desai, p. 103 n.

<sup>2</sup> Jardine, Note ii, Circular, p. 15.

<sup>3</sup> Jardine, Note iv, p. 4.

themselves to be governed by these considerations.'<sup>1</sup> But this procedure was quite inconsistent with a system based on the rule of law, and upholding the sanctity of contract in the interest of economic freedom. In British courts the judges, whether British or Burman, applied western principles of law, and preferred what was legal, or what the judge regarded as legal, over what Burmans regarded as reasonable.

British and Burmans differed not only in their systems of legal procedure but also in their conception of law. Burmese law was founded on 'the *Dhammathat*, a Pali version of the Hindoo laws of Menu, and the *Yazathat*, a collection of precedents and of rules and regulations established by different Kings of Ava'.<sup>2</sup> Burmans drew their idea of law from the *dhamma*, the Moral Law. To the Buddhist this is not a divine law, a law of God, a commandment; it lacks the element of 'command' which Austin took to be an essential element of law, and Burmans regard law rather as a statement of cause and effect, like the laws of nature. Every act or omission entails certain consequences in this world or the next. Some consequences are beyond the jurisdiction of the courts, but they fall within the subject-matter of their law books; thus anyone guilty of striking a monk is liable to a fine of Rs. 100 and to innumerable existences in various stages of hell. The function of the judge was subordinate to that of the jurist whose aim was to discover the law, much as a scientist aims at discovering natural law. The men who wrote the *dhammathats* were mostly clerics wishing to advance religion, jurists looking for promotion, scholars demonstrating their erudition or ingenuity, or men of letters showing their skill in prose or verse; of the better-known *dhammathats* about one-third are in verse.<sup>3</sup> The extant *yazathats* purport mainly to record the decision of wise men on knotty points, and in fact are largely folklore of Indian Buddhist origin.

<sup>1</sup> *Ru.Sj*, p. 197. The Burmese idea of law still apparently persists in Japan. 'There is not in the Japanese mind that clear-cut distinction between, say, justice and injustice, pure and impure, legal and illegal, that there is in the Anglo-Saxon. . . . For example, take a law case. There is a law suit about a sum of 10,000 yen. This has been borrowed on terms, and has not been returned to the lender according to the agreement. There is no dispute about the terms. All that is clear and agreed. The lender seeks the authority of the court to compel the borrower to keep the letter of the agreement. There is no need to ask what a British court would decide; the agreement, the whole of the agreement and all its implications would be implemented. Not so in Japan. Judgment would probably (I have known such cases) take the form—9000 yen to the lender, 1000 to the borrower.' Rt Rev. Bishop Heaslett, *Spectator*, 13 April 1945.

<sup>2</sup> *SL*, p. 105.

<sup>3</sup> Furnivall, *JBRS*, Aug. 1940, p. 351.

British judges were puzzled by the apparent disregard of Burmans for their own law, and thought at first that they treated the *dhammathats* with little veneration. This idea was quite mistaken. Both in Lower and Upper Burma, elders called in to arbitrate professed to be following the *dhammathats*, while giving decisions that ran counter to them.<sup>1</sup> The British judge on the Mixed Court remarked that the Burmese judges 'used the Laws of Menu to some extent as a Civil Code'. In the official digest of Burmese-Buddhist law, published for the British Government in 1893-6, the compiler, a judge of the former Burmese High Court, defines a *dhammathat* as 'a collection of rules, which are in accordance with custom and usage and which are referred to in the settlement of disputes';<sup>2</sup> they had no claim to authority except as representing the views of learned men. They were venerated, as the Bible was venerated by the British, but they were applied only so far as the judges thought expedient. As was remarked by a judge of the Chief Court, who had long previous experience as an administrative official, 'The law to which Burmans were subject was not the law of the *dhammathats*, but the customary law to which the *dhammathats* were a very important but not the only guide.'<sup>3</sup> To the Burman a code of law furnished 'rules of conduct'; to the British judge the law was a command.<sup>4</sup> Under British rule the *dhammathats* came to be treated like western codes of law and, so far as possible, were literally interpreted and strictly enforced.

Of necessity the new idea of law changed the law. But the change was gradual, as for many years the *dhammathats* were neglected in the British courts; until 1847 none had been translated. By that time the tradition of disregarding them had been established, and the first Civil Code, compiled by Major Sparks in 1860, was based on current practice, including only a few phrases from the *dhammathats* that had become proverbial as expressing general custom. With the appointment of a Judicial Commissioner in 1872 legal administration began to pass into the hands of professional lawyers, who tended to give the *dhammathats* an authority and rigidity which they had never possessed under Burmese rule, and tried to interpret and apply them strictly like statutory law. For example, the general Burmese custom on the inheritance of an estate is for all the children to obtain an equal share; but the *dhammathats* can be held to support the view that the first-born child should be regarded as an *orasa* child entitled to a larger

<sup>1</sup> *Ru. 2 UB*, p. 102; *Ru. 5 LB*, p. 8.

<sup>3</sup> *Ru. 3 LB*, p. 187.

<sup>2</sup> *Digest*, p. 2.

<sup>4</sup> *Ru. Sŷ*, p. 197.

share. In Sparks' Code all the children shared alike, and the right of the eldest to special treatment was wholly ignored. Not until 1882 does the term *orasa* appear in a judgment. Jardine then remarked that, according to the *dhammathats*, the eldest son or *orasa* held a superior position,<sup>1</sup> but in his Note on the subject in the following year he states that, although Burmans who know the *dhammathats* say that under their codes the eldest son has special rights, these are seldom exacted.<sup>2</sup> No claim to such special rights was put forward until 1899, when it was asserted by a man who knew something of the British interpretation of Burmese law.<sup>3</sup> Now, anyone who can make good his position as *orasa* can obtain a special share through the courts, but among the people in general the old custom of equal division still survives.

Thus, even where professing to apply Burmese law, the courts have substituted the *dhammathats* for Burmese custom; they apply them as rules of law instead of as principles of conduct; and they try to lay down the law instead of aiming at a reasonable compromise. But they have gone beyond this, by disregarding both Burmese law and custom, and substituting western law. Burmans regarded land as a family possession over which all members of the family had rights; no one could alienate it without the consent, express or tacit, of all parties interested. The British courts defined and restricted family rights, and made land subject to the western law of property. Under Burmese rule the outright sale of land was unknown; if a man 'sold' his land, it was always understood that he or any member of the family might at any time redeem it. The British courts came to treat such conditional sales as final. According to Burmese custom the interest on a debt could not accumulate beyond the sum originally borrowed, but the British courts recognized no limit. The Burmese held that all who had taken part in cultivation were entitled to a first claim upon the produce, but this was disregarded in the British courts. In all these matters Burmese custom, in the interest of social welfare, formed a barrier to economic progress. Moneylenders would not grant loans on land if the title was uncertain, or if they could not sell it to realize their claims, or if they could not recover more than the original loan as interest, or if labourers had a prior claim upon the produce. Economic progress took precedence of social welfare; western ideas of individual property in land were substituted for the Burmese custom of family possession; transactions which the Burman regarded

<sup>1</sup> *Ru.Sy*, p. 115.

<sup>2</sup> Jardine, Note iv, p. 22.

<sup>3</sup> *Ru.Py*, p. 585.

as a mortgage were construed as sales; debts were allowed to accumulate; and labourers lost their security of payment for their labour. But all these changes were implicit in the introduction of the rule of law, and this was necessary for the conduct of business on modern lines.

Although the courts were supposed to apply western law on western lines, most courts of original jurisdiction, from almost the beginning of British rule, have been presided over by Burman officers. Up to 1870 and later few were acquainted either with English or the law. For the more efficient administration of justice they were then required to pass examinations in law. This gave an advantage to candidates who 'had received some smattering of education in a government or mission school to the exclusion of the old class of hereditary and highly influential men'; but even ten years later some courts still had no copies of the Acts which the judges were expected to administer. As they 'did not understand what they learned and had little or no power of applying it',<sup>1</sup> these changes tended to produce uncertainty rather than efficiency; though in practice they probably had little effect in either direction and, in the courts, as in native custom, the reasonable continued to have preference over the legal.

That was well enough so long as the courts were dealing merely with Burmans. But from about 1880 Indian moneylenders, attracted into the interior by the profits of paddy cultivation, looked to the courts for the enforcement of their contracts, and judges had to pay more attention to law, and to the view that would be taken on appeal. At the same time the constitution of a provisional Chief Court of three judges in 1881, 'to the great satisfaction of the mercantile community',<sup>2</sup> marked a step in the direction of efficiency, carried still further by the constitution of a formal Chief Court in 1900 and the creation of a separate judicial service in 1905-6. But the judicial system became more and more the apparatus of a foreign government. In the great majority of courts in Burma the law was administered by Burmese judges and magistrates, but on the bench they were living in a different world from that in which they lived at home. It was no longer true that the judges could not apply the law, but, as the law had no roots in the community, they applied it literally, mechanically. The British lawyers on the Chief Court also applied the law mechanically because they did not know the people. It has been alleged that

<sup>1</sup> *RAB*, 1868-9, p. 61; 1881-2, p. 23.

<sup>2</sup> *RAB*, 1881-2, *Intr.* p. 9.

'there were no High Courts in the British Empire where the atmosphere was so unreal'.<sup>1</sup>

The cleavage between law and life has had many unfortunate results. One result, further noticed below, was to encourage corruption. Another result was the growth of litigation. Up to about 1870, as already noted, the people preferred to settle their disputes by arbitration, and in difficult matters would accept the decision of the circle headman. The demand for lawyers was confined to the mercantile community, European, Indian and, to a less extent, Chinese. These classes wanted lawyers who could speak English and appear in western courts. In India law was the only profession outside Government service for the unemployable surplus of the schools, and large numbers of Indian lawyers, naturally not the ablest, flocked over to Burma, giving the courts a still more alien aspect. Even in 1880 there were no facilities in Burma for the study of law and, though every little court throughout the country had a few licensed pleaders, none of them, except possibly one or two Indians, had any legal training.<sup>2</sup>

But conditions were already changing. The Indian moneylenders employed lawyers to conduct their cases, and Burmans had to employ lawyers in self-defence. The growth of litigation was beginning to attract attention. In 1862 the total number of cases before the courts was less than 20,000. During the next ten years it rose by only 2000; but in the following six years by more than 6000. By 1886 even in the remote hill tracts of Arakan 'the large increase of litigation' was attributed to 'the disuse of the custom of referring disputes for arbitration to the local chiefs'.<sup>3</sup> For many years the law remained the prerogative of Indians; as there were few Burmans with a general education sufficiently advanced to study western law, there were still no law classes and naturally few Burman lawyers. Moreover, in cases before European judges, Burman litigants preferred Indian lawyers who could speak the same language as the judge. Gradually, however, Burman lawyers swelled the crowded ranks of the profession, and the instigation of lawsuits and the employment of touts grew until legal practice became synonymous with sharp practice, while the courts and judges, though increasing in numbers almost every year, were still unable to cope with the accumulating mass of litigation. The growth of commerce stimulated the demand for lawyers, the supply

<sup>1</sup> Harvey, *CHI*, vi, 443.

<sup>2</sup> *RAB*, 1880-1, Intr. p. 12; p. 130.

<sup>3</sup> *RAB*, 1881-2, Intr. p. 9; 1886-7, p. 16; *BBG*, I, 500.

of lawyers stimulated the demand for lawsuits, and the supply of lawsuits stimulated the demand for courts. Litigation hastened the decay of custom, the decay of custom encouraged litigation, and the courts, intended to promote efficiency and welfare, served chiefly to break down the social order that was the best guarantee of welfare and the strongest bulwark against crime.

*Crime.* The growth of crime during the past sixty years is one of the outstanding characters of modern Burma. We have seen that in Tenasserim the Commissioner was impressed by 'the generally peaceable and orderly habits of the people'. Again in Pegu, after the suppression of disorder consequent on the British occupation, crime diminished and the people settled down to a quiet life; dacoity became less frequent, and its former accompaniments of torture and cold-blooded murder almost entirely disappeared.<sup>1</sup> Gang-robbery, though not entirely unknown, was rarely committed by British subjects, and the proportion of Burmans in jail was far lower than that of any other people. In some years, as in 1872, there were waves of crime, but such years were exceptional. Then, from about 1880, there was a change for the worse.

The change may best be illustrated from Tharrawaddy which, during the present century, has been proverbially the most criminal district in Burma. Yet in 1860 it had less crime in proportion to population than any other district, and was so peaceful that a separate district magistrate was thought unnecessary. From 1861 to 1876 dacoity was regarded as practically impossible, because a gang would find no sympathy among the people.<sup>2</sup> For some twenty years the district, now regarded as conspicuously criminal, was just as conspicuously peaceful. Then, in Tharrawaddy as in the rest of British Burma, something went wrong. The problem of crime in Burma seems first to have attracted attention in 1878 when, 'during the past few years there had been a large and continuous increase of crime'.<sup>3</sup> By 1884 this had assumed such dimensions as to call for comment by the Government of India, and the criminals were no longer from outside British territory but were local men. Dacoity was rife even in the vicinity of Rangoon. The rebellion that broke out at the time

<sup>1</sup> *BBG*, I, 509, 514; II, 57, 564.

<sup>2</sup> *Tharrawaddy Gazetteer*, pp. 33, 74.

<sup>3</sup> *RAB*, 1877-8, Intr. p. 4; *BBG*, II, 564-5. It should, however, be noted that the annual reports are inconsistent. In 1880-1, there is reported a gradual *reduction* since 1870 when violent crimes were twice as numerous (pp. 12, 22), whereas in 1881-2 there was 'again an increase in violent crime in Rangoon and the districts around' (Summary, p. 8), and there was also 'a serious increase' in 1882-3.

of the third war gave a new impulse to disorder,<sup>1</sup> and from 1900 onwards the growth of crime is noticed in almost every annual report.

Crime in Upper Burma followed a like course. For some five years after the Annexation conditions were disturbed, but from 1890 Upper Burma 'enjoyed greater freedom from crime than the Province formerly known as British Burma'.<sup>2</sup> In 1906 there were only 16 dacoities in Upper Burma as against 84 in Lower Burma, and, including all violent crime, there were 201 cases in Upper Burma as against 729 in Lower Burma. The annual report for 1910 re-echoes that of 1890. But in 1911 Upper Burma went the same way as Lower Burma,<sup>3</sup> and the number of cases under the more serious heads rose by 1080 in Upper Burma as against 280 in Lower Burma. The sudden rise was probably due to a failure of the crops, but within a few years there was little to choose between them, and sometimes an increase in Upper Burma coincided with a decrease in Lower Burma. The marginal table illustrates the incidence of the most serious crime per million people.

*Murder and dacoity per million people\**

(a) Lower Burma only; (b) Whole Province

Period	Murder	Dacoity
1876-80	26.5	11.6 (a)
1886-90	War and Rebellion	
1896-1900	24.8	9.5
1906-10	32.0	9.4
1916-20	42.9	17.9
1926-30	59.7	31.9

\* Harvey, *British Rule in Burma* (1946), p. 40.

The prevalence of crime in Burma is the more impressive if contrasted with conditions elsewhere.<sup>4</sup> By 1913 it was remarked that, in proportion to the population, the number of people sentenced to rigorous imprisonment in Burma was three or four times as great as in any other province of India; the jails were continually being enlarged and continually over-crowded. New jails were built, but the jail population outgrew the new accommodation. In 1910, with accommodation for rather less than 15,000 convicts, there was a jail

<sup>1</sup> Crosthwaite, pp. 23, 50, 54.   <sup>2</sup> *RAB*, 1901-2, p. 8; 1906-7, p. 16; 1911-12, p. 9.   <sup>3</sup> *RAB*, 1911-12, p. 43; 1918-19, p. 27.

<sup>4</sup> In England and Scotland, with a population of over 40 million, there are on an average about 150 murders a year; in two districts of Burma, with a combined population of less than 1 million, the murders in 1927 numbered 139. In the United States, where social ties are looser than in England, the number of cases of murder and deliberate manslaughter even in the largest cities, taken as a group, is no more than 33 per million, whereas over the whole of Burma, including the most remote and peaceful areas, there are close on 40 per million. One district alone, about the size of Devonshire and with a population of only half a million, had 87 murders in 1927, as many as there are in Chicago with 3½ million and world-wide notoriety for gangsters. *ISC*, xi, 24; *The Times*, 28 Dec., 1935.

population of over 16,000. Whipping was substituted so far as possible for imprisonment; convicts were employed on extra-mural labour on the roads and other public works and in the mines; every opportunity was taken to release well-behaved convicts on occasions of ceremonial importance and, during the war of 1914-18, many were drafted into a Labour Corps. But in 1920 'the old trouble of overcrowding, for which during the war several palliatives presented themselves, had now once more to be faced'.<sup>1</sup>

The growth of crime was not due to lack of efforts to suppress it. When it was first noticed in 1878 the immediate reaction of Government was to strengthen and improve the police; the police force was frequently reorganized and repeatedly enlarged. But all in vain. The population was growing rapidly, but crime grew more rapidly. Between 1900 and the outbreak of war in 1914 the population increased by about 15 %, the number of police rose from 1 for every 789 people to 1 for every 744, but crime increased by 26 %.<sup>2</sup> Police training schools were opened and a special detective branch was formed, but crime still increased. In 1921 it was noted that during the preceding decade the population had risen by about 9 %, but the percentage of increase in the more important forms of crime 'ranged from 31 % in the case of murder to 109 % in the case of robbery and dacoity'.<sup>3</sup> In the more criminal tracts the ordinary police was reinforced from time to time by 'punitive police', an addition to the local establishment of which the local residents had to bear the charges. Heavy sentences were imposed, and for certain offences rigorous imprisonment for two to seven years became almost a matter of obligation. Magistrates were multiplied and magisterial powers steadily enhanced. Ordinarily only the district magistrate had been vested with special powers to impose sentences of seven years' rigorous imprisonment, and when in 1903 these special powers were given to selected European officers, it was with some hesitation and only 'to relieve over-burdened Deputy Commissioners in the most hardworked districts';<sup>4</sup> thirty years later the same abnormal powers had been conferred on some 200 officers, including even some Burmese township officers, the lowest grade in general administration. Again, the ordinary law has always allowed preventive action by the taking of security or

<sup>1</sup> *RAB*, 1910-11, p. vi; 1911-12, p. 50; 1912-13, p. 26; 1920-1, p. xi.

<sup>2</sup> *RAB*, 1877-8, Intr. p. 4; 1910-11, p. vi; 1914-15, p. 23.

<sup>3</sup> *RAB*, 1920-1, pp. xi, 38.

<sup>4</sup> *RAB*, 1903-4, p. iii.

imprisonment in respect of reputed criminals who cannot be convicted of a specific offence. Magistrates were continually exhorted to make full use of these preventive sections, but eventually they had to be supplemented by an Habitual Offenders' Restriction Act and a Criminal Tribes Act, which rendered any portion of the general public liable to be treated as a criminal tribe.<sup>1</sup>

These measures under the penal law were supported by forceful executive action under the Village Act. This Act, as we have noticed, was introduced on the annexation of Upper Burma as an instrument of martial law, and reports on village administration were made annually under the head of 'police'; the village was regarded as an instrument of law and order rather than as a social unit. Under the Village Act collective penalties may be imposed on villages which fail to resist or to report on criminals; relatives and friends of suspected criminals may be deported, and villages are expected to maintain fences and to report on the movements of strangers. These powers were vigorously employed. In some years upwards of 300 villages were fined up to a total amount exceeding a lakh of rupees. Deportation was not infrequent, and in exceptional cases a whole village was removed. Headmen were required to fine villagers for omitting to maintain the village fence or to report strangers, and they were themselves fined for derelictions of duty. It may fairly be claimed that Government did everything possible to suppress crime. But it did not succeed in preventing the growth of crime.

From time to time various explanations were suggested.<sup>2</sup> It was often attributed to 'the passionate nature of the Burman', which might explain the prevalence of crime, but not its growth. Another suggestion was 'improved detection', though one might have thought that this would check it. A more plausible explanation was found in the greater indulgence in alcohol. The use of alcoholic liquor had been prohibited under Burmese rule, but this was impossible under British rule, as provision had to be made for the requirements of Europeans, Chinese, and Indian coolies. Another theory, which certainly cannot be accepted, was that suggested to the Simon Commission in 1931, that it was due to 'unrest following the war'. Clearly the cause lies much deeper. The abnormal criminality is a feature of British rule, which did not appear until some years after the British occupation. Up to 1880, as we have seen, the people in Lower Burma

<sup>1</sup> *RAB*, 1918-19, pp. ii, 24.

<sup>2</sup> *RAB*, 1910-11, pp. 17, 22; 1920-1, p. 38; 1887, *Cmd.* 4962, p. 122; *ISC*, xi, 24.

were law-abiding, and the jail population contained a remarkably small proportion of Burmans. Again, in Upper Burma there was very little crime for twenty-five years after the Annexation. In Lower Burma the growth of crime first attracted notice a few years after the opening of the Suez Canal, and it spread to Upper Burma when similar conditions began to prevail there after 1910. In Lower Burma it synchronized with a steadily increasing difficulty in the collection of the poll tax, despite measures that in some districts amounted to 'undue harshness'.<sup>1</sup> A review of the problem in 1921 suggested that

'in certain portions of Lower Burma, the root of the trouble is probably agrarian...the slow but steady passing of the land into the hands of non-agriculturists, especially non-resident members of this class. Agricultural instability induces a want of ballast which reacts disastrously upon the communal life. With no incentive to improve another's land and no guarantee of fixity of tenure a man is apt to find a life of crime more profitable and exciting than a bare subsistence on the balance of the profits of his labour after the non-cultivating landlord or moneylender has been satisfied.'<sup>2</sup>

Other factors noticed were the 'loosening of civil and religious authority and the decay or suppression of the old-fashioned amusements'. Here we would seem to be nearer to a true explanation of the growth of crime during the last thirty years in Upper Burma and sixty years in Lower Burma. In view of the fact that social disintegration, unemployment and impoverishment were all features of the same period, and all alike due to the abnormal predominance of economic forces, it seems unnecessary to look further for a cause, or to expect a cure except by the reintegration of society on a new basis.

<sup>1</sup> *RAB*, 1885-6, p. 54; 1911-12, p. 85.

<sup>2</sup> *RAB*, 1920-1, p. 38.