

BURMA: IT WORKS, BUT IS IT LAW?

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I. INTRODUCTION

Since the *Survey* has not covered Burma before, I shall sketch the main outline of Burmese family law rather than concentrate on recent developments. There are two main aspects of comparative interest. First, Buddhist ethics combine with Burmese sentiments to produce a system with very little sexual discrimination: "There is no country where the principle of equality of the sexes has been carried further than in Burma,"¹ enthused an English judge in 1927. Second, law, meaning both state-appointed judges applying state-based sanctions and religious leaders applying conscience-based sanctions, is strikingly absent from the regulation of the Burmese family. The important sanctions are those of local group pressure, which restrict parties to a narrow range of behavior permitted by family law.

II. SOURCES OF FAMILY LAW

The British conquest of Burma was accomplished by three wars, starting in 1824 and culminating in the fall of Mandalay, the traditional Burmese capital, in 1865. The British followed the policy set down by Warren Hastings for India that matters of family law, succession, and religion should be governed by the existing pre-colonial law. Family law, as administered by the Anglo-Burmese courts, and by their successors up to the present, was intended to be the same as that administered by the last Burmese kings of Mandalay. British judges, inspired by the scholarly Judicial Commissioner, Sir John Jardine, embarked on a historical reconstruction of pre-colonial law. To their surprise they discovered a family law that was on the whole just and certainly more favorable to wives than their own.

Furthermore, this family law was part of a legal system with

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¹ *Ma Yin Mya v. Tun Yauk Pu*, 5 Ran. 406 (1927).

something of a common law flavor. A profession of lawyers had existed in Burma since the twelfth century, and their arguments had been couched in terms of the applicability of rival written sources. Whereas early common lawyers argued for one precedent over another to apply to the instant case, their Burmese contemporaries argued for the applicability of the rule in one or another *dhammathat*. The *dhammathats* were the prime written source of pre-colonial Burmese law, and thus of contemporary family law, but their nature is elusive: They do not fall easily into any European category of a written legal source. *Dhammathats* are not law reports, since they lay down general rules unrelated to a specific dispute.² They are not legislation, since they can be promulgated by any individual citizen. They are not codifications of law, at least insofar as a code claims to be the unique source of a set of rules. They are certainly not religious texts like the Koran or the Indian *dharmaśāstras*, though they are suffused with Buddhist ethics in much the same way as Coke or Littleton reflects Christian ethics. Nor is it helpful to describe them as custom, which is orally communicated and mutable. The *dhammathats* were the core of a literate system, and their rules did not change dramatically from the twelfth to the nineteenth century. Readers who are familiar with classical Roman and modern American law can picture the *dhammathat* as a genre halfway between Gaius' Institutes and an American Restatement of Law.

There were other written sources of pre-colonial Burmese law, notably *rajathat*, which emanated from the king but were more like standing orders for his bureaucracy than royal legislation. A great deal of *rajathat* material has become available for the first time during the last five years.³ It is proving crucial to Burmese legal history and history in general, but it has little application to family law. Under the Burmese kings, family law was considered to be a *dhammathat* rather than a *rajathat* subject: It was outside the scope of the king's special legal interests and could safely be left to mediation or judgment based on non-regal *dhammathats*.

The Anglo-Burmese courts filtered these *dhammathat* rules through the newly imposed common law structure of binding precedent and printed law reports. For sixty years the Judicial Committee of the Privy Council in London was the pinnacle of the Burmese court system. One admires, of course, the polymathic facility with which the noble

² In fact a separate legal genre of law reports, the *pyatton*, has survived.

³ 1-6 THAN TUN, THE ROYAL ORDERS OF BURMA AD 1598-1885 (1984-88).

lords switched from interpreting Jamaican legislation or construing the Roman-Dutch law of Ceylon to expounding Burmese texts of the eighteenth century or earlier such as the Manugye *dhammathat* or the *rajathat* of King Bodawpaya. But it cannot be claimed that the state of Burmese family law in 1948 (when Burma regained its independence) was a shining advertisement for common law technique. Professor Gledhill states of the Anglo-Burmese system the criticism often made of the Anglo-Indian courts: "They had made the law rigid without removing its uncertainty."⁴ In the forty years since independence there have been some statutory changes, particularly in the field of internal conflict of laws, but in general family law has continued unchanged through the post-independence civil wars, through the government of U Nu, and through the single party state dominated by the military which has governed Burma from 1963 to the present.

Why has Burmese family law resisted change for so long? Certainly it is not because the structure of the Burmese family has remained unchanged since the sixteenth century: Any visitor to Rangoon will recognize that he is in the twentieth century, though he may be confused as to which decade he has arrived. Perhaps it is because family law had long anticipated twentieth century notions of sexual equality. Mi Mi Khaing assesses this suggestion as follows: "No legislation in modern times has been considered necessary, as customary laws ensure for women a position suitable to present day concepts of equality [T]his early advantage—i.e. their position in traditional law—has in a sense resulted in their having fallen behind in the present march of women."⁵ Or perhaps because "law," with its implications of state authority, is the wrong word to apply to the regulation of Burmese family matters, where all except for intractable cases are arbitrated in the villages by men of respect and, in the cities, by a combination of friends, neighbors, and patrons. This explanation is more acceptable, since it accounts for the legal survival of family options such as polygamous marriage and divorce by consent which, in practice, are all but unknown. Courts will only intervene to apply family law principles as a last resort in deciding cases that local mediation has failed to settle: "In the majority of cases marriage, divorce, partition and inheritance are settled and given recognition without resort to the

⁴ Gledhill, *Community of Property in the Marriage Law of Burma*, in *FAMILY LAW IN ASIA AND AFRICA* (Anderson ed. 1968).

⁵ Mi Mi Khaing, *THE WORLD OF BURMESE WOMEN* 26 (1984).

courts.”⁶ That most family arrangements are “not the law’s business” is shown most strikingly by the fact that in Burma, as opposed to neighboring Thailand and Laos, there is no obligation to register a marriage with the state. The legal system will condescend to give judgment in cases referred to it and can wield its sanction of committal for contempt, but most family transactions are validated by the knowledge of one’s peers and enforced only by peer pressure.

It follows that knowledge of what is technically possible under the rules of family law must be read subject to knowledge of current practice, which may differ slightly between village and town, and between central Burma and the Irrawaddy delta, but it may differ dramatically between better off, university-educated families and their poor relations. The most important development of the last four years has been the publication of Mi Mi Khaing’s *The World of Burmese Women*. This study of the varieties of contemporary Burmese family practice is anecdotal in the best sense: The matrimonial histories of her friends in all levels of society have been gently welded into a modern sociology of the Burmese family.

Before discussing family law in detail, mention should be made of some fundamental aspects of Burmese relationships between the sexes and the generations. First, the name of an individual gives no clue as to lineage or marital status. There is no surname inherited by the children or acquired by the wife, and the Burmese equivalents of Master, Miss, Mr., and Mrs. depend not on marriage but on the age of and respect due the person addressed. Second, there is no power to make a will: Property passes between the generations by intestate succession. Third, the wife is more likely to hold the purse strings than her husband: “Anyone with the briefest experience of Burma knows that . . . the supremely confident wife conducting her family business in pennywise fashion (while her husband does nothing except enjoy an ill-founded local reputation as a philosopher, poet or alchemist) is a well-known figure in Burmese society.”⁷ This applies to the capital of marriage, as well as the conduct of family business. It is usual, for example, to register the matrimonial home in the name of the wife.

⁶ *Id.* at 28.

⁷ Gledhill, *supra* note 4, at 210.

III. MARRIAGE

Marriage has been judicially defined as "cohabitation with a present common intention to create a valid marriage."⁸ Cohabitation—"eating from the same dish"—is the key element in establishing a publicly reputed marriage, since there are no obligatory formalities. Registration by affidavit is an optional formality, in practice used only by the rich and better educated strata of society. The traditional marriage ceremony is the usual way of making a public declaration of intent to live together as man and wife, but this is not required. The marriage ceremony is secular and presided over by a respected elder male of the community, since Buddhist monks, pursuing the cessation of all desires, are thought to look unfavorably on a ceremony that leads to the gratification of most desires. The ritual center of the wedding consists of tying the bride and groom's hands together and pouring water over them. Surrounding aspects are ad lib, but a "proper" wedding, with many guests and an overabundance of food, will cost between six weeks' and a year's average earnings. Usually the marriage will have been preceded by an engagement party. The Anglo-Burmese courts held that engagement to marry is a matter of contract law, rather than family law, and allowed an action for breach of promise under the Contract Act.⁹

Capacity to marry is governed by family law. The husband must be past puberty, while the wife, unless marrying with her parent's consent, must be at least twenty. Both parties must be mentally competent, and the marriage must be consummated (perhaps to show that a present, rather than a future, marriage has been undertaken). "The dhammathats are surprisingly silent on the question of affinity,"¹⁰ but in practice cousins through the maternal line do not marry. A younger sister owes her elder sister almost as much submission and respect as a daughter owes her mother. Consequently, a levirate marriage with a deceased wife's elder sister is unheard of, while a marriage with a deceased wife's younger sister is very common.

Capacity leads to the vexing question of polygamy. Burmese family law states that a woman with a valid subsisting marriage has no capacity to marry again, but there is no corresponding "legal" bar on a

⁸ Ma Hla Ma v. Maung Hla Baw, 8 Ran. 425 (1930).

⁹ Maung Tun Aung v. Ma Aye Kyi, 14 Ran. 215 (Full Bench, Civil 1936).

¹⁰ Hla Aung, *Some Aspects of Marriage under Burmese Buddhist Law and Malayan Muslim Law*, 48 J. BURMA RES. SOC'Y 1 (1965).

man having simultaneous wives. The word legal is emphasized because practice, or morality, or peer group pressure has eradicated polygamy. Under the Burmese monarchy, kings and some courtiers were polygamous. "Polygamy was inevitably of small incidence though, like other fabulous doings of the great, it had high social visibility wherever it occurred."¹¹ Some noble families in the Shan and Kachin states kept up the royal tradition into the 1950s, but now "[p]olygamy in Burma is looked upon with disfavour even though the law recognises it. In Thailand, on the other hand, polygamy still exists even though it is prohibited by the law."¹² An Anglo-Burmese court as early as 1907 was prepared to hold that a Burmese Buddhist marriage was monogamous by nature,¹³ but it, with respect, was fallaciously treating family law as based on oral custom. Once the *dhammathats* are accepted as the sources of family law, legislation will be necessary to cure all Burmese marriages of the taint of potential polygamy. Hla Aung, one of the most learned postwar Burmese lawyers, took this view: "In the second place, polygamy, which is the ugliest spot in Burmese family law, should be abolished altogether. It is a legacy of the feudalistic and colonial past and is no longer consonant with the present Burmese way to socialism."¹⁴

IV. DIVORCE

The colonial legislature and the courts provided new remedies for marital problems falling short of divorce. The wife was given a statutory right to sue for maintenance for herself and her children (whether or not legitimate),¹⁵ while the courts granted either party a right to sue for restitution of conjugal rights.¹⁶

As regards divorce, governed by the *dhammathats*, there is another striking contrast between the legal position, where divorce can take place by mutual consent without the court's intervention, and the actual position, where "divorces are as difficult and rare as they are anywhere in the world."¹⁷ Legally, where one party does not consent to

¹¹ J. GOODY & S. TAMBIAH, *BRIDEWEALTH AND DOWRY* 147 (1973).

¹² 5 AYE KYAW, *THE WOMEN, THE FAMILY LAWS AND THAI-BURMESE SOCIETIES* (1984)(Proceedings of the International Conference on Thai Studies).

¹³ *Ma Wun Di v. Ma Khin*, 4 LBR 175 (1907).

¹⁴ Hla Aung, *supra* note 10, at 15.

¹⁵ CODE OF CRIM. PROC. § 488(1).

¹⁶ *Maung Sein v. Khin Thet Gyi*, 2 UBR 5 (1904-06).

¹⁷ Hla Aung, *supra* note 10, at 14.

the divorce, the other may bring court proceedings. The husband may divorce on the grounds of his wife's single act of adultery; however, the wife must show that her husband is cohabiting regularly with another woman without her consent. This sexual inequality is partially offset by the rule that a wife, but not a husband, can claim cruelty as a ground for divorce. Even without mutual consent, divorce can occur without the court's intervention. A spouse deserted for three years has the option of treating the marriage as dissolved.¹⁸ And, in the common case of desertion by a husband entering a monastery, the marriage can be treated as dissolved as soon as there is sufficient proof of the husband's intention permanently to renounce the world.¹⁹

In practice divorce entails serious loss of prestige, though there have always been Burmese who preferred ostracism to continued cohabitation. Accurate figures on the divorce rate are impossible to obtain, since most marriages and some divorces are not registered. A late nineteenth century survey estimated it as between two and five percent. A 1976 survey in Rangoon showed ten percent of marriages ending in divorce, while a 1978 survey of a small town showed a less than one percent divorce rate.²⁰

The courts have recognized the peculiar Burmese institution of a sham, or astrologically motivated, divorce. Misfortune within the marriage, particularly illness, may be diagnosed as due to a temporary occlusion of the spouses' ruling planets. The cure is a "harmonise planets with humans" divorce, or temporary separation until the planets move to a more favorable aspect. Though the planets are fooled by this temporary arrangement, the courts are not. They have held that a wife who dies during the separation dies in the estate of matrimony.²¹

V. DIVISION OF PROPERTY ON DIVORCE

Partition on divorce usually goes by mutual consent or settlement under arbitration of friends and elders. When the parties cannot come to terms, and go to the court for a decree, partition is generally determined by the grounds for the divorce, the party at fault being liable to forfeit some shares to which he or she would otherwise have been entitled.²²

¹⁸ Dr. Tha Mya v. Daw Khin Pu, 1951 BLR 108.

¹⁹ U Ohn Kin v. Daw Ohn Bwin, 1935 Civil 1st Appeal 156 (1936).

²⁰ Mi Mi KHAING, *supra* note 5, at 39.

²¹ Maung Ba Oh v. Maung San Bu, 1 Chan Toun's Leading Cases 137.

²² MAUNG MAUNG, LAW AND CUSTOM IN BURMA AND THE BURMESE FAMILY 95 (1963).

For both these situations, the *dhammathat* rules provide a background of technical terms and assumptions that may be modified to account for special facts in an extrajudicial property settlement or of notions of punishment in a court settlement. Marital property is divided according to the *dhammathats* into the following categories. *Pa-yin* is property held by husband or wife before marriage. It is assumed to revert to the owner on divorce, unless one spouse was much richer than the other. Here, where a "dependent-supporter" relationship exists, the dependent will take one third and the supporter two thirds of the *pa-yin*. When either spouse has had a previous marriage, their *pa-yin* is renamed *ahtet-pa* and is much more likely to revert intact to the original owner, as a provision for children of the first marriage. Property donated during the marriage ceremony is *hkan-win*. Traditionally, this consisted of dower given by the groom or his family to the bride. Today it includes all wedding presents from whatever source and on divorce is divided equally between the spouses. Property acquired during the subsistence of the marriage is *let-htet-pwa* if inherited by one spouse or earned by one spouse's individual exertions. *Let-htet-pwa* is divided two thirds to the spouse who earned or inherited it and one third to the other. All other property acquired during marriage is *hnapa-zon* and subject to equal division.

This taxonomy of marital property is less formalistic than it might appear. There is endless scope for argument as to what financial dealings are sufficient to convert *pa-yin* or *let-htet-pwa* into *hnapa-zon*. When husband and wife cannot agree on a property division, these arguments are doubtless rehearsed before the arbitrator. But the basis on which he reaches his decision was lucidly stated in evidence before the early Anglo-Burmese courts: "We did not give the decision according to a *dhammathat* or custom. We village headmen questioned the parties and ascertained from them what division of property would satisfy them and prevent further disputes. We then gave our decision accordingly."²³ In contested divorce proceedings before the courts, judges dividing marital property explicitly favor the innocent over the guilty party "in accord with justice and equity" (though this is less likely to happen in a divorce based on cruelty than in one based on adultery). In one case the courts asserted, but did not exercise, a power to grant all of the marital property to the innocent spouse. The Privy Council found

²³ Ma E Mya v. Ma Kun, II UBR 107 (1892-96).

this "a startling proposition."²⁴

VI. ADOPTION

Adoption is common and relatively unrestricted: Anyone of full age, married or single, may adopt a child. There is one exception—that a monk may not adopt—and one qualification—that where a married couple adopts they must both consent to the arrangement. But adoption poses a problem for succession to property on death. Since there is no will that spells out the deceased's intentions to her adopted child, her intentions must be construed as of the time of the adoption. Family law distinguishes *kittima* adoption, where the child is intended to inherit as a natural child, from *apatittha* adoption, where the child acquires no inheritance rights. The Anglo-Burmese courts look for an unambiguous public statement that the child was intended to inherit. In its absence they proceed with caution since:

It is common knowledge that the Burmese are given to hospitality and are extremely liberal to relations; near or distant nephews and nieces and cousins of all degrees are taken into the family and generally provided for: and it is often a matter of some difficulty to distinguish between them and the sons and daughters of the house.²⁵

In the last years of British rule, the Registration of Kittima Adoptions Act 1941 was passed.²⁶ Registration under the Act is now sufficient,²⁷ and, according to section 5 of the Act, necessary to prove a *kittima* adoption. But Mi Mi Khaing suggests that an unregistered *kittima* adoption can still be validated by proof that the *kittima* discharged filial duties during the adopting parent's last illness.²⁸

VII. PERSONAL LAWS AND INTERNAL CONFLICTS

The system just described was, until the British conquest, the territorial law applied throughout the Burmese kingdom. There is some evidence that pre-colonial courts recognized the distinct family customs of non-Buddhist hill tribes and the Buddhist, but Thai speaking, Shan states, but this appears to have been on the basis of external conflict of laws: Such communities were not fully integrated into the territory of

²⁴ Maung Po Nyun v. Ma Saw Tin, 5 Ran. 841 (Privy Council 1927).

²⁵ May Oung's Leading Cases 131.

²⁶ It slightly modified an Act of 1926, which had never been brought into effect.

²⁷ Daw Mya May v. Daw Hla Yin, 1965 BLR (CC) 237.

²⁸ Mi Mi KHAING, *supra* note 5, at 44.

the Burmese kingdom. Soon after the conquest was completed, the British changed the nature of *dharmathat* law: It was now to be regarded as one of three competing personal laws based on religious affiliation. Because Burma was mistakenly seen as part of India, the approach that Warren Hastings had laid down for the subcontinent was uncritically applied to an entirely different culture. But at the same time the British were consciously engaged in diluting that culture. They had learned not to rely on the Burmese for the large scale exploitation of natural resources, or for the integration of the Burmese economy into world markets. They had therefore encouraged the mass immigration of Indians, who came to dominate agricultural finance, and overseas Chinese, who took on much of Rangoon's trading activity. This is the background of the Burma Laws Act 1898, section 1 of which states:

(1) Where in any suit or other proceeding in Burma it is necessary for the Court to decide any questions regarding succession, inheritance, marriage or caste or any religious usage or institution,-

(a) the Buddhist law in cases where the parties are Buddhists,

(b) the Mohammedan law in cases where the parties are Mohammedans, and

(c) the Hindu law in cases where the parties are Hindus,

shall form the rule of decision, except insofar as such law has by enactment been altered or abolished, or is opposed to any custom having the force of law.

Subsection (a) woefully blunders by renaming the *dharmathat* law as Buddhist law with the implication that it is a universal religious system analogous to the Islamic Shariah. The Anglo-Burmese courts, in fifty years of struggle with this subsection, never succeeded in making it yield a sensible result. This is not surprising, since they were faced on a practical level with a problem that still plagues contemporary sinologists. How do you decide whether a particular Chinese family is Buddhist, Confucian, or Taoist when its practices and ethics derive from all three sources in differing proportions? After independence as will be seen, the problem was solved by statutory reform. Subsections (b) and (c) were less difficult but still left open the question of where the rules of Hindu law and Mohammedan law were to be found. Since independence, differing solutions have been adopted.

Hindu law has been taken to be the law for the time being in effect in India, so as to include those provisions of the Indian Hindu Marriage Act 1955 allowing inter-caste marriage: "It is to the Indian

legislature that all Hindus must look for their protection in respect of cases coming within the sphere of their personal law."²⁹ But in another case the provisions of the same Act abolishing polygamy were held not to be part of Hindu law: "S. 17 would only be recognized if, after generations of obedience to the statute, new migrants from India come into Burma and claim that so far as they were concerned monogamy was a custom having the force of law among them."³⁰ The first view seems more consistent with the way the courts have approached Chinese law. In 1951 the Supreme Court held that Chinese customary law is foreign law, to be proved by expert opinion, and that the court could take judicial notice of Mao Ze Dong's law reforms: "The old laws had been replaced by new ones: the Chinese customary law was no longer in force in China, and, therefore, it could not be enforced in Burma."³¹

Mohammedan law is found primarily in the Shariah, though the Burmese legislature has asserted a capacity to revise it by legislation. The talaq divorce is recognized, but the Muslim Marriage Act of 1952 granted the wife a right to initiate divorce herself. Mi Mi Khaing's comment that "[t]he law has never been taken advantage of, as the Islamic tradition against it was too strong for women to feel bold enough to do so"³² is of great interest given that many other aspects of Burmese Muslim marriage have been Burmanized.³³

The effect of internal conflict of laws on the capacity rules of the various personal laws proved disastrous to Burmese women. If they married a Muslim husband, the marriage was invalid unless they converted to Islam. If they did, they were subject to talaq divorce and drastically curtailed rights of inheritance. Hindu husbands of the top four castes had no personal capacity to marry outside their religion, so marriage to a Burmese wife was invalid. With much less logic, the Anglo-Burmese courts at first held that a Chinese husband and a Burmese wife must marry in accordance with Chinese customary law. Later decisions made *dhammathat* law inapplicable as the *lex loci contractus*, at least where the husband was a Chinese Buddhist,³⁴ but at independence it remained unclear whether this applied to questions of succes-

²⁹ Ramadhar Keot v. Ratipal Ahir, 1958 BLR 11 (High Court).

³⁰ Union of Burma v. MV Gadhia, Cr. Misc. Appln. 18 (1960).

³¹ Daw Thike v. Cyoung Ah Lin, 1951 BLR 133.

³² Mi Mi KHAING, *supra* note 5, at 25.

³³ See Khin Khin U, *Marriage in the Burmese Muslim Community*, 37 J. BURMA RES. Soc'y 24 (1956).

³⁴ Ma Yin Mya v. Tun Yauk Pa, 5 Ran. 406 (1927).

sion, or the Confucian or Taoist Chinese.

In 1954 the Special Marriage Act intervened to improve the Burmese woman's position. A mixed marriage, as long as it is registered, will come under the *dhammathat* law for all matters of divorce, inheritance, and succession. In effect the blunder of subsection (a) has been undone. Burmese family law, with its roots in Buddhism and its sources in the *dhammathats*, is once again the territorial law applicable in Burma.

La loi de la famille en Birmanie provient des *dhammathats* qui sont les textes de loi du royaume Birman d'avant la colonisation. C'est peut-être à cause de l'influence Bouddhiste que l'homme et la femme ont toujours été placé dans une position proche de l'égalité sexuelle. De nos jours il y a un contraste frappant entre les directions de la loi qui autorisent la polygamie et le divorce facile et les pratiques encouragées par l'étiquette Birmane qui sont caractérisées par la monogamie et par un taux de divorce très bas.