

# OF CONSUMMATION, MATRIMONIAL PROMISES, FAULT, AND PARALLEL WIVES: THE ROLE OF ORIGINAL TEXTS, INTERPRETATION, IDEOLOGY AND POLICY IN PRE- AND POST-1962 BURMESE CASE LAW

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## I. INTRODUCTION

This article is written with four objectives: first, to introduce the evolution of aspects of Burmese law dealing with particular family law issues and their mode of function and operation since colonial times; second, to trace the consequences and changes that were effected in the structure of the Burmese judiciary as well as in aspects of legal thinking and discourse as a result of the 1962 military takeover, in order to relate them to some of the issues that arose in cases decided in the post-1962 era, and to juxtapose and contrast them with other decisions on similar subjects; third, to discern how the concepts of "original texts," "interpretation," "ideology," and "policy" appear intermingled in pre- and post-1962 Burmese case law; and fourth, to illustrate that by analyzing these cases, a reasonable conclusion can be made that legal, political, social and ideological issues cannot always be delineated in the development of Burmese case law.

### A. *Burmese Buddhist Law / Burmese Customary Law*

The cases that will be discussed in this article deal with issues concerning Burmese family law. Here, family law means disputes concerning marriage, divorce, inheritance, custody of children, etc., and the law that would govern these disputes if the parties were Buddhist Burmese nationals who resided in Burma, and if the issues were to be decided either during colonial times<sup>1</sup> or in the post-independent era by "Burmese courts."<sup>2</sup>

Section 13 of the *Burma Laws Act* (which is still in force) states that

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1. Parts of Burma were under British rule from 1826 until independence in 1948. The British fought and won three wars with the Burmese during the 19th century. After the First Anglo-Burmese war (1824 to 1826), the Burmese King signed a treaty which ceded parts of Southern and Western Burma to the British. After the Second Anglo-Burmese war, which started and ended in 1852, Rangoon and other parts of Lower Burma came under British control. After the Third Anglo-Burmese war, which began in November of 1885, the whole country was annexed into the British-Indian Empire on January 1, 1886.

2. During the early days of British colonial rule, a few elite Burmese lawyers and barristers managed to become magistrates and judges in Burmese colonial courts established by the British. However, during the colonial era, mainly British judges presided, especially in appellate courts that gave decisions on, among other things, family law. Hence, for the purpose of this article, "Burmese courts" include courts that were established during the colonial era in Burma and presided over mainly by British judges. During the colonial era, in a few exceptional cases, decisions given by the highest court in colonial Burma could be appealed with special leave to the Privy Council. The Privy Council decided some cases about Burmese family law. In those instances, even from a geographical perspective, the decisions can no longer be described as decided by "Burmese courts." However, none of the cases discussed in detail in this article were decided by the Privy Council. In accordance with the above explanation, all of the decisions discussed in this article can be described as those decided by "Burmese courts."

in matters regarding “succession, inheritance, marriage or caste or any religious usage or institution,” courts shall apply “Buddhist law in cases where the parties are Buddhists ... except insofar as such law has by an enactment been altered or abolished.”<sup>3</sup> However, for more than thirty years now, the term “Buddhist law” is no longer officially used in such cases. One of the main reasons for eschewing the term “Burmese Buddhist law” (“Myanmar Bokeda Barthar Taya Upadei”) for the term “Burmese customary law” (“Myanma Dalait Htonedan Upadei”) is that Buddhism as a religion does not, as in Islam or Christianity, directly regulate family affairs. The law relating to Burmese Buddhists arose in accordance with Burmese customs and was not directly regulated by tenets of the Buddhist religion. Thus, the Chief Court (then the highest court in Burma) ruled in the case of *Na Si Ti v. Ah Phu Si*<sup>4</sup> that henceforth, the term “Burmese customary law” should be used in both English and Burmese instead of the term “Burmese Buddhist law,” which hitherto was almost universally used.<sup>5</sup> Nevertheless, notwithstanding the name-change, this particular genre of law applies mainly to Burmese Buddhists and, in some contexts, non-Buddhist men who are married to or cohabit with Burmese Buddhist women. Only Burmese Buddhists and, in some instances, non-Buddhist husbands or “partners” of Burmese Buddhist women come within the jurisdiction and ambit of Burmese customary law.<sup>6</sup> As “[a]n estimated 85% of the population [of Burma] adhere to Theravada, an ancient strain of Buddhism,”<sup>7</sup> principles of Burmese customary law are applicable in deciding disputes concerning

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3. See Burma Laws Act, §13 (1898). Many acts, laws, by-laws, decrees and notifications that were promulgated during both the colonial and post-independence eras are compiled in a twelve volume *Burma Code*. Theoretically, unless these acts, laws, notifications, etc., are formally repealed or amended by the ruling government, they remain at least nominally in force.

4. See 1969 BLR (Burma Law Reports) CC (Chief Court) FB (Full Bench) 155. (The ruling was written in Burmese.)

5. At least one Burmese legal scholar continued to use the term “Burmese Buddhist law” after the Chief Court decision in 1969. The late Dr. U E Maung (1898-1977), a former Judge of the Supreme Court of the Union of Burma in the late 1940s to early 1950s, and an authority on the subject, first published in English as *BURMESE BUDDHIST LAW* in 1937. A revised and updated version of his book was published in 1970 (SARPAY LAWKA, Printing Works, Rangoon), in which the term “Burmese Buddhist law” was retained not only in the title but also throughout the book. In this article, unless reference is made in the original texts as “Burmese Buddhist law,” the term “Burmese customary law” will be used.

Note that Dr. E Maung is a separate person from Dr. Maung Maung, *infra*; both are discussed in detail in this article.

6. In the words of an earlier Burmese Supreme Court (then the highest court of the land), and as stated in the case of *Lin Chin Noe v. Lin Gok Su*, 1956 BLR (SC) (Supreme Court), “Burmese Buddhist law is customary law of the Burmese Buddhist” (Emphasis added; the ruling was written in English.)

7. See *Burma (Myanmar)* in THE SBS WORLD GUIDE 91 (1995).

family matters for a large majority of the country's population.<sup>8</sup>

### B. *The Dhammathats*

A major source of Burmese customary law is the *Dhammathats*, which can be very roughly described as "legal treatises" that were written by various persons or groups of persons from about nine hundred to about two hundred years ago. They embody rules that are in accordance with custom and usage, and are referred to in the settlement of disputes relating to persons and property. *Dhammathats* are not codes of law in a strict sense and vary widely in content and quality, but they reflect the social customs of the day and expound rules of wisdom as guides for kings, ministers, and judges to rule by and for the people to live by. They record decisions, real or imaginary, to establish rules of persuasive force.<sup>9</sup>

After the British annexed Burma, the colonial administration systematically compiled the *Dhammathats*, and in court decisions, its judges interpreted and developed the principles contained therein. After the whole of Burma was annexed into the British Empire on January 1, 1886, a compilation of thirty-six *Dhammathats* was made under the auspices of a Chief Minister who served at the court of King Thibaw.<sup>10</sup> *A Digest of Burmese Law*, better known as *Thirty-six Dhammathats*, was compiled by Kinwun Mingyi U Gaung from June 1893 to February 1897, and was published soon thereafter.<sup>11</sup> During the colonial era, judges referred to these

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8. When a party to the dispute is a non-Buddhist, principles of Burmese customary law could still be applicable either through operation of conflict of laws, or from the *Burmese Buddhist Women Special Marriage Protection Act* (1954), wherein "Buddhist Law" would apply in cases of family disputes between Burmese Buddhist women and their husbands or partners. This would be so even if the personal, ecclesiastical or religious law of the husband is contrary to principles of Burmese Buddhist law. In other words, according to Section 4 (and also Sections 20 (1), 25(1) and 26) of the 1954 Act, principles of Burmese Buddhist law override contrary laws or customs of a non-Buddhist man when deciding family disputes between him and a Burmese Buddhist woman with whom he had cohabitated.

9. See MAUNG MAUNG, *LAW AND CUSTOM IN BURMA AND THE BURMESE FAMILY* (1963). For the important role of the *Dhammathats* in Burmese legal history, especially in cases dealing with what can be described as family law, see Ryujki Okudaira, *The Burmese Dhammathat* in M.B. HOOKER (ED.), 1 *LAWS OF SOUTH-EAST ASIA* (1986) and Andrew Huxley, *The Importance of Dhammathats in Burmese Law and Culture*, 1 *JOURNAL OF BURMA STUDIES* 1 (1997).

10. King Thibaw was the last King of Burma. After the defeat of the Burmese forces in the Third Anglo-Burmese War, on November 28, 1885, King Thibaw was "taken away" by the British to live and die in exile in Southern India.

11. See Aye Kyaw, *Religion and Family Law in Burma* in UTA GARTNER AND JENS LORENZ (EDS) *TRADITION AND MODERNITY IN MYANMAR*, 237, 242 (1994). Kinwun Mingyi U Gaung was the Chief Minister in Thibaw's court. Some of the *Dhammathats* that were compiled were originally written in Burmese. A few were written in Pali (the *lingua franca* of Buddhist literature in Southeast Asia) or were translations from the Mon language into Burmese.

*Dhammathats* — mainly the translated versions — when deciding cases dealing with family law issues among Burmese Buddhists. A few of these *Dhammathats* were translated (or, as was alleged in some cases, mistranslated) into English.<sup>12</sup> The interpretation of these “original texts” (i.e., what weight should be given to them and to what extent reliance should be made on them) became an issue in Burmese family law cases of both the colonial and post-colonial era.

### C. Case Law

Since some parts of Burma were under British colonial rule for over a century, British substantive and procedural law as well as British legal thinking had an influence on the development of Burmese law. Therefore, it would be appropriate to say that Burma was, at least during colonial times and perhaps even after independence, a “common law country”<sup>13</sup> as far as aspects of its legal system and some of its laws are concerned.

Consequently, during the colonial era and, to a large extent, post-independent times, case law and the doctrine of precedent played an important role in developing and refining legal doctrines in various areas of the law, including Burmese customary law. It follows that holdings laid down by British judges on Burmese customary law issues would theoretically “bind,” or at least be cited or referred to as precedent in Burmese courts, provided the precedent or ruling had not been explicitly overruled in a subsequent case or overridden by subsequent legislation.<sup>14</sup>

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12. “Some of the early translations of the *Dhammathats* would include D. Richardson’s translation of the *Law of Menoo* (1847), Major Sparks’ Civil Code of the *Province of Pegu* (1860), W. De Courcy Ireland’s *Digest of Buddhist Law* (1874) and the *Manu Wannana Dhammathat*, edited by Maung Tet Toe with a preface by Colonel Force (1878).” Aye Kyaw, *supra* note 11, at 242. All of the above translations were published before 1885, when the British annexed the whole country.

13. “Common law” is used here not as “case law,” but to denote the legal system, especially in contrast to civil or continental systems. For this author’s general classification of post-1962 Burmese law as a mixture of “customary law, common law, socialist law and/or martial law,” see Myint Zan, *Law and Legal Culture, Constitutions and Constitutionalism in Burma* in ALICE TAY (ED.), *EAST ASIA: NATION-BUILDING, HUMAN RIGHTS, TRADE* 200-201, fn.73 (1999). For an excellent summary of what could in ordinary parlance be described as Burmese family law, including the role and function of the Burmese *Dhammathats*, see Huxley, *Burma — It Works, but is it Law?*, 27 *JOURNAL OF FAMILY LAW* 23-34 (1989). However, Huxley’s work contains one important misstatement of the law, that “the marriage must be consummated [to be considered valid under Burmese customary law].” In fact, as it is explained in the next section (and especially at text accompanying *supra* note 37 to note 43), the “consummation” requirement for a valid marriage under Burmese customary law was overruled by the Chief Court in 1972.

14. Court decisions during the British era were compiled in various law reports during British colonial times. The earliest law reports of court decisions, all of them written in English, were the *Selected Judgments of Lower Burma* (1872-92). The last series of law reports before independence

Based on the relative importance of case law in the periods discussed in this article, it may be feasible to “tease out” certain issues regarding original texts, interpretation, ideology and policy in pre- and post-1962 times as reflected in these case laws.

#### D. 1962 as “Dividing Line”

Some of the cases discussed in this article deal with decisions from post-1962, a year of significance in modern Burmese legal history. There was a major political change on March 2, 1962, when the Burmese Army took power from the democratically-elected government of the late Prime Minister U Nu. A seventeen member Revolutionary Council was formed to rule the country.<sup>15</sup> Parliament was abolished on March 8, 1962, by a decree of the Revolutionary Council.<sup>16</sup> On March 30, 1962, the Supreme and High Courts of Burma, the two apex courts under the 1947 Constitution, were also abolished by a decree of the Revolutionary Council.<sup>17</sup> In their place, a new court called “Chief Court” was established.<sup>18</sup>

Though much literature discusses the political consequences of the

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were published as *Rangoon Law Reports* (1937-1947). For a compilation of the lists of the law Reports from 1872 to 1947 see Maung Maung, *supra* note 9, at 146.

With independence in 1948, the judgments of the Supreme and High Courts of Burma (the two apex courts under the 1947 Constitution of Union of Burma) were compiled in a series called *Burma Law Reports*. From 1948 to 1962, most of the rulings given by the Supreme and High Courts of Burma were written in English. However, as early as 1948, the year of Burmese independence, roughly 10% of the rulings were written in Burmese. After 1962, the rulings of the Chief Court (later renamed Supreme Court) were increasingly written in Burmese. 1968 was the last year in which a few (roughly less than 10%) of the judgments contained in the annual law reports of the Chief Court were written in English. From 1969 onward, all of the judgments of the highest court of the land, whether formally named Chief Court (1962-70), Supreme Court (1971-73), Central Court of Justice (1974-88) or Supreme Court (1988 to present), were all written in Burmese.

In the early to mid-1970s, around the time of the introduction of the “People’s Judicial System,” there was considerable de-emphasis on case law and reliance on precedents. Maung Maung, then Judicial Minister, wrote in 1973 that foreign rulings should not be quoted at all, and even previous rulings by Burmese courts should be cited and referred to with caution since the social and historical circumstances of each case vary. See Myint Zan *supra* note 13, 235-36. However, since the earliest case cited and discussed in this article dates back to 1929, and the latest case was in 1972, the resulting “time-frame” does not precisely cover the period of de-emphasis of case law and precedent. Hence, the above generalization of the relative importance of case law is tenable.

15. See *Army Takes Over Power, President, Chief Justice of Union, Prime Minister, Cabinet Ministers, Federal Leaders Detained for Security; Revolutionary Council Formed*, THE [RANGOON] GUARDIAN, in March 3, 1962. See also THE [RANGOON] NATION of the same date for news item concerning the military takeover.

16. See THE [RANGOON] GUARDIAN and THE [RANGOON] NATION, March 9, 1962, for news concerning the abolition of Parliament.

17. See THE [RANGOON] GUARDIAN and THE [RANGOON] NATION, March 31, 1962.

18. The English name of the Chief Court was changed back to “Supreme Court” in the early 1970s. For the sake of consistency, and to prevent confusion with the pre-1962 Supreme Court, the term “Chief Court” will be used in reference to the highest court of the 1962-1974 period.

1962 military takeover, academic articles that discuss the legal consequences as well as the changes in the legal arena, thinking and orientation of post-1962 Burma are relatively few.<sup>19</sup> Not only did laws become vehicles to implement the new government's radical and socialist developmental plans, and to embody and reflect its "socialist ideology,"<sup>20</sup> but courts also began increasingly to become instruments and implementers of government policy and ideology.<sup>21</sup>

The author does not imply that most of the post-1962 decisions or case law discussed in this article are "politically motivated" or are purely ideological in nature, emanating as a direct result of the 1962 military coup. But the author does claim that at least in a few of the post-1962 cases, rhetoric reflecting the ideology and policy of the Burmese government then in power can be discerned in the both the tenor and tone of the decisions. It is acknowledged, though, that on the issue of "consummation," ideology and policy would have played little role. In fact, the issues as stated in the title were those of original texts and interpretation. The fact that a decision reversing a British judge's ruling of 1930 was made by the Chief Court in

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19. The author has tried to fill this lacuna. See Myint Zan, *supra* note 13, at 214-81. See also Huxley, *Fifty Years of Burmese Law: E Maung and Maung Maung*, LAW ASIA 9 (1996-1997). For a correction of one factual error, among others, along with expressions of the author's philosophical disagreement with some of Huxley's views, see Myint Zan, *Comments on Fifty Years of Burmese Law: E Maung and Maung Maung*, IN CAMERA (Deakin University Law Student Magazine) 39-40 (1999). For a "conversational" discussion of some post-1962 legal developments, see Maung Htin Aung, *A Conversation with Princess-Learned-in-the-Law, Part I*, THE WORKING PEOPLE'S DAILY [RANGOON] March 28, 1974, at 2; Maung Htin Aung, *A Conversation with Princess-Learned-in-the-Law, Part II*, THE WORKING PEOPLE'S DAILY [RANGOON], March 29, 1974, at 2. A rejoinder to Dr. Maung Htin Aung's article was written by Dr. Htin Aung's elder brother U Myint Thein, the third Chief Justice of independent Burma. See MMT, *Comments on Dr. Htin Aung's Dialogue with the Princess*, which appeared in three parts in 24, 25 and 26 April 1974 issues of THE WORKING PEOPLE'S DAILY. ALEX CHRISTIE AND SUZANNE SMITH, FOREIGN DIRECT INVESTMENT IN MYANMAR, (1997) describes in detail almost exclusively the commercial and foreign investment laws, except in a sub-section entitled "Legal System" (5-6).

20. In the first twelve years of its existence, the Revolutionary Council issued new laws by announcing decrees on radio and publishing them in newspapers, often with the statement: "This Order shall come into effect immediately." One example of a law geared towards the Revolutionary Council's "ideology" is the banning of all political parties except the ruling Burma Socialist Programme Party. See the promulgation of the *Law Protecting National Unity* in the March 24, 1964 issues of THE GUARDIAN. This was itself repealed by a decree of the State Law and Order Restoration Council (SLORC) on September 18, 1988, the day this Council assumed power. See THE WORKING PEOPLE'S DAILY, September 19, 1988.

21. For example, in the early years of its assumption of power, the Revolutionary Council established the Special Criminal Courts Appeal Court, which was presided over by three judges and included at least one member of the Revolutionary Council. In the post-independence and pre-1962 era, members of the "legislature" (here, the Revolutionary Council) did not preside in court. That the Revolutionary Council mandated this indicates that some of the courts in the post-1962 period had become vehicles to implement the executive government's policy and ideology.



1972 (a post-1962 event) might well have been a fortuitous event<sup>22</sup> rather than any direct or indirect implementation or reflection of the executive government's views. However, in other post-1962 case law discussed in the article, shades of the rhetoric, ideology and policy of the government of the day can be discerned. It is in light of the above discussions that 1962 is postulated as a dividing line in analyzing Burmese case law.

## II. CONSUMMATION

### A. *The Issue*

The legal issue considered in this section is whether under Burmese customary law, there is a need for consummation (after the marriage) to constitute a valid marriage. In other words, is there a requirement for consummation ("Paung-Thin-Sat-Shette Hmu") under Burmese Buddhist law/Burmese customary law for a marriage to be considered valid? Two different cases give different answers to this question. A brief survey of the facts in two pre- and post-1962 cases as well as the *ratio decidendi* of the two cases will be analyzed and commented upon primarily with a view towards discerning the role and hierarchy of original texts (*Dhammathats*) and their interpretation by the courts.

### B. *The Ruling in Ma Hla Me*

The case of *Ma Hla Me v. Maung Hla Baw*<sup>23</sup> arose out of a suit for restoration of conjugal rights. The marriage ceremony, under Burmese customary law, between Maung Hla Baw (the bridegroom) and Ma Hla Me (the bride), both of whom were Burmese Buddhists, was held. There was dispute between the parties as to whether it was "completed." The trial judge held and the appellate judge affirmed that a quarrel took place "between the parents of the parties and after the wedding ceremony" and that "[i]t has not been proved that the plaintiff and the defendant lived as man and wife together for a single day [after the marriage ceremony]." <sup>24</sup> Judge Baguely

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22. See Note, "The Luck of the Law: Allusions to Fortuity in Legal Discourse" 102 HARVARD LAW REVIEW 1862-82 (1989).

23. See *Ma Hla Me v. Maung Hla Baw*, 8 ILR (Indian Law Reports), (Rangoon Series) 425 (1930). The ruling can also be found in 8 AIR (All India Reports) (Rangoon Series) 29-32. The decision delivered by Judge Baguely on February 3, 1930, was written in English. Citations are made from the AIR.

24. *Id.* at 29. As a result of the quarrel, the bride's parents took away their daughter. There was a dispute between the parties as to whether there was "cohabitation" between the bride and bridegroom after the marriage ceremony. This factual dispute is discussed in the first part of the ruling. The appellate judge confirmed the ruling of the trial judge that, after the marriage ceremony,

also concurred with the trial judge's finding "that after the wedding there was no cohabitation between the newly married husband and wife."<sup>25</sup>

Hence, the success of the suit for restoration of conjugal rights hinged on the issue of whether there was a valid marriage in the absence of cohabitation or consummation between the married couple after the marriage ceremony. The question phrased by Judge Baguely was, "[if] a Burmese Buddhist couple go through a marriage ceremony customary to persons in their state of life but the ceremony is not followed by cohabitation so that the marriage is never consummated, are they legally married or not?"<sup>26</sup> The learned judge acknowledged that previous case law (prior to 1930) was not helpful in determining the issue since the circumstances in those cases were different.<sup>27</sup> Then the judge turned to the "original texts" and referred to certain sections in the *Digest of Burmese Law* or the *Thirty-six Dhammathats*.<sup>28</sup> In particular, he cited "[S]ection 39 [of the *Digest*], which deals with 'The seven kinds of marriage.'" <sup>29</sup> Judge Baguely stated:

The second [kind of marriage] referred to is the marriage of a young man and young woman when they themselves and their parents desire the union and the note at the end of the extract runs as follows: "The contracting parties according to the second kind of marriage acquire, after the consummation of the marriage, the full status of husband and wife."<sup>30</sup>

From this reference to § 39 of the *Digest*, and by extrapolating the second of the seven kinds of marriage that are classified and described in the *Digest*, the judge expressed his view that under Burmese Buddhist law "consummation is necessary to attain the full status of husband and wife."<sup>31</sup> Judge Baguely later stated:

My own personal view, for what it may be worth, based on more than 20 years' experience as a judicial officer, is that a marriage between Burmese Buddhists is created by cohabitation coupled with intent to

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there was no proof that "the plaintiff and the defendant lived as man and wife together for a single day."

25. *Id.* at 31.

26. *Id.*

27. The cases cited were decided by the colonial courts of British Burma and date back to the years of 1892-96 and 1902-03. *See supra* notes 1-2. For the role and relevance of case law in Burmese law, *see* Section I. C. *supra*.

28. *See* text accompanying *supra* note 10. When the ruling was given in 1930, the DIGEST OF BURMESE LAW must have been quite well-known for judges who presided and lawyers who appeared in the colonial courts of that time. Baguely merely made reference to the "Digest."

29. *See Ma Hla Me, supra* note 23, at 31.

30. *Id.*

31. *Id.*

become husband and wife. The [marriage] ceremony is merely a way of publishing to all the world that the cohabitation, which is intended to follow it, is with the intention of creating a marriage tie between the couple.<sup>32</sup>

As there was no cohabitation or consummation after the marriage in this particular case, the judge was "bound to hold that the marriage tie does not exist between these parties, and therefore the suit for restitution of conjugal rights [by the bride groom] must fail."<sup>33</sup>

### C. *The Overruling of Ma Hla Me*

From the period between 1930 to 1972, the ruling in *Ma Hla Me*<sup>34</sup> remained "case law" and could be cited, referred to and even followed by the Burmese courts. In books published in the 1960s, legal scholars have expressed reservations on the correctness of this particular ruling.<sup>35</sup> Also, in two decisions given by the Chief Court (then highest court in Burma), the ruling in *Ma Hla Me* was criticized *in obiter*, though it was not formally overruled.<sup>36</sup>

The formal overruling of *Ma Hla Me* did not occur until 1972 in the case of *Daw Khin Mya Mar (alias) Mar Mar v. U Nyunt Hlaing*.<sup>37</sup> Neither the ruling nor the narration of the facts of the case by U Mya Sein in his book<sup>38</sup> mention whether the case in the original instance arose, as in *Ma Hla Me*, out of a suit for restoration of conjugal rights. Nevertheless, it is strongly presumable that the case originally arose out of such a suit by the bridegroom (U Nyunt Hlaing). As in *Ma Hla Me*, both parties in *Daw Khin Mya Mar* did not dispute that there was an engagement between the parties;

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32. *Id.* at 32.

33. *Id.* Internal citation omitted.

34. *See* 8 AIR (Rangoon) 29.

35. *See* Maung Maung *supra* note 9, at 59. E Maung, BURMESE BUDDHIST LAW, *supra* note 5, at 41-46. E Maung, in particular, stated that at least one extract from the *Dhammathat* has possibly been mistranslated or misinterpreted.

36. *See* Maung San Aung v. Ma Kyi Kyi Way, 1963 BLR CC (Chief Court) 995; *Ma Tin Thein v. Maung Win Khaing*, 1965 BLR (CC) 199. Both cases dealt with a suit for maintenance of a child by a woman against the father of the child. The issue of whether or not consummation (after the marriage/ marriage ceremony) was necessary to constitute a valid marriage under Burmese customary law was not featured in the *ratio decidendi* of the cases.

37. *See* Civil Appeal No. 38 (1972) of the Chief Court of the Union of Burma. The bench of the Chief Court (by then renamed "Supreme Court" in English; for explanation of this author's continued use of the term Chief Court, *see supra* note 18) consisted of Justice U Tin Ohn, Justice U Thet Pe, and Chief Justice U Hla Thinn. The judgment was written in Burmese and delivered on October 29, 1972. It is reproduced in U MYA SEIN, MYANMA DALAIT HTONEDAN UPADEI [BURMESE CUSTOMARY LAW] 395-402.

38. *See* U Mya Sein, *id.* at 37-39.

that there was a marriage ceremony wherein relatives and friends of both parties were invited and treated to meals; and that before the ceremony the parties took an oath of marriage and signed a certificate of marriage before a magistrate.<sup>39</sup> And, again as in *Ma Hla Me*, there was dispute between the parties as to whether there was consummation after the marriage. The bridegroom claimed that he and the bride slept together for four nights. The bride disputed this claim, stating that though there was a marriage ceremony she went and slept with her great-aunt and that there was not a single night (instance) of consummation. Moreover, to prove that she was at the time of the suit still a virgin, she submitted herself to a medical examination and also proffered two doctors as witnesses.<sup>40</sup> Since the legal issue to be decided here was not, like the previous cases of the mid-1960s, a suit for child maintenance where the issue of the "consummation requirement" only appeared as *obiter*,<sup>41</sup> it is strongly presumable that this case also arose out of a suit for restoration of conjugal rights.

Be that as it may, the Chief Court of Burma did not find it necessary to decide the factual issue of whether there was, in this particular case, consummation after the marriage ceremony between the couple. In the Chief Court's own words, the sole issue to be decided in the case was

whether a couple can be legally considered to be husband and wife under Burmese customary law if the bridegroom and the bride after having been married with the agreement of parents from both sides have not consummated their marriage.<sup>42</sup>

The Chief Court's unequivocal answer to this question was in the affirmative:

Both parties with their mutual consent and the consent of parents from both sides have gone through the marriage ceremony. Hence under Burmese customary law, there is a valid marriage. All rulings or findings to the contrary in the case of *Ma Hla Me v. Maung Hla Baw* are overruled."<sup>43</sup>

A considerable portion of the Chief Court's decision of 1972 was devoted to analyzing and refuting the reasoning of Judge Baguely in the 1930 ruling. A brief analysis follows.

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39. *Id.*

40. *Id.*

41. See cases cited *supra* note 36.

42. *Daw Khin Mya Mar*, Civil Appeal No. 38 (1972), ¶ 1 (unreported decision, see *infra* note 158.)

43. *Id.* at ¶ 22. Internal citation omitted.

### 1. Origin and Hierarchy of "Original Texts"

In *Ma Hla Me*, Judge Baguely relied on § 39 in the *Digest of Burmese Law* (or the *Thirty-six Dhammathats*) in concluding that there was a consummation requirement to constitute a valid marriage under Burmese Buddhist law.<sup>44</sup> The Chief Court reproduced in full and in the original (and to the modern reader, such as the author, slightly archaic) Burmese "The Seven Different Kinds of Marriage Arising Out of Parents Promising to Marry Off [their Sons and Daughters],"<sup>45</sup> which is contained in § 39 of the *Digest*. The Chief Court observed that the origin of the particular *Dhammathat* in which the quoted statements of § 39 was reproduced was not known. That particular *Dhammathat*, named "Kyet Yoe,"<sup>46</sup> was obscure, and neither the name of its author nor the year of its completion was known.<sup>47</sup> Hence, the hierarchy and the weight to be given to this *Dhammathat* was one of the grounds (albeit not a material one) upon which the Chief Court refuted Judge Baguely's reliance on the rule that was laid down in § 39 of the *Digest of Burmese Law*.<sup>48</sup> Since the *Digest* contained the compilation of (as its other title suggests) thirty-six *Dhammathats* even during the colonial days, the "hierarchic nature," so to speak, of the original texts can be discerned in court decisions. For example, in a case decided on appeal, their Lordships of the Privy Council stated:

The *Manugye Dhammathat* [a *Dhammathat* whose authorship and origin was not exactly known or verified but was thought to be written during the reign of King Alaungphaya (1752-58 AD)] ha[d] held a commanding position since the time of King Alompra [Alaungphaya] and is still to be regarded as of the highest authority. Where it is not unambiguous other *Dhammathats* do not required to

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44. See texts accompanying note 29 to note 32.

45. See *Daw Khin Mya Mar*, *supra* note 42, at ¶ 7. It should be stated here that Judge Baguely in *Ma Hla Me* mentioned Section 39 merely as "The Seven Kinds of Marriage."

46. "Kyet Yoe" can be literally translated as "chicken bone."

47. *Daw Khin Mya Mar*, *supra* note 42, at ¶ 8.

48. *Id.* The "hierarchy" or the hierarchic nature of the sources of law (customary, enacted or other types or genres of law) can also be discerned in other systems of law. The generally hierarchic nature of "The Sources of Islamic Law" can be discerned in a chapter by that name in C.G. WEERAMANTRY, *ISLAMIC JURISPRUDENCE: AN INTERNATIONAL PERSPECTIVE* 30-58 (1988), especially in the sections entitled "The Primary Sources" (32-6) and "The Dependent Sources" (39-45). For the arguments that the "sources" of International Law as embodied in Article 38 (1) of the Statute of the International Court of Justice, though "not hierarchical...but are necessarily complimentary and interrelated," and that "[t]he first source listed in Article 38 of the International Court of Justice suggests that treaties take precedence over the other 'sources,'" see MARTIN DIXON AND ROBERT MCCORQUODALE, *CASES AND MATERIALS ON INTERNATIONAL LAW* 25-26 (1995). Burmese customary law, as it contained in the *Dhammathats*, is neither religious text nor (like those in the Statute of the International Court of Justice) a constitutional or organizational document.

be referred to.<sup>49</sup>

However, in the 1951 case of *Dr. Tha Mya v. Daw Khin Pu*<sup>50</sup> “the reliability and viability of *Manugye* were finally challenged.”<sup>51</sup> The status of the *Manugye*, at least as a “first among equals” if not paradigmatic *Dhammathat*, was debunked by the Supreme Court of the newly independent Union of Burma.<sup>52</sup> These cases are briefly mentioned to illustrate that the Chief Court in the case of *Daw Khin Mya Mar* in 1972 was not breaking with precedent in classifying the role and importance of *Dhammathats* according to known and unknown facts about their origin, authorship and year of completion.

## 2. (In)Consistency in and (Mis)Interpretation of Original Text

The obscurity and relative unimportance of the *Dhammathat* which Judge Baguely relied upon in his 1930 ruling was only one reason for the overruling of *Ma Hla Me* by the Chief Court in 1972. The Chief Court observed that if the “second [among the seven] kinds of marriage” stated in the *Kyet Yoe Dhammathat* and relied upon in *Ma Hla Me* is read literally, it would have to be construed that there is a need for the requirement of consummation only in cases where a young man and a young woman are married in accordance with their parents’ wishes and by their mutual consent. In the other six types of marriage mentioned in § 39 of the *Digest* there is no need for consummation. Such an interpretation, the Chief Court stated, would be “unnatural” (or “absurd”).<sup>53</sup> The Chief Court’s ruling, as stated in the particular paragraph of the judgment, would amount to a rejection of the “original text,” i.e., the rule laid down in the particular *Dhammathat* on grounds of the obscure and unimportant nature of the

49. *Ma Hnin Bwin v. U Shwe Gon*, 8 LBR (Lower Burma Reports) PC (Privy Council) 1 (1915-16); internal citations omitted.

50. See 1951 BLR (SC) 102. The ruling was written in English. A considerable portion of the judgment (119-31) is devoted to discussing and resolving the origin, known or unknown authorship, role and hierarchy, translation and retranslation (from Pali/Mon to Burmese and then into English), mistranslation and interpretation and reinterpretation of various “original texts” in the *Dhammathats*. The Supreme Court consisted of The Hon’ble Sir Ba U, Chief Justice of the Union of Burma, Mr. Justice E Maung and U Thaug Sein, J. The judgment of the Court was delivered on March 19, 1951, by Mr. Justice E Maung. Ordinarily the Chief Justice would deliver the judgment. In this particular case, since E Maung was an eminent scholar of Burmese Buddhist Law and the author of a book under that name, it was logical that he would deliver the judgment of the Court. See *infra* note 73.

51. Aye Kyaw, *supra* note 11, at 243.

52. See *Dr. Tha Mya*, 1951 BLR (SC) 102, 120-27.

53. *Daw Khin Mya Mar*, *supra* note 42, at ¶ 8.

original text<sup>54</sup> and its inconsistency. It should be observed that the rejection of a *Dhammathat* rule on grounds of the obscurity of the original text and the inconsistency of its application, is only possible because Burmese customary law — unlike Islamic law, Hebraic law or (Christian) Canonical Law — is not a religious-based system. The *Dhammathats* are, in the words of Andrew Huxley, “certainly not religious texts like the Koran or the Indian *dharmasastras*, though they are suffused with Buddhist ethics.”<sup>55</sup>

Judge Baguely also relied upon § 50 of the *Digest* in *Ma Hla Me* in deciding that there is a consummation requirement to constitute a valid marriage under Burmese customary law. However, without reproducing the text of § 50, the Chief Court pointed out that this particular section deals with cases where bride and bridegroom were married through the arrangement and consent of their parents. In its view, § 50, which was taken from a *Dhammathat* named *Manuvunnana*, merely states that in such an “arranged marriage,” if there is consummation between the couple, there exists a valid marriage. The Chief Court clarified that the *Dhammathat* only notes that if either the bride or the bridegroom did not consent to the marriage and did not consummate the marriage, the couple did not become “husband and wife.” The Chief Court emphasized that § 50 does not mean that in any or all Burmese Buddhist marriages, lack of consummation renders the marriage invalid.<sup>56</sup> Counsel for the appellant (the bride) argued before the Chief Court in 1972 that if there is no consummation after the marriage, either the bride or the bridegroom can “cancel” the marriage.<sup>57</sup> He had made the same point as that of the Chief Court in his book, published in 1970.<sup>58</sup> Indeed, the Chief Court mentioned in its judgment that “even counsel for the appellant (the bride Daw Khin Mya Mar) Dr. U E Maung himself had argued that the case in *Ma Hla Me v. Maung Hla Baw* was wrongly decided mainly due to mistakes in translation of the

54. See text accompanying *supra* note 47, note 48.

55. Huxley, *supra* note 13, at 23. However, in religion-based legal systems like Islam, by 1964 or even earlier, “[e]minent Islamic jurists have argued that re-interpretation of the Koran in the light of modern conditions should be the basis of law reform and that to do so is not only the right but also the duty of present generations, if Islam is to adapt itself successfully to the demands of today” C.G. WEERAMANTRY, *THE LAW IN CRISIS: BRIDGES OF UNDERSTANDING* 154 (1975). Nevertheless, this author notes that in religious systems of law, of the “Abrahamic” (monotheistic) and non-Abrahamic (non-monotheistic, such as Hindu) kinds, rejection of an “original text” may not be easily feasible. For a mainly human rights and feminist critique of some of the orthodoxies and rigidities of Islamic and Catholic legal traditions, see Hilary Charlesworth, *No Principled Reason*, 7(9) *EUREKA STREET* 24 (1997). For the interpretation of Islamic texts when implementing them in modern financial dealings, see Judith Thomson, *Developing Financial Law in Conformity with Islamic Principles: Strict Interpretation, Formalism or Innovation?* 4(2) *DEAKIN LAW REVIEW*, 77, 78-83 (1999-2000).

56. See *Daw Khin Mya Mar*, *supra* note 42, at ¶ 10.

57. *Id.* at ¶ 3.

58. See E Maung, *supra* note 5, at 42-46.

*Dhammathats*.”<sup>59</sup>

E Maung’s arguments (in his 1970 book) as regards § 50 of the *Digest* — upon which section Judge Baguely relied in his ruling and which the Chief Court refuted in 1972 — are more elaborate than those contained in the Chief Court’s decision. E Maung wrote that since “the official translation [of § 50 of the *Digest*] appears to be incorrect, it is necessary to examine the original Burmese text”<sup>60</sup> and reproduce it.<sup>61</sup> At this point, it is worth noting that the Chief Court had also reproduced the original Burmese text pertaining to § 39, but had rejected or at least downplayed it by dismissing the source of the text as obscure<sup>62</sup> and the text itself as inconsistent.

The “original text” as reproduced by E Maung apparently deals with the giving away of daughters by the parents in two different sets of circumstances. It also, incidentally, indicates that even centuries ago,<sup>63</sup> Burmese women, including young women who were still under the guardianship of their parents had, from a historical and comparative perspective, a great degree of personal autonomy and rights in conjugal matters and in matters concerning family law.<sup>64</sup> To illustrate this historical fact, as well as the (mis)interpretation of original texts, E Maung’s comments on the original Pali-Burmese text are worth reproducing in full:

It is clear that the text contemplates two different sets of circumstances. One is where parents give their daughter to a man out of goodwill and another where the daughter out of mutual desire is intimate with a man. Where parents, out of goodwill to the man, give

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59. *Daw Khin Mya Mar*, *supra* note 42, at ¶ 14. Since counsel for the appellant E Maung argued for non-requirement of consummation in 1970, yet argued a greatly modified position on behalf of his client less than three years later in 1972, one wonders whether the late jurist and legal practitioner changed his mind in the intervening two to three years since he wrote and published the revised edition of his book, *BURMESE BUDDHIST LAW*, in 1970. Perhaps he anticipated — as a practicing lawyer rather than as a jurist, one should add — this sort of comment or criticism. In a preface to his book dated December 1, 1969, E Maung wrote: “[f]or the discrepancies [between the first edition of his book published in 1937 and the revised edition] I can only repeat the plea I once made at the Bar, when my Learned opponent confronted me with my own previous statement, that every man is entitled to grow in wisdom with the passage of years. Whether it is a just plea or not I leave it to my readers to decide for themselves.” E Maung, *supra* note 5, Preface.

60. E Maung, *supra* note 5, at 44.

61. *Id.* In fact, the reproduced text was partly in Pali and partly in Burmese. Each Pali phrase was immediately followed by a Burmese translation.

62. *Daw Khin Mya Mar*, *supra* note 42, at ¶ 8.

63. The *Manuvunnana Dhammathat* was, according to Chapter 2, Section 4 of the *Digest* (reproduced in U Mya Sein, *supra* note 37, at 403), written and completed approximately in the year 1763.

64. For the high status of Burmese women not only as regards personal autonomy, but also in matters such as control of matrimonial property and the division of property after divorce, *see* Huxley, *supra* note 13. *See also infra* note 78.



him their daughter, he does not become her husband before consummation. Consummation in this case is relevant as proof of the daughter's ratification of the arrangements made, *ex hypothesi* behind her back, between her parents and the man.<sup>65</sup>

And again:

The early [Burmese] jurists dealing with a state of society, where patriarchal power was supreme could not envisage marriage, involving a change in *potetas* of the daughter, except as a contract by the parents in which the daughter had no part and in describing the various reasons for parents in agreeing to give the daughter in marriage, little notice was given to the daughter's part therein. The next stage in development would be to recognize the option of the daughter to repudiate the contract of her parents by refusing consummation. The third and last development came where the parents can, at the utmost, refuse consent to the marriage of a minor daughter to the man of her choice. That this stage of development had at the latest arrived by the early 18<sup>th</sup> Century is evidenced by the *Dhammathats* of the [King] Alaungpaya period<sup>66</sup> allowing the daughter to over-ride the parents' veto by remaining steadfast to the man of her choice. By then consummation even, as of evidentiary value [to "prove" that a marriage under Burmese customary law existed], lost its importance.<sup>67</sup>

It is hoped that the above discussion pertaining to the problem of consummation in Burmese family law as evidenced through case law has illustrated a few of the issues that could arise in the role, interpretation, (mis)interpretation and (re)interpretation<sup>68</sup> as well as the nature of the original texts, the *Dhammathats*.<sup>69</sup>

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65. E Maung, *supra* note 5, at 44.

66. Footnote inserted by author. The *Manuvunna Dhammathat* was written and completed around 1773. Therefore, the rule concerning the giving away of daughters in marriage that was embodied in § 50 of the *Digest* was written during King Alaungpaya's reign.

67. E Maung, *supra* note 5, at 45-46.

68. For some of the issues that could be involved in interpreting ancient and original "texts," "injunctions" and "laws," see Weeramantry, *supra* note 55, at 150-55. For a few of the issues concerning interpretation from a modern perspective, especially as to "Law as Interpretation," see RONALD DWORKIN, *A MATTER OF PRINCIPLE* 117-77 (1985).

69. For the statement that *Dhammathats* are "not law reports," "not legislation," and "certainly not religious texts like the Koran or the Indian *dharmasastras*," but that those "[r]eaders 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," see Huxley, *supra* note 13, at 23-24. The author read Huxley's observation in February of 2000. In seminars and presentations that the author gave on the topic of this article in September of 1999, the author described the *Dhammathats* as "roughly between codes and legal treatises."

D. Two “Curiosities” or “Mischievous Ideas”<sup>70</sup>

Before concluding the discussion about “consummation” two “addenda” or “curiosities” may briefly be mentioned and discussed. These curiosities could arguably (but by no means certainly) arise in relation to a possible influence in legal reasoning in the case of *Ma Hla Me*. And the possible (but no means certain) consequences or outcome of *Daw Khin Mya Mar* may also be briefly mentioned and discussed.

1. Possible Legal and Cultural “Imperialism” in *Ma Hla Me*?

E Maung had, in his book, subtly suggested that the British judge who gave the decision in *Ma Hla Me* might have been influenced by English law on non-consummation.<sup>71</sup> Again, it is worth quoting E Maung in full:

[Under British law] [i]mpotency is inability to consummate the marriage and is a ground for nullity. Such inability must exist at the time of marriage and continue to exist at the date of hearing. Before 1937, the respondent's refusal to consummate could raise a presumption of impotency; but the refusal as such was no ground for nullity. It was only by the Matrimonial Causes Act of 1937, that wilful refusal of the respondent to consummate was made a ground for nullity. Such marriage is voidable only and remains valid and exists until the Court pronounces a decree of nullity.<sup>72</sup>

E Maung then embarks upon a discussion and critique of the ruling in the *Ma Hla Me* case. The ruling in *Ma Hla Me* was decided by Judge Baguely, a British colonial judge. Was E Maung<sup>73</sup> implying that the British judge, in deciding *Ma Hla Me* in 1930, was (perhaps sub-consciously) influenced by

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70. After the author had written several sentences in this sub-section, he came across the subtitle “Two Mischievous Ideas” in Ronald Dworkin's book, *A MATTER OF PRINCIPLE*, *supra* note 68, at 33. Dworkin wrote that both the “original intent” and the “fair process” concepts for justifying the United States Supreme Court's right of judicial review are “mischievous” because they “cover up substantive decisions with procedural piety, and pretend they have not been made.” *Id.* at 34. Though writing on a different genre of law of another land and clime, the author feels that an alternative subtitle to “Two Curiosities” might be “Two Mischievous Ideas.”

71. See E Maung, *supra* note 5, 41-2.

72. *Id.* at 42.

73. E Maung, in addition to being an eminent legal scholar on Burmese Buddhist law (as he himself would call it), was also during the time of the British colonial administration a judge of the High Court of Judicature at Rangoon. After independence, he was also a judge of the Supreme Court of the Union of Burma in the late 1940s and early 1950s. In fact, E Maung delivered the judgment of the Supreme Court in the important case of *Dr. Tha Mya v. Daw Khin Pu* in 1951.

British cultural and legal notions?<sup>74</sup> E Maung did not explicitly suggest this, but the fact that he had mentioned it would indicate such a “curiosity” should not immediately be dismissed out of hand as mere fantasy. Yet one should note, according to E Maung, under British law prevailing in 1930, “respondent [obviously male] refusal to consummate only creates a presumption of impotency” and that was only a ground for nullity of a marriage. This is still markedly different from the ruling in *Ma Hla Me*, which stated that because of non-consummation (certainly *not* due to the impotence of the male respondent in the *Ma Hla Me* case, but due to the quarrel among the bride and bridegroom parents<sup>75</sup>) after the marriage ceremony, there was no valid marriage in the first place under Burmese customary law. Comparison between British law and Burmese customary law on the subject of consummation, in different legal contexts, has its limits. It should be acknowledged that the arguable manifestation of cultural and legal imperialism in the ruling of *Ma Hla Me* remains a “curiosity” or a “mischievous idea,” and not a definite legal presumption.

## 2. A (Feminist?) Analysis of the (Postulated) Outcome of the Two Cases?

This sub-section should start with an “apologia,” and the contingent, indeed, uncertain nature of the query itself should be mentioned and emphasized. It is clear from the facts narrated by Judge Baguely that the suit in *Ma Hla Me* arose out of a suit for restoration of conjugal rights.<sup>76</sup> However, neither the judgment in *Daw Khin Mya Mar* nor the narration of the facts in U Mya Sein’s book, *Myanma Dalait Htone Dan Upadei* [*Burmese Customary Law*], specifically mentions that *Daw Khin Mya Mar* arose out of a suit for restoration of conjugal rights, even though it is strongly presumable that it so arose.<sup>77</sup>

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74. Though no comparison is intended here, the cultural and legal imperialism of the British vis-à-vis the Australian Aborigines has been much less “sub-conscious,” much less subtle, and much more brutal, not to say arrogant. See, e.g., the section entitled “Law and Culture” in Jennifer Clarke, *Law and Race: The Position of Indigenous People*, in STEPHEN BOTTOMLEY AND STEPHEN PARKER, *LAW IN CONTEXT* 264-74 (1997).

75. See *Ma Hla Me*, supra note 23.

76. *Id.*

77. Another possible but unlikely alternative explanation for the suit could revolve around the division of property, since the issue of whether the property should be divided would depend on whether there was a marriage relationship. Because division of property can only occur after a divorce, this is not a very plausible alternative explanation, unless the respondent (bridegroom) intended to sue for divorce immediately after the courts held that there was a marriage relationship. Hence, it is very likely, indeed, almost certain, that *Daw Khin Mya Mar* arose, like *Ma Hla Me*, out of a suit for restoration of conjugal rights.

The second presumption postulated (which can by no means be verified or confirmed) is that the unsuccessful appellant in *Daw Khin Mya Mar* had, as a result of the Chief Court ruling, to live with her “husband” and perhaps even “consummate” the marriage. This is based on the Chief Court’s ruling that the appellant Daw Khin Mya Mar (the bride) and the respondent U Nyunt Hlaing (the bridegroom) were husband and wife. Again, it should be emphasized that the Chief Court in *Daw Khin Mya Mar* in 1972, unlike Judge Baguely’s judgment in 1930, did not even mention that the suit for restoration of conjugal rights by U Nyunt Hlaing succeeded. Nor did the Chief Court “order” that the appellant return to her husband. It might well be that the appellant Daw Khin Mya Mar and the respondent U Nyunt Hlaing never reestablished contact, notwithstanding the fact that the Chief Court had indirectly ruled in the respondent’s favor that the marriage relationship existed.

From the judgment in *Ma Hla Me*, it was clear that the female was decidedly able to maintain her “autonomy”<sup>78</sup> in that she was not required against her wishes to rejoin the person to whom she was briefly betrothed, but had not actually married.<sup>79</sup> If and only if *Daw Khin Mya Mar* had been — and again it is to be emphasized that this scenario can by no means be assumed with any degree of confidence — in the words of Judge Baguely of 1930, “unwilling[ly] force[d]” into the “embraces” of her husband despite her wish not to do so, could a conclusion be possibly warranted that as an indirect result of the Chief Court’s decision in *Daw Khin Mya Mar*, the autonomy of a woman had been adversely affected. From a feminist or woman’s perspective, and based on the postulated but uncertain outcome in

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78. For Burmese Buddhist women — even young women still under the guardianship of their parents — with a very considerable degree of “autonomy” and rights in law, see text accompanying *supra* note 64 to note 67. For the generally high status of women in Burmese culture and law regarding marriage, divorce, and partition of property after divorce, there are many sources, written by both males and females, indigenous and foreign scholars, judges and writers of all ages, of which the present author will provide only a few. See for example, the introduction by Sir John Jardine in VICENTUS SANGERMANO, *THE BURMESE EMPIRE A HUNDRED YEARS AGO* (1893). For a male Burmese scholar’s analysis in the 1960s, see Maung Maung, *supra* note 9, 7-12. For a female Burmese scholar’s assertion in the 1950s that in many aspects of social life and legal standing, Burmese women “would admit no inferiority” to their male counterparts, see Mi Mi Khaing, *People of the Golden Land, Perspectives of Burma*, ATLANTIC MONTHLY, (1958). For a British scholar’s reaffirmation, in the 1980s, that “Buddhist ethics combined with Burmese sentiments...produce a system with very little sexual discrimination,” see Huxley, *supra* note 13, at 23.

79. Judge Baguely did not have very kind words about the bride and the bridegroom in the *Ma Hla Me* case. He wrote: “The defendant [the intended bride Ma Hla Me] says that the wedding would have taken place but for the non-payment of the sum of Rs [Indian rupees, currency used in colonial Burma] 500, in other words she was quite prepared to yield herself to the plaintiff for that sum. I have also little doubt that the evidence she gave on oath is by no means the truth, the whole truth and nothing but the truth. On the other hand the plaintiff has tried to use the Courts in order to force into his embraces an unwilling girl to whom he is not married.” See *supra* note 23, at 32.

*Daw Khin Mya Mar*, could it be regarded that the Chief Court's decision was "bad" and perhaps even encouraged patriarchy and male dominance in the particular case? Could it be further argued that Judge Baguely, old-fashioned, white, privileged, colonialist male judge<sup>80</sup> that he was, decided correctly (in terms of woman's autonomy) in *Ma Hla Me*, and his decision is preferable to that of the Chief Court decision of 1972 in *Daw Khin Mya Mar*?

This is perhaps a "mischievous idea" of the author's, and written in order to "stretch" the case and the issue to facilitate a brief and contingent analysis from what he believes to be, if not a (mainly) Western feminist perspective, then a woman's perspective in the case of *Daw Khin Mya Mar*. It should again be emphasized that it is virtually impossible to trace the factual outcome of the relationships between the parties consequent to that of the Chief Court's decision in *Daw Khin Mya Mar*. The above brief analysis is based on "assumed" facts and fall entirely within the realm of speculation. Therefore, a conclusion that either or both the decisions, by a male British judge in 1930 and by the Chief Court (all three members of which were Burmese males) in 1972, were motivated by "misogyny" or "male domination," or a particularly great concern for women's rights, would not be fully warranted or justified.

### III. MATRIMONIAL PROMISES

#### A. *The Issues*

The initial issue that was raised in a post-1962 case law was phrased by Maung Maung, Chief Judge of the Chief Court of Burma, in the case of *Maung Ko Gyi v. Daw Ohn Khin*:<sup>81</sup>

An adult male made a promise to the mother of a minor girl that he would marry [the girl]. The mother also accepted the agreement of the male after receiving the consent of the daughter and considering the welfare of her daughter into account. When the male fails to

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80. For a stinging indictment that "Western jurisprudence and law are patriarchal and masculinist" and discussion about "male dominance" in Western law, see MARGARET DAVIES, *ASKING THE LAW QUESTION*, (1994) especially at 167-218. Davies specifies: "As in other instances, I am directing my remarks to Western law and jurisprudence, and in particular, the Anglo-American conceptions of law... I make no pretensions to speak globally about law." See *id.* at 167. Davies' point of making "no pretensions to speak globally about law" is of particular relevance here since Judge Baguely was making his judgment based on his understanding of the principles of Burmese Buddhist law (as it was called at that time).

81. See *Maung Ko Gyi v. Daw Ohn Khin*, 1965 BLR (CC) 913. The Chief Court bench consisted of Chief Judge Maung Maung, Judge U Chit, and Judge U Sein Thinn. The judgment was written in Burmese and delivered by Maung Maung on October 5, 1965.

fulfill his promise can a suit for failure of breach of promise to marry be made [against the adult male]?<sup>82</sup>

Even though that was the issue as framed by the Chief Judge, the issue could perhaps be even more specific, and for this a brief account of the facts of the case is necessary.

Maung Ko Gyi (the appellant) was twenty five years old when he was sued for breach of promise to marry. Ma Thet Htar, daughter of Daw Ohn Khin (the respondent) was aged just over seventeen when she and Maung Ko Gyi became lovers. He promised her that he would lawfully marry her. Both mother and daughter met with Maung Ko Gyi, and they both secured his promise that he would marry the daughter. Subsequently, the daughter became pregnant, and he breached his promise to marry. Thereupon, mother and daughter sued him in a lower Civil Court. The Court held that the facts alleged by the complainants were true; however, when the two young persons became intimate and when the promise to marry was given, the daughter was only seventeen years and four months old. As a minor she could not enter into a contract, and therefore, the suit for breach of promise to marry could not be made. On this ground, the lower Court dismissed the suit.

On appeal, the Mandalay Divisional Court held that his promise was made not only to the daughter, but also to the mother. Hence, the Divisional Court held that though the lower Court correctly dismissed the daughter's suit, he still had to pay damages to the mother.

He appealed to the Chief Court. The single judge who heard the case was of the opinion that the case raised issues of importance which affected the public, and referred it to the full bench of the Chief Court for further consideration and decision on the wider issue.<sup>83</sup> On argument before the full bench of the Chief Court, U Hla Nyunt, counsel for the respondent, Maung Ko Gyi, argued that the mother could not obtain damages, basing his argument on the fact that the mother had to sue on the promise given to the minor daughter. Since the original promise itself was void due to the fact that she was a minor, and since the suit was based on that void original promise, the mother could not obtain damages, argued U Hla Nyunt. Counsel based his argument on the ruling in *Maung Tun Aung v. Ma E Kyi*,<sup>84</sup> which ruled that since the promise to marry is a "future undertaking," the issue cannot be decided by the principles of Burmese Buddhist law.

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82. *Id.* at 913-14.

83. *Id.* at 916.

84. See 14 AIR (Rangoon Series) 215. This was a ruling by a British colonial court given around 1936.

Since the promise to marry is a separate contract between the parties, the determination of whether there was a breach of promise to marry must be decided by principles of the *Majority Act*, which was in force in Burma.<sup>85</sup>

The Chief Court rejected the arguments submitted by counsel for the respondent, and also “differed from” the ruling in *Maung Tun Aung*.<sup>86</sup> Since the Chief Court ruled that the provisions of the *Majority Act* are not dispositive in determining the case and the legal issues that arose from it, the issue would be:

in a case of breach of promise to marry, of which the said promise was initially made to a minor [girl] by an adult [male], whether principles that can be extrapolated from the *Dhammathats* or broadly-framed public policy arguments should supercede, override or be given preference to legislative enactments which state that a minor cannot validly enter into a contract.

### B. *The Ruling in Maung Ko Gyi*

The Chief Court, in answer to the issue which it had itself raised,<sup>87</sup> stated that “under the circumstances as stated, a suit for damages against a male (who breached his promise to marry) can be made.”<sup>88</sup> The reasons for the Chief Court’s decision can be summarized from the judgment. The Chief Judge, Maung Maung, writing for the Court, stated that in matters regarding marriage and cohabitation among Burmese Buddhists, Burmese customary law must be the primary focus of reference. A promise to marry cannot be considered on the same level as mercantile and commercial dealings. In any civilized country, matters concerning marriage and establishing a family are not considered on the same level as transactions involving the buying and selling of goods. They are considered delicate and important social matters. The promise made by Maung Ko Gyi to the daughter did not involve the individual woman alone. It involved the woman’s mother. It also partly involved the society in which they live and, additionally, matters concerning human morality. Therefore, when a dispute arose as a result of a breach of promise, the case should not be decided merely by reference to a superficial analysis of the *Contract Act*. Burmese custom and culture need to be deeply

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85. See *Maung Ko Gyi*, *supra* note 81, at 918-19.

86. See *infra* note 167. In a head note in *Maung Ko Gyi* at 914, it is stated that the Chief Court “differed from” (“Thabaw Kwei Lwei”) but did not explicitly overrule (“Pei Phyet”) *Maung Tun Aung*. Compare the explicit overruling of *Ma Hla Me*, *supra* note 23, by the Chief Court in *Daw Khin Mya Mar*, *supra* note 42.

87. See text accompanying *supra* note 82.

88. See *Maung Ko Gyi*, *supra* note 81, at 923.

analyzed in order to achieve a result that would be just to parties in the case, and that would be acceptable to the society to which they belong.

Section 135 of the *Thirty-four Dhammathats*,<sup>89</sup> compiled by Minister Kinwun Mingyi U Gaung, states:

If a man after, obtaining the consent of the woman [and after becoming intimate with the woman], states that he no longer wants the woman [a case against him will lie before a judge]. If, arriving before the judge, [the man] feeling fearful that he would have to pay damages [if he states before the judge that he no longer wants the woman], affirms that he wishes [the woman to be his wife], then judges should decide that the couple should live together [as man and wife]. After obtaining the woman thus, if the man again says he no longer wants the woman [as wife], then give severe lawful punishment — [fine the man and] withdraw all [his] property from him and give them to the young woman. [She] should also be free from being [the man's] wife.<sup>90</sup>

The Chief Judge stated that the stipulation, as excerpted above from the *Dhammathats*, was based on a desire to bring an equitable settlement between the two parties in accordance with Burmese custom and culture, and not based on narrow legalistic thinking.

Chief Judge Maung Maung stated that “under the stated circumstances a suit for damages for breach of promise would lie against the male [appellant Maung Ko Gyi].” This decision is based on Burmese custom, on the principle of non-exploitation of man by man which is now practiced in Burma, and on *Lawkabala Tayar* (“principles that govern the universe”), which should regulate the relationships among humans.<sup>91</sup>

### C. *Analyzing the Decision*

#### 1. The Perspectives of “Positivism” and “Natural Law”

Andrew Huxley analyzed the decision in *Maung Ko Gyi* by utilizing two paradigmatic theories of law in his article “The Last Fifty Years of

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89. Apart from the *Thirty-Six Dhammathats*, there is at least in Burmese another compilation by Kinwun Mingyi U Gaung of *Thirty-four Dhammathats* dealing with family matters, published in 1899. *The Thirty-six Dhammathats* were said to have dealt with “matters concerning inheritance.” U Mya Sein, *supra* note 37, at 451.

90. Section 135 of *Thirty-four Dhammathats* was reproduced in the original Burmese in the judgment.

91. The text in the paragraph following note 87 is a translation of the major portions of the Chief Court's judgment from *Maung Ko Gyi*, *supra* note 81, at 921-23.



Burmese Law: E Maung and Maung Maung.”<sup>92</sup> Huxley based his analysis on E Maung’s<sup>93</sup> criticism of Maung Maung’s<sup>94</sup> ruling in *Maung Ko Gyi*.<sup>95</sup>

According to Huxley, the classification of Maung Maung as at least a “non-positivist,” if not a “natural lawyer,” and of E Maung as a “positivist,” can arguably be derived from a statement the Chief Judge made in the ruling in *Maung Ko Gyi*, and in terminology that he employed at the very end of his judgment. Maung Maung’s statement that promises to marry could not be considered on the same level or context as commercial or mercantile dealings, and his use of the terminology *Lawkabala Tayar*, were assailed by E Maung. In his judgment, Chief Judge Maung Maung expounded on the inadequacy of the *Contract Act* alone as the basis to decide whether a suit for breach of promises to marry could be sustained.<sup>96</sup> As to the untenability, if not incorrectness, of this point E Maung was categorical:

The implication that the Contract Act applies only to mercantile or commercial dealings is to restrict the scope of the Act without justification. The Act is intended to and does apply to all consensual dealings.<sup>97</sup>

As to the terminology Maung Maung used at the end of his judgment, E Maung was of the view that:

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92. See Huxley, *supra* note 19, at 9, 17-19.

93. Huxley also mentions a longer biographical note about E Maung in *supra* note 19, 12-13. However, Huxley’s biographical note on E Maung contains two factual errors. E Maung became a High Court Judge in 1946 (at the High Court of Judicature in Rangoon) at the age of 47 or 48, not 57, as stated on page 12. (E Maung’s age was mentioned as “80 years” in his obituary, which appeared in THE GUARDIAN, July 21 or 22, 1977.) Furthermore, E Maung was most likely Minister of Foreign Affairs, not “Home Affairs when the Army took over indefinitely in 1962,” as stated at Huxley *supra* note 19, at 13.

94. Huxley also mentions a brief biographical note on Maung Maung on pages 14-15 of his article. Again, there are two factual errors in this brief note. Maung Maung was not born in 1924 (as stated on page 14), but on January 31, 1925. See WHO’S WHO IN BURMA (1961). See also Maung Maung, *infra* note 187, at 66. There was no book published in 1956 by Maung Maung entitled “The Burmese Constitution,” as stated by Huxley at page 15. Maung Maung published his doctoral thesis at the University of Utrecht under the title BURMA IN THE FAMILY OF NATIONS (1956). Another one of his books was BURMA’S CONSTITUTION (1959).

95. E Maung’s criticism of some of Maung Maung’s statements in the *Maung Ko Gyi* case can be discerned in his 1970 book, BURMESE BUDDHIST LAW, *supra* note 5, at 18-19. Huxley based his analysis on the “positivist” approach of E Maung, and on the natural law/social policy orientated approach of Maung Maung in the case of *Maung Ko Gyi* (mainly from the two pages of comment in E Maung’s book). Huxley states that “[t]his volume [of *Burma Law Reports* containing the *Maung Ko Gyi* case] is missing from my library. I have to rely on account of the case in E Maung (1970).” See Huxley, *supra* note 19, fn. 33.

96. See *Maung Ko Gyi*, *supra* note 81, at 921-922. Maung Maung stated that “the case cannot be decided by a superficial analysis of the *Contract Act* alone.” *Id.* at 922.

97. E Maung, *supra* note 5, at 18.

The reference to *Lawkabala Taya* (principles upholding the Universe) could well have been omitted. The principles are amorphous and lack definition. Buddhist scriptures enumerate “fear” and “shame” as the two principles: being afraid to do wrong and feeling ashamed at consciousness of doing wrong. The Constitution of 1947 of the Union of Burma enumerates justice, liberty and equality.<sup>98</sup> The Learned Chief Judge defined the principles as non-oppression between man and man and non-exploitation of man by man. *Lawkabarla Taya* appears to be unruly a horse to ride as public policy.<sup>99</sup>

There is more “evidence” that Maung Maung had, in the context of the *Maung Ko Gyi* case, eschewed positivism or at least “legalistic thinking.” At the end of the judgment and immediately after reproducing the excerpt from the *Thirty-four Dhammathats*, Maung Maung stated that the exposition as stated in the *Dhammathat* was not based on “narrow legalistic thinking.”<sup>100</sup>

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98. Footnote inserted by author. It should be pointed out here that E Maung’s definition of *Lawkabala Taya* was subsequently affirmed by Burmese lexicographers. In the *Myanmar-English Language Dictionary* (1993), compiled by the “Department of Myanmar Language Commission” of the Ministry of Education, *Lawkabala Taya* is defined at 437 as “deterrent principles of shame and fear which guard the world from falling into chaos.”

99. E Maung, *supra* note 5, at 18-19.

100. *Maung Ko Gyi*, *supra* note 81, at 922. Even though Maung Maung was arguably (in Huxley’s words) not a positivist or a “legalist” in his judgment in the *Maung Ko Gyi* case, Maung Maung happened to be a “legalist,” and was very much a “positivist” (in the uncomplimentary sense of the words), during the 1988 uprising, when he was President of Burma from August 19 to September 18, 1988.

When hundreds of thousands, if not millions, of people were in daily demonstrations throughout the country, demanding that his government resign and hand over power to an interim government to supervise free and fair elections, Maung Maung told the country that it was “constitutionally” impossible for him to do so since the 1974 Burmese constitution did not contain such a provision (concerning handing over power to an interim government). In two speeches to the nation on August 24 and September 1, 1988 Maung Maung played the role of “legalist” or “constitutionalist.” See Myint Zan, *supra* note 13, at 252-253; Myint Zan, “Comments on Fifty Years of Burmese Law,” *supra* note 19, at 40. In his posthumously published “memoirs” entitled *THE 1988 UPRISING IN BURMA*, *infra* note 187 at 88-89, 174-75, 204, Maung Maung again reiterated the “sacrosanct” nature of the 1974 constitution and gave a “legalist” argument of how forming an interim government was constitutionally impossible. In one point, in his last book, Maung Maung the “legalist” even got his facts wrong when he compared his besieged government of which he was President for four weeks with that of the Presidency of the United States. Maung Maung wrote that “In the United States [a President’s] popularity, may dip to as low as 10% or 20%, but he does not, cannot, resign until his term is over.” *Id.* at 204. The late Maung Maung might have re-familiarized himself with the historical fact of Richard Nixon’s resignation in August 1974.

Maung Maung defended, praised, indeed even “fetishized” the 1974 Burmese constitution which after all “constitutionalized” one party rule. See Myint Zan, *supra* note 13, at 236-251. Yet Maung Maung did not take a consistently legalistic approach to the Burmese Army’s military coup of 1962 (which overthrew the democratically-elected government under the 1947 constitution), nor to the 1988 military coup which brutally and bloodily crushed an uprising which arose, in Maung Maung’s own words, out of “the people’s desire for basic changes.” See Myint Zan, *supra* note 13, at 243. There was no provision in the 1947 Burmese constitution that mandated, authorized or permitted, a military

E Maung made a final critique of Maung Maung's judicial reasoning in *Maung Ko Gyi*, apparently on a legalistic or at least positivist basis:

The suggestion that (if the author has not misunderstood the Learned Chief Judge) because marriage is a social institution, in which not only the parties to the marriage but the whole society have an active interest, customs of that social system must invalidate any positive enactment not consistent with it ignores the fact that customary laws are by § 13 (1) of the Burma Laws Act subject to any positive enactment to the contrary.<sup>101</sup>

A relevant factor in this "positivism vs. natural law" analysis of the judgment in *Maung Ko Gyi* is described by Huxley as an illustration of "the interface between dhammathat law and the *Indian Contract Act*," which was, according to him, the "issue" in *Maung Ko Gyi*.<sup>102</sup> In this regard, it needs to be noted that Maung Maung in *Maung Ko Gyi* did not explicitly state that the stipulations in the *Dhammathats* overrode those of positive laws. Only one excerpt from § 35 of the *Thirty-four Dhammathats* was cited in the judgment in *Maung Ko Gyi*. This excerpt from the *Dhammathat* was not precisely relevant to the issue under consideration in *Maung Ko Gyi*, since the excerpt did not directly deal with damages or suit by minors for breach of promises to marry. The Chief Court merely pointed out that it should take inspiration from such traditional Burmese thinking and not merely be guided by "superficial" analysis and a "narrow, legalistic" following of the provisions of the *Contract Act*.<sup>103</sup> Both E Maung and Maung Maung were eminent Burmese legal scholars and judges of the highest courts in the country. It is a useful, indeed, fruitful enterprise to analyze the case from positivist and "natural law" approaches that arguably typify the legal thinking of E Maung and Maung Maung respectively in this particular case. For a more rounded or "context-based" analysis of the case,

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coup. At least from the perspective of the 1947 constitution the military coup that brought General Ne Win to power was "illegal." At a minimum, it was in direct violation of the 1947 constitution, about which Maung Maung had written an entire book according fulsome praise when it was in force. See Maung Maung, *BURMA'S CONSTITUTION*, 1959, Rev. Ed. 1961. Similarly, the military coup of September 18, 1988 which crushed the massive peoples' uprising of August and September 1988 was *not* authorized, mandated or permitted under any provision of the 1974 constitution which was in force at the time of the 1988 military takeover. Both the 1962 and 1988 military coups were *ultra vires*, indeed in direct violation of the pre-existing constitutions in force during those times. The "non-positivist" (in Huxley's words) or "legalist" or "constitutionalist" (as the case may be) Maung Maung not only did *not* take a legal, constitutional or moral stand, but used special pleading and rather fawningly endorsed and praised the military coups of both 1962 and 1988. See Maung Maung, *THE 1988 UPRISING IN BURMA* at 28-29, 243-44.

101. E Maung, *supra* note 5, at 19. For the provisions concerning Section 13 of the *Burma Laws Act*, see text and notes accompanying *supra* note 3.

102. See Huxley, *supra* note 19, at 17 (internal citation omitted).

103. *Maung Ko Gyi*, *supra* note 81, at 922.

it is necessary to delve into the possible “ideological” reasons or rhetoric that can be discerned in the judgment in *Maung Ko Gyi*.

## 2. “Socialist” Ideology

Two phrases that Maung Maung employed in *Maung Ko Gyi* facilitate, perhaps necessitate, a brief analysis of the case in terms of ideology, or at least in terms of the use of rhetoric reflecting the ideology of the then relatively new Revolutionary Government of Burma.<sup>104</sup> The particular phrase or sentence that lends itself to such an “ideological analysis” appears only at the very end of the judgment. Maung Maung stated that the “*Lawkabala Taya* (“principles that govern the universe”) currently practiced in Burma whereby the oppression of man by man and the exploitation of man by man [is prohibited]” required that the court decide the issue in the way it did — in favor of the respondent Daw Ohn Khin, the minor girl’s mother. The “non-oppression of man by man and non-exploitation of man by man” entered into the Burmese political lexicon on April 30, 1962, when the Revolutionary Council, which had taken over power less than two months earlier, announced “The Burmese Way to Socialism” (hereafter, “BWS announcement”) as a guiding document for its policies. To discern the ideological flavor of the BWS announcement, in which the particular phrase “non-exploitation of man by man” was used, a full reproduction of the relevant paragraph from the BWS announcement is necessary:

The Revolutionary Council of the Union of Burma (RC) does not believe that man will be set free from social evils as long as pernicious economic systems exist in which man exploits man and lives on the fat of such appropriation. The Council believes it to be possible only when exploitation of man by man is brought to an end and a socialist economy based on justice is established; only then shall all people, irrespective of race or religion, be emancipated from all social evils and set free from anxieties over food, clothing and shelter, and from inability to resist evil, for an empty stomach is not conducive to wholesome morality, as the Burmese saying goes; only then can an affluent stage of social development be reached and all people be happy and healthy in mind and body.<sup>105</sup>

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104. It should be noted that the decision in *Maung Ko Gyi* was given in October 1965, just over three and a half years after the March 1962 military coup which brought the Revolutionary Council and the Revolutionary Government into power.

105. The BWS announcement is reproduced in BURMA SOCIALIST PROGRAMME PARTY, THE SYSTEM OF CORRELATION BETWEEN MAN AND HIS ENVIRONMENT (1963), which was published in both Burmese and English. The author clearly remembers that at least during one year of high school,

Hence, Maung Maung extrapolated a term used from the "policy document" of the executive branch of the government in a judicial decision regarding a social matter. In addition, the BWS announcement dealt with economic matters, and with correcting economic injustice as a desirable social goal.<sup>106</sup> It is akin to (though also quite different from) a Chief Justice of the United States Supreme Court citing the New Deal policy of the Franklin Roosevelt administration in deciding a family law case during the 1930s.<sup>107</sup> Perhaps a slightly more appropriate analogy would be that of a Soviet court, in around 1920, citing a phrase from one of Lenin's books to decide a dispute in

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the students, at the beginning of the week and before classes started, had to assemble in the school playground and follow a school teacher in reciting this particular paragraph in Burmese. This paragraph, with some amendments, was adopted (affirmed) and reaffirmed by the First Party Congress of the Burma Socialist Programme Party (the sole political Party in Burma under RC decree since 1964 and under the 1974 Constitution, from 1974 to September 1988) in 1971, The Extraordinary Party Congress in 1974 and the Fourth Party Congress in 1981 (See BURMA SOCIALIST PROGRAMME PARTY, MYANMA HSO SHALIT LANZIN PATI OAKKHAT GYI EI KHIT PYAUNG TAW HLAN YEI THAMAING WIN MEINT KHUN MYAR ("The Epoch-changing, Revolutionary, Historic Speeches of the Great Burma Socialist Programme Party Chairman") 1 (1983).

The possibly offensive word "man" in "exploitation of man by man" was first used in the 1960s in translation — long before the current "gender neutral" or politically correct expressions were adopted in Western academic publications. Additionally, the Burmese word *Lu* appears to be more gender neutral than the English word "man." Maung Maung, in *Maung Ko Gyi*, did not use that more explicit term, but "Lu-Lu Chin A-Naing Htet Ma Pyu, Ah-Myat Ma Htoke," approximately translating as "non-oppression of humans by each other, non-exploitation of humans by each other." However, a politically correct translation (using humans instead of "man") should be eschewed, for the historical record, in preference of the original translation which was used officially throughout the 1960s, 1970s and 1980s.

106. However, General Ne Win (then Chairman of the Revolutionary Council, Prime Minister of the Revolutionary Government and Burma Socialist Programme Party Chairman) used the term *Lu-lu Chin Gaung Boan Phat* ("exploitation of man by man") in describing and condemning social practices in the Shan states of Burma when he recounted "exploitative acts." These acts include, for example, some ethnic Shans being required to serve the *nats* ("spirits") by serving the exploiting "shamans" a prized cow when a person died, and "serving" young women, before their marriages, to males in high society or to those holding hereditary offices. The speech was delivered in the closing session of the First Congress of the Burma Socialist Programme Party on July 11, 1971. It is reproduced in Volume 3 of the "historic speeches" of the BSPP Chairman (published by BSPP in February 1975). For a translation of the speech, see THE [RANGOON] GUARDIAN and THE WORKING PEOPLE'S DAILY, July 12, 1971. It should also be stated that Maung Maung published a book entitled BURMA AND GENERAL NE WIN (1969) in English. (A separate and longer Burmese version was also published.) The Ministry of Information awarded Maung Maung (who was then the Chief Judge of the Chief Court of Burma) the National Literature Award (Political Literature category) in 1970 for publishing the book.

107. The author is fully aware that the analogy may be "inconvenient." First, from 1932 to 1936, the United States Supreme Court, far from "quoting with approval" the rhetoric or spirit of the New Deal, regularly struck down New Deal legislation as unconstitutional. This happened until President Franklin Roosevelt threatened to "pack the court," and until Justice Owen Roberts changed his mind at around the same time. See, e.g., STEPHEN ELLIOTT (ED.), A REFERENCE GUIDE TO THE UNITED STATES SUPREME COURT 299 (1986). Second, a case of a "breach of promise to marry" or, for that matter, a family law case is unlikely to come before the Supreme Court. Third, family law matters in the United States are unlikely to have "interstices" between customary law and legislation as in the *Maung Ko Gyi* case.

family law. Still, the distinction from the hypothetical analogy of the Soviet court is that Burma in the 1940s, 1950s and early 1960s had an independent judiciary.<sup>108</sup> During those years it is quite unlikely that a Burmese Supreme Court or a High Court judge would give much (if any) deference to a phraseology or an ideological cliché of the executive arm of the government, in a dispute dealing with family matters.

Perhaps that was the unstated but subtly hinted premise for which E Maung found the juxtaposition of the Buddhist term *Lawkabala Taya* with that of “non-oppression of man by man and non-exploitation of man by man” by Maung Maung in *Maung Ko Gyi* to be untenable and “perplexing.”<sup>109</sup> E Maung inferred that the Buddhist scriptures’ definition of *Lawkabala Taya* would not logically led to Maung Maung’s virtual equation of that term with “non-exploitation of man by man.”<sup>110</sup> Hence, E Maung, himself a Supreme Court judge in the 1950s, was perhaps chiding Maung Maung not only for employing a somewhat ideologically-laden rhetoric in the judgment in *Maung Ko Gyi*,<sup>111</sup> but also for rushing into the “ideological” twilight zone (or was it a “shining light”?)<sup>112</sup> which E Maung and his brethren<sup>113</sup> in the Supreme Court of the old pre-1962 days would not

108. The author has written a more detailed article concerning the independence of the judiciary in Burma pre- and post-1962. See Myint Zan, *Judicial Independence in Burma: No March Backwards Towards the Past*, 5 ASIAN-PACIFIC LAW AND POLICY JOURNAL 1-39 (2000), <<http://www.hawaii.edu/aplpj/1/05f.html>>, as of November 30, 2000.

109. E Maung, *supra* note 5, at 18, states that “some of the observations of the learned Chief Judge [in *Maung Ko Gyi*’s case] can perplex Judges of subordinate courts (just as they perplex the author) who might misconstrue them” [the comments concerning *Lawkabala Taya* and non-exploitation].

110. The lexicographical definition of *Lawkabala Taya* provided in the *Myanmar-English Dictionary* of 1993 is identical to that provided by E Maung in 1970. See *supra* note 98.

111. Huxley states that Maung Maung managed to impress or recruit many persons with his choice of phraseology *Lawkabala Taya*: “Maung Maung using his skills he acquired as a journalist, has devised a phrase which can appeal to Buddhists, magicians, royalists, socialists and supporters of Ne Win’s coup (groupings by the way which are not mutually exclusive.)” Huxley, *supra* note 19, at 18. Note that Maung Maung actually did not “devise” the phrase, but rather extrapolated it from the Buddhist scriptures.

112. About eight years after “extrapolating” and equating the phrase *Lawkabala Taya* with that of “non-exploitation of man by man,” Maung Maung, writing in 1973 as Judicial Minister (and as a member of the Revolutionary Council and the Revolutionary Government), exhorted the “People’s Judges” in the “Peoples’ Judicial System” to follow the advice of the Revolutionary Council Chairman (U Ne Win) by not looking up in awe or looking down in contempt on professional legal advisers (who advised the People’s Judges appointed by the Party). For the introduction of the People’s Judicial System in 1972, and for the context in which Maung Maung made those statements, see Myint Zan, *supra* note 13, at 232-33. By 1973, Maung Maung had moved from merely citing a politically correct phrase to advising People’s Judges to follow as guidelines the exhortations contained in the speech of the Revolutionary Council Chairman.

113. In the late 1940s, 1950s and 1960s, all of the Judges of the Supreme and High Courts of Burma were Burmese males. At least some, if not most of them were British-trained barristers. Also, from the 1960s to late 2000, none of the judges in the various apex courts in Burma was female.

have trodden.

It should be repeated here that the “ideological” analysis of the ruling in *Maung Ko Gyi* is based only on two phrases (*Lawkabala Taya* and the apparent equation of its meaning with “non-exploitation of man by man”) which were mentioned virtually in the last sentence of Maung Maung’s judgment. It is important that their ideological “flavor” and especially the political context in which they were made are not overlooked in discerning the trends in post-1962 case law. At the same time, it should be kept in mind that the ruling, though not shorn of its ideological content, is not purely or even predominantly ideological. That is why it is necessary to analyze, albeit briefly, the ruling in *Maung Ko Gyi* through the prism of “principle” and “policy” in its not-so-ideological sense.

### 3. The Viewpoints of “Principle” and “Policy”

It was mainly Ronald Dworkin who, in the contemporary era, expounded the role of “principle” and “policy” in judge-made or case law, primarily (one should add) in the context of Western, common law legal systems.<sup>114</sup> Nevertheless, Dworkinian reasoning or argument has been employed *a posteriori* to analyze some aspects of Burmese case law as it related to how judges in colonial Burma applied and interpreted the rules expounded in the *Dhammathats*. For example, Andrew Huxley wrote that a Burmese legal scholar, U Tha Gywe (who first published his book *Treatise on Buddhist Law* in 1909), used what could retrospectively be called a “Dworkinian argument,” and tried to save the “reputation” of the British colonial judges who had at times mispronounced the principles contained in the *Dhammathats*:

Tha Gywe tried to save the reputation [of the early British colonial judges] by what we would now call a Dworkinian argument: in cases where they appear to be overruling the dhammathat sources, the Anglo-Burmese judges were in fact identifying and applying principles which underlay the dhammathats rules: surface

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However, the first Burmese female barrister, the late Daw Phwar Mee, graduated from the Inns of Courts in London in 1925 — the same time as her Burmese male counterparts. In fact, Daw Phwar Mee was married to the late U Myint Thein, the third Chief Justice of the Union of Burma and the last to be appointed under the 1947 Constitution. See Maung Maung, *Profile of U Myint Thein*, THE [RANGOON] GUARDIAN MAGAZINE (October 1957). For a brief account of how Daw Phwar Mee spent her last days apart from her husband, U Myint Thein (since her husband was under detention as a result of the March 1962 military coup), see Myint Zan, *Obituary: U Myint Thein, MA, LLB, LLD*, 69 AUSTRALIAN LAW JOURNAL 225 (1995).

114. See generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977), and *A MATTER OF PRINCIPLE*, *supra* note 68.

inconsistencies marked a deeper continuity.<sup>115</sup>

It is not possible to adequately skim and analyze the case from the viewpoint of Dworkinian principle and policy, but the briefest attempt can be made mainly with a view towards adding to the analysis a comparative and contemporary jurisprudential “flavor.” Dworkin tries to encapsulate his argument on principle and policy thus:

Our political practice recognizes two different kinds of argument seeking to justify a political decision. Arguments of policy try to show that the community would be better off, on the whole, if a particular program were pursued. They are in that special sense, goal-based arguments. Arguments of principle claim, on the contrary, that particular programs must be carried out or abandoned because of their impact on particular people, even if the community as a whole is in some way worse off in consequence. Arguments of principle are rights-based. Because the simple view that law and politics are one ignores this distinction, it fails to notice an important qualification to the proposition that judges must and do serve their own political convictions in deciding what the law is. Even in hard cases, though judges enforce their own convictions about matters of principle, they need not and characteristically do not enforce their own opinions about wise policy.<sup>116</sup>

Taking Dworkin’s exposition into account, and keeping in mind the “different political practices” of the United States and other common law countries compared with those of mid-1960s Burma, can it be argued that the decision in *Maung Ko Gyi* is justifiable under the rubric of both policy and principle?

Maung Maung’s argument in *Maung Ko Gyi* that the promise made by Maung Ko Gyi affects not only the minor girl and her mother but also partly affects the society they live in<sup>117</sup> can be analyzed and justified at least loosely by Dworkinian arguments of policy as stated above. It is arguable, if a little stretched, that society would be, in Dworkin’s words, “better off” by deciding against Maung Ko Gyi.<sup>118</sup> Therefore, the decision could be justified under “policy” grounds.

The decision in *Maung Ko Gyi* could also perhaps be justified on the

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115. Huxley, *supra* note 19, at 13 (internal citation omitted).

116. Dworkin, *supra* note 68, at 2-3.

117. See *Maung Ko Gyi*, *supra* note 81, at 922.

118. In fact, U Mya Sein, the author’s former Chamber-Master and a specialist on Burmese customary law, argued partly to that effect as *amicus curae* in *Maung Ko Gyi*. U Mya Sein stated: “If it were to be decided that no suit for breach of contract against MKG lies then it would be tantamount to protecting and according privileges to a person who is defective in human morals.” See *Maung Ko Gyi*, *supra* note 81, at 921.



ground of principle as stated above. The particular provision of the *Contract Act* (concerning the status of minors to enter into contract) should not apply (be “abandoned” in Dworkin’s words) since the “impact” on the minor girl and her mother would be bad if the particular “legalistic” line of reasoning (in Maung Maung’s words), or “program” (in Dworkin’s words) is followed. Hence, such an interpretation or discernment of the decision in *Maung Ko Gyi* could arguably be justified under both “goal-based” and women’s “rights-based” arguments.<sup>119</sup> It could even be added that, unlike the excerpted elaboration of the rights-based argument of Dworkin, by allowing the “enforcement” of the minor girl’s and her mother’s rights, the community as a whole would not in anyway be worse off and could even be argued to be “better off.”

One final observation concerning the “principle” / “policy” distinction in the *Maung Ko Gyi* case could be made if the meanings of the terms “principle” and “policy” are construed differently from Dworkin’s definitions in the above paragraph. This line of reasoning would postulate that the principle involved in *Maung Ko Gyi* was the legal principle contained in the *Contract Act* (which was in force in Burma in 1965): that minors as persons who do not have capacity to contract cannot sue or be sued for breach of promise to marry. The policy reasons would be rights of the minor girl, her mother and even those of society, as well as withholding protection from a “moral wrong-doer.” From this perspective, it could be argued that the Chief Court of Burma in *Maung Ko Gyi* opted to base the reasons for its decision on grounds of policy rather than principle as defined above.<sup>120</sup> If the above definitions of principle and policy, rather than those proffered by Dworkin, are used to review the case, then the following comment by Dworkin becomes pertinent as ammunition for criticism rather than as support for the ruling in *Maung Ko Gyi*:

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119. Again, the arguments above have “caveats.” Ronald Dworkin was primarily writing about “political decisions” made by judges mainly in common law countries and in democracies. The assumption here is that the decision in *Maung Ko Gyi* was “political” in the sense that Dworkin used the term. Moreover, the *Maung Ko Gyi* case is also characterized by the interface between customary law and positive law which could, if not skew, then at least complicate the implementation of the “principle” and “policy” argument as expounded by Dworkin in the excerpted paragraph.

120. Again, the above analysis “discounts” or “shelves” the interface of customary law and positive law which is discussed in the ruling itself and in other sections of this article. It also does not discuss here — since it was already discussed in earlier sub-sections of the article — the merits or demerits of a “policy-oriented” decision. Among these, in particular, is using *Lawkabala Taya* as public policy in *Maung Ko Gyi*, which, in the vivid words of E Maung, amounts to “riding an unruly horse.” Considering this and other qualifications made when analyzing the decision from a principle/policy and other perspectives, the author points out that analyses should not be made piecemeal or viewed singly, but all should be considered as an integrated whole regarding the decision in *Maung Ko Gyi*.

Even in hard cases though judges enforce their own convictions about matters of principle, they need not and characteristically do not enforce their own opinions about wise policy.<sup>121</sup>

Perhaps it was from such a “Dworkinian perspective” that E Maung criticized some of Maung Maung’s legal reasoning in *Maung Ko Gyi*.

The discussion and analysis of *Maung Ko Gyi* has not been made particularly from the perspective of women’s rights. One can venture to suggest that advocates of women’s rights would generally approve the outcome of the decision even if they have differing opinions or no opinion about the legal reasoning that led to the decision.

#### IV. MATRIMONIAL FAULT

##### A. *The Issues*

This section deals with a case which can perhaps be discussed more explicitly from the standpoint of women’s rights, in relation to a lack of equal opportunity or equal standing of Burmese women as regards a “matrimonial fault.” The issues are 1) whether adultery by a husband is, under Burmese customary law, a “matrimonial fault” that entitles the wife to divorce her husband; and 2) whether a ruling in 1929 by two British colonial judges that “[m]ere adultery on the part of the husband does not by itself entitle a wife to a divorce according to Burmese Buddhist law”<sup>122</sup> is “good” law, or a correct interpretation of the *Dhammathats*, or reflective of Burmese custom, and if not, why, at least as of 1974, and probably even now, those decisions have not been formally overruled.

##### B. *The Ruling in Ma Thein Nwe*

In *Ma Thein Nwe v. Maung Kha* both Judge Heald and Judge Otter based their judgments mainly on the fact that they did not find sufficient evidence in the *Dhammathats* to rule that the husband’s adultery alone entitled his wife to sue for divorce under Burmese Buddhist law. A variety of excerpts from the *Dhammathats* submitted by counsel for the appellant (wife), which arguably pointed to the contrary conclusion, were rejected by the judges as being inconclusive.

Judge Heald did cite a passage excerpted in § 256 of the *Digest*

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121. Dworkin, *supra* note 68, at 3.

122. *Ma Thein Nwe v. Maung Kha*, 7 ILR (Rangoon Series) 451 (1929). Two judgments were separately delivered by Mr. Justice Heald and Mr. Justice Otter on April 2, 1929.

(*Digest of Buddhist Law, or Thirty-six Dhammathats*)<sup>123</sup>: “if the wife is guilty of adultery, she is to have her head shaved in four patches and to be sold into slavery, and [if] the husband keeps a paramour he is to leave the house with only the clothes he is wearing.”<sup>124</sup> But Judge Heald argued that the above passage “is the only one which goes any way towards supporting appellant’s arguments that a wife may divorce a husband for mere adultery, and it can hardly be contended that the Courts are bound to enforce that law at the present day.”<sup>125</sup> The reasons for the contention that courts are not bound to enforce that law (as contained in § 256 of the *Digest*) were not explained or elaborated by the judge. But they become clearer from Judge Heald’s citation of § 302 of the *Digest* (which is reproduced here, not from the translated *Digest* itself, but from its paraphrase in the judgment of Judge Heald):

The passage [in § 302 of the *Digest*, which is taken from *Manugye Dhammathat*] says that where one party to a marriage behaves like an animal it shall be no defence to a suit for divorce brought by the other party for the husband, if the suit is brought by the wife, to say that he has not been guilty of cruelty and has not taken a lesser wife, or for the wife if the suit has been brought by the husband to say that she has not taken a paramour. This passage supports the view that the ordinary grounds for divorce are cruelty and adultery on the part of the husband and adultery on the part of the wife.<sup>126</sup>

On the subject of adultery as grounds for divorce among Burmese Buddhist couples, it is clear that Judge Heald preferred the rule laid down in the *Manugye Dhammathat*,<sup>127</sup> as translated and reproduced in § 302 of the *Digest*, to that of “that law” contained in § 256 of the *Digest*, which was

123. See text and notes accompanying *supra* note 11.

124. *Ma Thein Nwe*, *supra* note 122, at 453.

125. *Id.* at 453-54.

126. *Id.* at 454.

127. According to the list of the *Thirty-six Dhammathats* compiled by Kinwun Mingyi U Gaung, as reproduced in U Mya Sein, *supra* note 37, at 403-405, the *Manugye* was written around 1753. It should be briefly noted that even if the wife had the right to divorce the husband in accordance with the excerpt from the *Manugye*, the penalties the husband and wife pay are different: “selling into slavery” for the wife and “leav[ing] the house with only the clothes he is wearing” for the husband. It would appear that this arrangement would give the husband a slight advantage for the same “matrimonial fault.” The author notes that the excerpted paragraph (provided it was correctly translated) was written about 250 years ago in the mid-eighteenth century — a time when under English law, wives were considered virtually “chattels” of their husbands. As for the option or right of selling an adulterous woman into “slavery,” a Burmese expatriate historian claimed that the use of the word “slave” was a mistranslation by British historians of the term *kyran*, and amounts to a “misreading [of] both the nature and evidence of the institution [of *kyran*].” See Michael A. Aung-Thwin, *Athei, Kyun Taw, Hpayay Kyun: Varieties of Commendation and Dependence in Pre-Colonial Burma*, in ANTHONY REID (ED.), *SLAVERY, BONDAGE AND DEPENDENCY IN SOUTHEAST ASIA* 64-89 (1983).

taken from another *Dhammathat* entitled *Dhammathatkyaw*.<sup>128</sup> One unstated reason for the preference for the *Manugye* over the apparently earlier *Dhammathatkyaw* was that about fourteen years before the decision in *Ma Thein Nwe*, the Privy Council had ruled in the case of *Ma Hnin Bwin v. U Shwe Gon* that the *Manugye Dhammathat* was of the “highest authority and if the *Manugye* was unambiguous other *Dhammathats* need not be referred to.”<sup>129</sup>

Judge Otter also considered the rule in the *Kaingza Dhammathat*, reproduced in § 230 of the *Digest*, which stated that “the wife has the right of refusing to cohabit with her husband who is adulterous, or is suffering from some repugnant disease.”<sup>130</sup> But the judge added, “In my view this expression of opinion, though perhaps then in accordance with the usages of Burmese Buddhists, does not amount to a statement that under such circumstances a divorce even by mutual consent could be obtained.”<sup>131</sup> It should be added that even before making the above statement, Judge Otter had commented that “the *Dhammathats* can only be regarded as directory not as statements of law which are necessarily binding in law.”<sup>132</sup> Judge Otter did not elaborate on what would, in the context of Burmese Buddhist law, be regarded “as statements of law binding in law.” But one gathers that, perhaps, Judge Otter considered case law interpreted and “laid down” mainly by British colonial judges as “statements of law binding in law” rather than the (occasionally varying) propositions that are contained in the “original texts” of the *Dhammathats* themselves.

Both judges ruled that “mere adultery on the part of the husband does not by itself entitle a wife to a divorce according to Burmese Buddhist law.” They seem to have based their decisions on the fact that there is insufficient authority in the *Dhammathats*, but even if there were, they are “sparse” and not unambiguous on the subject of the husband’s adultery as a ground for divorce. Judge Otter seems to imply that in the absence of definitive case law, when the rules contained in the *Dhammathats* are merely directory, even if they are relatively clear, what is written in them should not always bind British colonial courts.<sup>133</sup>

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128. See *Ma Thein Nwe*, *supra* note 122. According to the list of the *Thirty-six Dhammathats*, reproduced in U Mya Sein, *supra* note 37, at 403-405, the *Dhammathat Kyaw* was composed in 1734.

129. See text and notes accompanying *supra* note 49. For the “debunking” of the alleged exalted position of the *Manugye* among the *Dhammathats* by the Supreme Court of the independent Union of Burma, see text and notes accompanying notes 50, 51.

130. *Ma Thein Nwe*, *supra* note 122, at 456.

131. *Id.*

132. *Id.* at 455-56. In this context, “directory” means “giving direction.”

133. That is the reading or “interpretation” the author gleaned from Judge Otter’s observation. Perhaps the sentence should read: “the *Dhammathats* can only be regarded as directory and not as

### C. Criticisms of and Comments on *Ma Thein Nwe*

In his 1963 book *Law and Custom in Burma and the Burmese Family*,<sup>134</sup> Maung Maung<sup>135</sup> mentioned the ruling in *Ma Thein Nwe* without comment or criticism. Also, in his book *Burmese Buddhist Law*, published in 1970, E Maung mentioned that “adultery by the husband is not, in itself, a sufficient ground for divorce for the wife, though the wife may be entitled to resist a claim by the husband for restitution of conjugal rights, see *Ma Thein Nwe v. Maung Kha*.”<sup>136</sup>

However, a strong criticism of the ruling in *Ma Thein Nwe* was made in 1974 by U Mya Sein, a Burmese customary law specialist, in an article that was published in the Burmese language newspaper *Hanthawaddy*.<sup>137</sup> U Mya Sein stated that current (as of 1974) Burmese customary law is that if a wife commits adultery, the husband has a right to divorce the wife. But if the husband commits adultery the wife does not have the right to divorce the husband. Since the bulk of this current social (family) law is a compilation of the case law of the highest courts in the State, it can correctly be described as “case law.”<sup>138</sup> The decision was given on April 2, 1929, by “two foreigner judges Mr. Heald and Mr. Otter” on the grounds that they did not find adequate evidence in the *Dhammathats* that adultery on the part of the husband alone would entitle the wife to divorce her husband.<sup>139</sup> U Mya Sein wrote: “this ruling decided in 1929 has become settled law until today [1974]. Times and eras have changed since the advent of the ruling. Years have passed. [As of 1974] it has been 45 years since the ruling” (strongly suggesting by implication that it is time to review if not

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statements of law which are necessarily binding *on the courts*.” Also compare the observation of Judge Page in the case of *Ma Hnin Zan v. Ma Myaing*, 13 Rangoon 487 (1935), which stated: “Now the *Dhammathats* are not the sole repository of Burmese customary law, which is also to be ascertained from decided cases and prevailing customs and practice of Burma.”

134. *Supra* note 9.

135. This was the same Maung Maung who, in 1965, as Chief Judge of the Chief Court of Burma delivered the judgment in *Maung Ko Gyi*.

136. E Maung, *supra* note 5, at 85. In *Ma Thein Nwe*, both Judge Heald and Judge Otter ruled (at 455 and 458 respectively) that, although the wife could not divorce her husband for adultery alone, the suit for restoration of conjugal rights by the husband would still not be granted. This is because “the respondent [husband] has treated the appellant [wife] extremely badly and he is not a man whom the Court will assist by ordering his wife to return” (per Judge Otter at 459).

137. The State-owned newspaper was published in Mandalay. U Mya Sein’s article *Lin-Maya Kuar-Shinn Hmu Thu-Thay-Tha-Na* [Research on Husband-Wife Divorce] was published in the May 27, 1974 issue of the newspaper. The article was reproduced in U MYA SEIN, MYANMA DALAIT HTONE DAN UPADAI [BURMESE CUSTOMARY LAW] 547-49 (1974).

138. U Mya Sein, *Research on Husband-Wife Divorce*, ¶¶ 1 and 3.

139. *Id.* at ¶ 6.

altogether overrule the judgment in *Ma Thein Nwe*).<sup>140</sup> For the next seven paragraphs of the article, U Mya Sein excerpted parts of seven different *Dhammathats* in Burmese, which would indicate (to this author) that the wife of an adulterous husband does have certain “remedies,” if not always a right to divorce for his adulterous behavior. Though U Mya Sein did not indicate that all the excerpts were taken from the Burmese version of *Kinwun Mingyi*, U Gaung’s *Digest*, it is presumed that this was so. A few of the excerpts from the various *Dhammathats* in U Mya Sein’s 1974 article, and the excerpts reproduced in translation in the 1929 *Ma Thein Nwe* ruling, seem to “overlap” in that they were reproduced either in Burmese<sup>141</sup> (in the article) or in English translation (in the judgment) from the same sections of the *Digest*.

For example, U Mya Sein quoted the extract, from § 230 of the *Digest*, which was mentioned in Judge Otter’s judgment. Judge Otter paraphrased the (translated) excerpt as “the wife has the right of refusing to cohabit with her husband who is adulterous, or is suffering from a repugnant disease.”<sup>142</sup> From the wording reproduced in U Mya Sein’s article, the Burmese phrase *set-hsoke* can either be translated as “suffering from a repugnant disease” or as “being despicable or abhorrent.”<sup>143</sup> Be that as it may, while Judge Otter held that the above phrase did not “amount to a statement that a divorce even by mutual consent could be obtained,”<sup>144</sup> U Mya Sein cited § 230, which was taken from the *Kaingza Dhammathat*, and argued that according to that *Dhammathat*: “if the husband is adulterous, the wife has a right to refuse to cohabit with him.”<sup>145</sup> However, at least as far as this particular *Dhammathat* was concerned, even U Mya Sein did not claim that the wife has a “right” to divorce the husband for his adulterous behaviour; she had the “option” to refuse to cohabit with him.

Excerpts from § 256 of the *Digest* were reproduced both in the judgment of Judge Heald in *Ma Thein Nwe*<sup>146</sup> and in U Mya Sein’s article.<sup>147</sup> The particular paragraph from § 256 of the *Digest*, which is

140. *Id.* at ¶ 7.

141. Not all *Dhammathats* were written in Burmese. Among the list of *Thirty-six Dhammathats* reproduced in U Mya Sein, *supra* note 137, fourteen were written in Pali, the *lingua franca* of Buddhist Southeast Asia, and twenty two were in Burmese. Among those in the vernacular, eleven were in prose and eleven in verse. Since these texts were translated and retranslated through three languages there could, at times, be problems of mistranslation.

142. *Ma Thein Nwe*, *supra* note 122, at 456.

143. The *Myanmar-English Dictionary*, *supra* note 98, defines *sethsoke* (at 116) as “abhor; loathe, feel distaste for, hate.”

144. *Ma Thein Nwe*, *supra* note 122, at 456.

145. U Mya Sein, *supra* note 137 at ¶ 10.

146. See *Ma Thein Nwe*, *supra* note 122, at 453.

147. *Supra* note 137, at ¶ 11.

included in U Mya Sein's article, reads:

If a husband and a wife become loose in morals and have committed adulterous behavior [they can no longer be considered as] husband and wife. Let the party at fault pay damages and let the couple end, cut and move way from [divorce] each other.<sup>148</sup>

U Mya Sein's excerpts from the *Manugye*, however, appear to "synchronize" with what was claimed in the judgment of Judge Heald. Quoting *Manugye*, U Mya Sein paraphrased the rule laid down:

If the wife became adulterous the husband can divorce her. If the husband has a "paramour/lesser wife [*Mayange*], rough in speech, violent by hand" only then the wife has a right to divorce.<sup>149</sup>

According to what is reproduced in the *Digest*, the original phrase in Burmese of the husband "having a paramour" and "being rough in speech and violent in hand" is separated by a Burmese equivalent of a comma which is described in Burmese as a *pokehtee*.<sup>150</sup> The equivalent of a (Burmese) comma between the phrases of the husband "having a paramour" and being violent to the wife could be of some relevance and even importance<sup>151</sup> in determining whether under the *Manugye Dhammathat*, the husband must have committed both adultery and cruelty before his wife can divorce him. The fact that U Mya Sein used the word "*thar*" (which roughly means "only then" in translation in the above paragraph) immediately following the two phrases would indicate that, according to the *Manugye*, both adultery and cruelty must be committed by the husband for the wife to be able to divorce her husband.

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148. The word *shin kwa* in the excerpt is similar to the modern Burmese term for divorce (*kwa shin*). It is apparent that although they were quoting from the same section of the *Digest*, both Judge Heald and U Mya Sein had not reproduced the entire section. What was in Judge Heald's excerpt about "selling the wife into slavery" (see text accompanying *supra* note 124) was absent from U Mya Sein's reproduction of the relevant phrase from § 256. From U Mya Sein's reproduction of the particular sentences from § 256 of the *Digest*, a strong, almost unequivocal statement can be made that the wife had a right to divorce her adulterous husband.

149. U Mya Sein, *supra* note 137 at ¶ 9, quoting *Manugye*, Fifth Volume, Chapter 24.

150. A *pokehtee* is denoted as a symbol "i" (an "i" without the dot). A *pokema*, the equivalent of a period at the end of the sentence, is denoted as "ii" (two "i"s without the dot).

151. The placing of a comma in legislative documents can, at times, play a crucial role in judicial interpretations. It indeed played a pivotal and "lethal" role in one British case. See Weeramantry, *supra* note 55, at 149-50, as to the issue of whether Sir Roger Casement committed treason "outside the realm" (of the United Kingdom) in a 1917 case, which depended on the presence and absence of commas corresponding to the word "realm" in the Law-French statute under which the charge arose. Weeramantry reported that the judges considering the case of Roger Casement discovered (after using "a magnifying glass [to] read the original of the statute in Norman French") there were two breaks in the text, the equivalent of commas in the days before punctuation. This "furnished a conclusive reply to one of the most important of counsel's arguments, and, after the failure of other arguments on his behalf, Sir Roger Casement was convicted and executed."

U Mya Sein gave the examples of the stipulations in three more *Dhammathats*<sup>152</sup> where there were statements that could be construed to mean that a wife did have a right to divorce a husband who kept a paramour.<sup>153</sup> He stated that these *Dhammathats*, which were written during the feudal era, firmly stated that if the husband “philandered” the wife had the right to divorce him. He rhetorically asked whether the ruling by two “foreign judges” should still stand “till this day.” He further argued:

Eras as well as ideas progress and move. They are never static. The bad [laws] must be removed and good [laws] must be accepted. A progressive outlook must be adopted. If a pointless ruling given by two British judges in the year 1929 is still accepted nowadays, in an age where the people are administering their own justice, then a black spot in the history of [our] administration of justice will always be ridiculing us.<sup>154</sup>

When U Mya Sein’s article, written and published in May 1974, is analyzed, one finds that the following reasons and rhetoric were employed in his critique of *Ma Thein Nwe*. First, the rulings were given by two “foreigner judges,” or British judges. Second, the British judges did not carefully research the *Dhammathats* which were written in the feudal ages. Third, eras and ideas change, and the unstated premise was that even if the ruling were in accordance with the *Dhammathats* written during the “feudal era” (which certainly was not the case), a progressive rule giving the wife the right to divorce her husband for the husband’s adultery should be adopted.

Maung Maung used the ideologically-laden and politically correct phrase “exploitation of man by man” in *Maung Ko Gyi*. U Mya Sein praised and complemented the “people’s judicial system,”<sup>155</sup> which Maung Maung implemented in 1972, by using the phrase “at the time when the people were administering their own justice” when he criticized the ruling in *Ma Thein Nwe*.<sup>156</sup> Hence, post-1962 rhetoric was employed (though in the case of U Mya Sein perhaps mainly for “theatrical purposes”) by a Chief Judge (Maung Maung) to justify a post-1962 decision, and by a lawyer to critique a pre-1962, indeed, pre-independence, judicial decision.

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152. See U Mya Sein, *supra* note 137, at ¶¶ 12-14.

153. The literal translation of the phrase used in all three *Dhammathats* cited by U Mya Sein (which is not reproduced here) would be “keep a female monkey.” The *Myanmar-English Dictionary* defined the phrase *Myauk-Ma-Htar* as “keep a paramour, a lover.” *Supra* note 98, at 365.

154. U Mya Sein, *supra* note 137, ¶¶ 15 to 17.

155. For this author’s account and comment on the “People’s Judicial System” that was in vogue in Burma from 1962 to about 1989, see Myint Zan, *supra* note 13, 232-36.

156. It should be mentioned that U Mya Sein acted as *amicus curae* in the *Maung Ko Gyi* case in 1965. He urged the Chief Court to rule that a suit against MKG by the minor girl’s mother could be sustained. See *Maung Ko Gyi*, *supra* note 81, at 920-21.



D. Possible Reasons for Not Overruling *Ma Thein Nwe*

1. A "Caveat," but a Strong Presumption

This section discusses the possible reasons that *Ma Thein Nwe* has not been formally overruled as yet. It should be immediately mentioned that the author cannot provide concrete "proof" that the ruling in *Ma Thein Nwe* has not been overruled. But there is a strong presumption that the 1929 ruling by Judge Heald and Judge Otter still stands as of November 2000.<sup>157</sup> At the very least, until 1974, and most probably long afterwards, the ruling in *Ma Thein Nwe* was not formally overruled. It is on this premise that a strong and probably correct presumption is made here that the ruling in *Ma Thein Nwe* still stands. If perchance *Ma Thein Nwe* has been overruled relatively recently, the analysis would still be valid since until the late 1980s, *Ma Thein Nwe* had definitely not been overruled.<sup>158</sup> Analyzing the reasons that such an apparently anachronistic ruling was not overruled for at least over fifty years is, therefore, a legitimate inquiry.

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157. The author telephoned from Melbourne, Australia, U Mya Sein in Mandalay, Burma, on March 30, 1998 and requested "legal" information from him as to whether *Ma Thein Nwe* has been formally overruled. U Mya Sein was unable to supply concrete information and appeared to have forgotten that he had written an article criticizing the ruling. The author believes, although he cannot prove, that the ruling has not been formally overruled. If it had, it would have been in the newspapers, and should have come to the author's or U Mya Sein's knowledge. Since the author knew that the consummation requirement in *Ma Hla Me* was overruled during the 1970s, he requested from U Mya Sein a citation of the ruling which overruled *Ma Hla Me*. It took U Mya Sein several minutes to find the citation for *Daw Khin Mya Mar* above from his book. Through inter-library loans, the author was able to obtain the full text of the ruling in *Daw Khin Mya Mar* which appeared in both the sixth (1974) edition and seventh (1978) edition of U Mya Sein's book *BURMESE CUSTOMARY LAW* (in Burmese). However, U Mya Sein's Article "Research on Husband-Wife Divorce," initially published in the May 27, 1974 issue of the newspaper *HANTHAWADDY*, was reproduced only in the sixth (1974) edition of his book. The sixth edition of his book is not available in Australian universities. The book was borrowed, through overseas inter-library loans, from Northern Illinois University in Dekalb, Illinois, in order to obtain U Mya Sein's article. The author would like to express his thanks to Ms. Elizabeth Broadfoot and the staff from Interlibrary Loans, Deakin University, Geelong, for their efforts in obtaining the rulings and books (a few of which were in Burmese).

158. Since the country was closed for a long time and since judgments of the highest court were written in Burmese for more than thirty years, foreign scholars of Burmese law at times were not fully aware of developments in case law concerning Burmese customary law. Huxley, for example, stated that "the marriage must be consummated [to be recognized under Burmese customary law]," probably thinking that *Ma Hla Me* (from which he quoted in an earlier paragraph) was still "good law." Huxley *supra* note 13, at 27. He was perhaps unaware that it was overruled in 1972. In the telephone conversation on March 30, 1998, U Mya Sein told the author that because of an apparent "oversight," the ruling by the Burmese Chief Court in *Daw Khin Mya Mar* was not incorporated in the *Burma Law Reports* and, therefore, was "unreported." Thus, the author can only cite the case name and case number without the official citation when discussing *Daw Khin Mya Mar*.

## 2. The Significance of Not Overruling *Ma Thein Nwe*

As U Mya Sein has written, Burmese customary law is essentially case law. If it is not yet formally overruled, what was decided in 1929 stands today as a “firm law.”<sup>159</sup> Hence, even though there has been in Burma a trend for de-emphasizing too much reliance on rulings, especially “foreign rulings” or those delivered by foreign judges,<sup>160</sup> if a case is not explicitly overruled it can still be cited and followed by courts. Even if it is not followed, perhaps there is a need, if not to overrule, then perhaps to judicially reexamine the dictum in *Ma Hla Nwe*, if only for the sake of symbolism. In this regard, one could briefly discuss another area of law (left over from the British colonial era) which has recently been the subject of controversy between the International Labour Conference and the Burmese government. The Commission of Inquiry provided a comprehensive, detailed report,<sup>161</sup> which strongly recommended that certain provisions of the *Village Act* (1908) and the *Towns Act* (1907), where the “call-up of labour was provided for in very wide terms,”<sup>162</sup> be “brought into line with the Forced Labour Convention, 1930 (No.29).”<sup>163</sup>

The Burmese government responded to the Report by issuing an Order that the “summoning of labour” must no longer be performed by using the authority and the empowering provisions under these Acts.<sup>164</sup> But it did not specifically repeal or amend the relevant provisions of the two Acts which were initially enacted during the British colonial era. The International Labour Conference, which was considering the Report and the response of the Burmese government, found the action taken by the Burmese government to be unsatisfactory since it did not specifically repeal or amend the laws.<sup>165</sup> The controversy between the International Labour

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159. U Mya Sein *supra* note 137, at ¶ 7. See also text and notes accompanying *supra* note 14.

160. See Myint Zan, *supra* note 13, 235-36.

161. *Report of the Commission of Inquiry Appointed Under Article 26 of the Constitution of the International Labour Organization to Examine the Observance by Myanmar of the Forced Labour Convention 1930 (No.29)* (hereafter, *ILO Report*), reported in 71 OFFICIAL BULLETIN (International Labour Office) (1998).

162. *ILO Report* at ¶ 529.

163. *Id.* at ¶ 530.

164. See Order 1/1999 of State Peace and Development Council Directing Not to Exercise Powers Under Certain Provisions of the Towns Act 1907, Village Act 1908, SECOND REPORT OF THE DIRECTOR GENERAL (OF ILO) TO THE GOVERNING BODY ON MEASURES TAKEN BY THE GOVERNMENT OF MYANMAR FOLLOWING THE RECOMMENDATION OF THE COMMISSION OF INQUIRY ESTABLISHED TO EXAMINE ITS OBSERVANCE OF THE FORCED LABOUR CONVENTION, 1930 (NO.9) (hereafter cited as *D-G Report*) ¶ 10. The Report can be accessed at the web site <<http://www.ilo.org/public/English>>.

165. See *D-G Report*, *supra* note 164.

Organization and the response of the Burmese government in the area of international and domestic labor laws and colonial legislation still in force is illustrative. The Burmese government repeatedly assured the ILO that it did not “implement” the legislation, a claim that was treated with a great deal of skepticism.<sup>166</sup> The International Labour Conference found it unsatisfactory that the “offending” provisions of colonial legislation of the early 20th century were still in force in present-day Burma, notwithstanding Burmese government assurances that the provisions had not been “implemented.” For similar reasons, those who care for equal rights for Burmese women could perhaps examine the possible causes of the ruling in *Ma Thein Nwe* being arguably still valid, unchallenged law after all these years. That the ruling of 1929 still stands, notwithstanding the fact that it is contrary to the principles contained in many *Dhammathats*, is perhaps only one reason for a reexamination of the ruling. The fact that it is also inequitable from a modern perspective is another reason to delve into the issues as to why this judgment has not yet been formally overruled.

### 3. Lack of Judicial Opportunity to Overrule *Ma Thein Nwe*?

The opportunity to (re)consider the judicial doctrines of its predecessors does not arise often for the highest court of a country. Even if the doctrines are considered, the issues may not have a direct bearing on the case at hand and the observations the judges made in previous cases may be (at least in partly common law based countries like Burma) in the nature of *obiter dicta*. That certainly was the case in the 1960s, when the Chief Court of Burma had, on a few occasions, expressed its disagreements with the ruling in *Ma Hla Me* regarding the “consummation” requirement to constitute a valid marriage under Burmese customary law. Maung Maung, in the case of *Maung Ko Gyi*, stated that once a ruling was established, courts would tend to follow it formalistically. Thus, the existence of a ruling itself would discourage clients (and their lawyers) to lodge suits in court if the substance of their arguments were contrary to established rulings. Maung Maung made that observation in relation to the decision in *Maung Tun Aung v. Ma Aye Kyi*,<sup>167</sup> where the High Court of Judicature in Rangoon held that a minor who promises or was the subject of a promise to marry could not sue or be sued, since breach of promises to marry fall under the *Contract Act*. Maung Maung opined that perhaps as a direct result of the

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166. See ¶ 1 of the *ILO Report*.

167. See 14 ILR (Rangoon Series) 215 (1936).

ruling, there was a paucity of suits for breach of promises to marry which were made by or against minors and that the “the opportunity to reconsider the issue had not arisen until now [i.e., until 1965].”<sup>168</sup>

The lack of opportunity to reexamine established principles regarding divorce among Burmese Buddhist couples would be even more pronounced. This is so because in Burma, according to one Burmese legal scholar writing in 1965, “divorces are as difficult and rare as they are anywhere in the world.”<sup>169</sup> Hence, the issue of challenging the grounds for divorce in the high courts of the country would have been and would still be comparatively rare. That perhaps would be the “technical” reason why the ruling in *Ma Thein Nwe* has not apparently been overruled for more than fifty years at the very least — perhaps more than seventy years — after it was laid down by two British judges in 1929.

#### 4. The Anomaly of a Nominal Polygamous System and Lack of Legislative Interest

Burmese customary law allows or honors polygamous marriages. In 1907 the Privy Council stated that “there is a custom of polygamy among Burman Buddhists is beyond dispute and that it is sanctioned by the Dhammathats is also beyond dispute.”<sup>170</sup> U Mya Sein criticized the ruling in *Ma Hla Nwe* in the context of there being no prohibition under Burmese law, customary or enacted, of a man taking more than one wife. U Mya Sein wrote: “if a man taking more than one wife is legally acceptable, then such an infringement will not be considered as a social or matrimonial wrong.”<sup>171</sup>

168. *Maung Ko Gyi*, *supra* note 81, at 918-19.

169. Hla Aung, *Some Aspects of Marriage under Burmese Buddhist Law and Malayan Muslim Law*, 48 JOURNAL OF BURMA RESEARCH SOCIETY 1, 14 (1965). This was also supported more than sixty years earlier by the observation of a British colonial officer that “in small villages (there are divorces in) 2 to 5 percent of the marriages.” See H. FIELDING HALL, *THE SOUL OF A PEOPLE* 218 (1902). Huxley, stated that “[a] 1976 survey in Rangoon showed ten per cent of marriages ending in divorce, while a 1978 survey of a small town showed a less than one percent divorce rate.” Huxley, *supra* note 13, at 29 (internal citation omitted).

170. *Ma Wun Di v. Ma Kin*, 4 LBR (Lower Burma Reports) PC (Privy Council) 175 (1907). Again, polygamy, though legal, is, like divorce among Burmese couples, practiced very rarely. More than a century ago, another British colonial officer observed that polygamy is rarely practiced “except among the officials and the wealthy.... In ordinary life a man with more than one wife is talked of as not being a very respectable person. This seems also to have struck the early European travelers in Burma, for we find many of them, like Nicolo Conti in 1430 remarking... ‘this people take only one wife.’” C.J.F.S. FORBES, *BURMA AND ITS PEOPLE* 64 (1878). Huxley went as far as stating that even though polygamy is legal, in the sense of there not being a “‘legal’ bar on a man having simultaneous wives...practice, or morality or peer group pressure has eradicated polygamy.” Huxley, *supra* note 13, at 27-8. This author, though, would demur from the use of the term “eradicated.” Small and negligible though their occurrence may be, polygamous marriages still exist in contemporary Burma.

171. U Mya Sein, *supra* note 137, at ¶ 5.

U Mya Sein wrote those words before he criticized the ruling in *Ma Thein Nwe*. Hence, even though U Mya Sein criticized the two British judges for being the “protagonists,” he saw the problem of the husband’s adultery *per se* as not being a matrimonial offense entitling the wife to a divorce, as perhaps “structural” and partially rooted in the polygamous system itself. He had also, like a few other Burmese legal scholars,<sup>172</sup> advocated that the customarily allowed but comparatively rarely practiced polygamous system should be abolished by legislation.

Yet it is a fact that despite these suggestions for “legislative repeal” of the polygamous system, such a development has not taken place and is unlikely to take place in Burma. This is true notwithstanding the fact that in a country like Malaysia, under the *Law Reform (Marriage and Divorce) Act 1976*, non-Muslim citizens of Malaysia cannot practice polygamy, even if allowed by their customary laws.<sup>173</sup> The paucity of “legislative intervention” in matters of family law since Burma’s independence in 1948 is highlighted by the fact that there has only been one major legislative enactment. This is the *1954 Burmese Buddhist Women Marriage and Inheritance Special Protection Act*,<sup>174</sup> which was essentially promulgated to protect the rights of Burmese Buddhist women who are married to or cohabiting with non-Buddhist men.

Post-1988 Burmese military governments, be they named SLORC (State Law and Order Restoration Council) or SPDC (State Peace and Development Council), have issued or promulgated many laws in the areas of foreign investments and financing, which certainly are high priority areas for the government.<sup>175</sup> However, it is very unlikely that the government would accord marriage reform (i.e., legislative repeal of the polygamous system) even a low priority, despite the fact that proposals for such reforms have been made as early as 1965. Therefore, legislative repeal of the ruling in *Ma Thein Nwe*, in the form of an introduction of a monogamous marriage law, is virtually out of the question.

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172. See, e.g., Hla Aung, *supra* note 169, who wrote in 1965 that “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.”

173. See, e.g., Khoo Boo Teong, *Law and Legal Culture in Malaysia from the Perspective of Public Law*, in ALICE TAY (ED.), *EAST ASIA: HUMAN RIGHTS, NATION-BUILDING, TRADE* 70, 97 (1999).

174. Act 32 of 1954, also known as the “Special Marriage Act.” Promulgated by Parliament on April 23, 1954. The Act was written in Burmese. The entire Act is reproduced in U Mya Sein, *supra* note 37, at 383-94.

175. See, e.g., *Myanmar Foreign Investment Law* (1988), *Myanmar Mines Law* (1994), *Myanmar Pearl Law* (1995), which were among the laws promulgated by the SLORC in the commercial and investment areas in the process of “opening up the country” for business. These laws and explanations of them can be found in Christie and Smith, *supra* note 19.

## V. PARALLEL WIVES

### A. *The Issue*

Discussion in the previous section concentrated on the arguable lack of equal rights of Burmese women in this particular area of Burmese customary law as evinced by the ruling in *Ma Thein Nwe*,<sup>176</sup> and the formal existence of the polygamous system. This section considers a case that, among other things, touches upon some of the issues regarding polygamy and the *Special Marriage Act*. The issue is whether a Burmese Buddhist woman who had cohabited with a now-deceased Burmese Christian man is entitled to be treated as a “co-wife” under the provisions of the 1954 *Special Marriage Act*, despite the fact that polygamy was not recognized under the *Christian Marriages Act*. If so, to what share of the deceased husband’s property is the Buddhist wife entitled?

The facts of *Daw Kyi Kyi v. Mrs. Mary Wain*<sup>177</sup> are essentially these: Daw Kyi Kyi, a Burmese Buddhist woman, after the death of her husband, U Htin Wain, lodged a suit in the original Rangoon city civil court. She claimed that since she was one of the wives of the late U Htin Wain, a Burmese Christian, she (Daw Kyi Kyi) was entitled to a proportional share with his first wife,<sup>178</sup> Mrs. Mary Wain, to the deceased husband’s estate. Mary Wain contended that she was married to U Htin Wain in accordance with the *Christian Marriages Act*. According to that Act, only monogamous marriages were valid. Therefore, Daw Kyi Kyi was not a lawful wife who could inherit the estate. The lower Court decided that the manner in which U Htin Wain and Daw Kyi Kyi cohabited amounted to a marriage under

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176. The phrase “in this particular area of customary law” is emphasized here. As for other areas, see text and accompanying notes *supra* notes 63-67, 78. Compare the observation of a British judge in 1927, in the case of *Ma Yin Mya v. Tan Yauk Pu*, 5 RANGOON (ILR) 406 (1927): “There is no country where the principle of equality of sexes has been carried further than in Burma.” It should be mentioned briefly here that even in the areas of “adultery” and polygamy, Burmese males, in cases decided during the colonial era, did not have great advantages over their wives. E Maung, citing a case decided in the latter part of the last century by British judges, stated that (notwithstanding the polygamous system) “it would be a matrimonial fault for the husband to take a second wife without the first wife’s consent, and that except in certain special circumstances, the wife could claim a divorce.” E Maung *supra* note 5, at 87.

177. *Daw Kyi Kyi v. Mrs. Mary Wain*, 1971 BLR (CC) 52.

178. The use of the term “first wife” in this context does not mean the first wife of U Htin Wain, who had either died or was divorced/separated from him while he was alive. It means that U Htin Wain had first married Mrs. Mary Wain, and that he was later married to Daw Kyi Kyi. From that time onward, he was simultaneously married to Mary Wain as his first wife and to Daw Kyi Kyi as his second wife. This was the contention of Daw Kyi Kyi that was accepted by the Chief Court.

Burmese customary law, so under § 20 of the 1954 *Special Marriage Act*,<sup>179</sup> U Htin Wain and Daw Kyi Kyi were husband and wife. The will was invalid, and Daw Kyi Kyi had a right as a lawful wife to share and inherit the property proportionally. A decree was accordingly given to that effect.

When Mary Wain appealed, the single judge of the Chief Court decided that though U Htin Wain and Daw Kyi Kyi were married according to the Act, Daw Kyi Kyi was *maya-nge* ("lesser wife") and entitled only to 2/5 of the estate. Mary Wain was entitled to 3/5. Both parties were dissatisfied with the ruling of the first court of appeals (a single judge of the Chief Court), and appealed with special leave to a bench of the Chief Court. Daw Kyi Kyi was dissatisfied with her classification as a *maya-nge*. Mary Wain was dissatisfied even with the very fact that Daw Kyi Kyi was entitled to inherit.<sup>180</sup> The appeals of both parties were jointly heard by the Chief Court.

## B. The Ruling in Daw Kyi Kyi

### 1. The Holding of the Case

The decision of the Chief Court in *Daw Kyi Kyi* had four major points.<sup>181</sup> First, the *Special Marriage Act* was not intended to create "lesser wives" of Burmese Buddhist women (married to/cohabiting with non-Buddhist husbands). It was intended to liberate Buddhist women who had been treated as "concubines" or "keepings" of non-Buddhist husbands. In trying to achieve this goal, if cohabitation according to Burmese customary law had taken place between a couple, then they are considered lawfully married, irrespective of provisions of other enacted laws or customary laws

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179. Section 20(1) of the 1954 *Special Marriage Act* stated: "If a non-Buddhist man and a Buddhist woman had cohabited in such a way that they would have been considered under the Buddhist *Dhammathat* to be husband and wife then it must be presumed that those persons from the time of such cohabitation have been accordingly married and also that they have been married under the present Act." Other relevant provisions of the Special Marriage Act:

Section 4. Regardless of other laws in force and customs having the force of law the provisions of this Act will apply to all Buddhist women and those non-Buddhist men who had cohabited with Buddhist women.

Section 26. In deciding matters concerning the inheritance of those who had married in accordance with the Act or who are deemed to have married in accordance with the Act the Buddhist *Dhammathat* must be referred to since not only those who are married but those of the family of the married couple must be deemed to be Burmese Buddhists.

180. See *Daw Kyi Kyi*, *supra* note 177, at 53-4.

181. See *id.* at 52-3. The bench of the Chief Court consisted of Chief Justice Maung Maung, Justice U Kyaw Zan U and Justice U Thet Pe. The ruling was written in Burmese and was delivered by Maung Maung on June 15, 1971. The summary of the decisions from the ruling was translated from the headnotes of the judgment.

which may have been in force. Consequently, inheritance and other rights must be decided according to Burmese customary law.

Second, the term *maya-nge* in the original Burmese was unclear. When that term was translated into English it was mistranslated as “lesser wife, inferior wife.” As a result, old rulings misconstrue the concept of equality between wives under Burmese customary law. Indeed, a Buddhist woman who has obtained the status of a lawful wife should, in parity with the other lawful wife, as a *maya-pyine* (“co-wife”) inherit equal shares. Designating wives who are thus of equal status as first wife and second wife would be more precise and correct than the *maya-gyi* (“bigger/superior/chief” wife) and *maya-nge* (“lesser/inferior”) wife, since such terminology could lead to inequality and discrimination among the wives.

Third, the 1954 *Special Marriage Act* recognized the Buddhist woman as a lawful wife. If the non-Buddhist husband has other lawful wives, the *Special Marriage Act* empowers the Buddhist woman to enjoy inheritance on an equal standing as a *maya-pyine* (“co-wife”). The conferral of such a right by the *Special Marriage Act* could not be taken away by the Chief Court. The husband also could not divest the right of the Buddhist wife in his will. The wife was entitled to a full share of the deceased husband’s estate.

Fourth and finally, even though Burmese customary law was said to have emerged from the *Dhammathats*, Burmese customary law was held to be an alive and growing genre. Burmese history, culture and social mores and practices were constantly enriching the law. Therefore, Burmese customary law was broader than the *Dhammathats*. The term “Buddhist *Dhammathat*” was also not correct, since the customary law dealing with Burmese family matters was not religious law.

Based on these grounds, Maung Maung dismissed the appeal by special leave of Mrs. Mary Wain, who argued that Daw Kyi Kyi was not entitled to any inheritance from the estate of the late U Htin Wain. Daw Kyi Kyi’s appeal was allowed with costs, and the decision of the first court of appeals (stating that Daw Kyi Kyi as a “lesser wife” is entitled only to 2/5 of UHW’s estate) was vacated. The Chief Court held that according to Burmese customary law the share of Daw Kyi Kyi in the estate was half of the *let-htet-pwar*<sup>182</sup> property earned during the period of cohabitation of U Htin Wain and Daw Kyi Kyi, and 1/3 of the *let-htet-pwar* property earned

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182. *Let-htet-pwar* property has been defined by E Maung, *supra* note 5, at 68, as “all property acquired at marriage and during coverture” and by Huxley, *supra* note 13, at 30, as “property acquired during subsistence of the marriage.”



by U Htin Wain and Mary Wain before the cohabitation of U Htin Wain with Daw Kyi Kyi.<sup>183</sup>

2. *Obiter Dictum*: Unimplemented Proposal for Marriage Law Reform

In conjunction with the comments made by the author about legislative reform of marriage law, it is of interest to note that Maung Maung in *Daw Kyi Kyi* made the following observations as *obiter dictum*:

As matters concerning marriage are social matters, it is necessary for the legislative authorities to seriously consider whether or not legislative enactments need to be made in order to [make uniform marriage laws] applying to all persons resident in the country regardless of the personal religion and personal laws of such persons. The mixture of religion and marriage, the [use of] personal religion and personal laws [in deciding matters concerning marriage] is no longer in accord with the times.<sup>184</sup>

Maung Maung made those comments when he observed in his judgment in *Daw Kyi Kyi* that the committee which drafted the *Special Marriage Act* had considered the fact that in Burma, due to the diversity of religious customs concerning marriage, there had arisen a considerable number of social problems. Even though Maung Maung was not explicit, it seems that he was advocating a uniform civil system of marriage laws that would be applicable regardless of the religious or customary laws of those who reside or are domiciled in the country. Barely a month after Maung Maung wrote those words, he was appointed by General Ne Win to become a member of the Revolutionary Council (the “legislative arm” of the government) in July 1971.<sup>185</sup> He also later became a judicial minister in the Revolutionary Government (the “executive arm” of the government). When the 1974 Constitution came into force, Maung Maung was a member of the Council of State from March 1974 to July 1988, when he became in quick succession Chairman of the Council of People’s Attorneys (“Attorney-General”)<sup>186</sup>

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183. *Daw Kyi Kyi*, *supra* note 177, at 61.

184. *Id.*

185. Maung Maung “relinquished” the position of Chief Justice (the English nomenclature has changed again in the early 1970s from “Chief Judge” to “Chief Justice” and from “Chief Court” to “Supreme Court”) when General Ne Win appointed him a member of the Revolutionary Council in July 1971. See Maung Maung, *infra* note 187, at 58. U Hla Thinn, Assistant Attorney-General, was appointed to take the position of Chief Justice. U Hla Thinn appeared in the *Daw Kyi Kyi* case as *amicus curae*. U Hla Thinn was Chief Justice when, in October 1972, the Chief Court in the case of *Daw Khin Mya Mar* overruled the “consummation” requirement of *Ma Hla Me*.

186. For an account of Maung Maung being appointed as Chairman of the Council of People’s Attorneys, see THE [RANGOON] GUARDIAN and THE WORKING PEOPLE’S DAILY, July 27, 1988.

and, for four weeks, President of the Socialist Republic of the Union of Burma.<sup>187</sup> The Revolutionary Council (from 1971 to 1974) and the Council of State (from 1974 to 1988) were, under the system of governance in force during those times, the top legislative bodies of which Maung Maung was a member. Though Maung Maung suggested in the *Daw Kyi Kyi* case in June 1971 that the “legislative authorities” should “seriously consider” marriage law reform with a view toward abolishing or modifying the use of personal and religious laws to determine marriage relationships in Burma, it is significant that no legislative reform took place during all those years. And this notwithstanding that Maung Maung was a prominent member of the legislative bodies that were in existence for seventeen years, from 1971 to 1988. This fact would reinforce the author’s opinion, stated in the previous section, that legislative reform of marriage law in Burma is unlikely to take place.<sup>188</sup>

### C. *Comments on the Ruling in Daw Kyi Kyi*

#### 1. The Applicability of the *Special Marriage Act* to the Case

The Chief Court decided correctly when it ruled that the *Special Marriage Act* applied to the case. Counsel for Mrs. Mary Wain was U Kyaw Myint, who had acted as *amicus curae* in the case of *Maung Ko Gyi*, and whom Maung Maung has mentioned as a “sage”<sup>189</sup> in that case. U Kyaw Myint argued in *Daw Kyi Kyi* that the *Special Marriage Act* was intended originally and primarily to protect Buddhist women who had cohabited with men who were Hindus and Muslims, and that Buddhist women cohabiting with Christians did not seem to have been taken into account when the law was drafted. The Chief Court did not accept the argument. In this author’s

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187. For news of Maung Maung’s appointment as both Chairman of the Burma Socialist Programme Party and President of the Socialist Republic of the Union of Burma, see THE GUARDIAN and THE WORKING PEOPLE’S DAILY, August 20 and August 21, 1988. Maung Maung’s presidency was terminated on September 18, 1988, when the State Law and Order Restoration Council (SLORC) took power. Maung Maung posthumously published his memoirs concerning the 1988 uprising, during which period he was President for four weeks. The book THE 1988 UPRISING IN BURMA was published by Yale University’s Council for South East Asian Studies in 1999.

188. But compare: “Most of us who have studied the *dhammathats* have our own reform projects (to introduce a right to make a will, or to involve the state in questions of marriage for example). For the next fifty years it is more important that *dhammathat* law is stable and unchanging than it is perfect.” Huxley, *supra* note 19, at 19.

189. *Maung Ko Gyi*, *supra* note 81, at 920. The Burmese word is *thukhamein*, which has been translated in the *Myanmar-English Dictionary*, *supra* note 98, at 497 as “man of wisdom, man of learning.”

opinion, the Chief Court's decision that the *Special Marriage Act* applies to the case is mandated by the clear words of §§ 4, 20 and 26 of the *Special Marriage Act*.<sup>190</sup>

## 2. Devising a New Phrase: *Mayapyine* ("Parallel Wives/Competing Wives")

The significance of *Daw Kyi Kyi* is that as a result of the ruling, a new phrase, *mayapyine*, which can be literally translated as either "parallel wives" or "competing wives,"<sup>191</sup> entered the Burmese legal lexicon. Hitherto, the phrase *mayapyine* had not been found in the *Dhammathats*,<sup>192</sup> in case law or in legislation. In fact, Maung Maung stated in the ruling that E Maung as *amicus curae* had suggested that "if a woman becomes a wife [in a Burmese Buddhist marriage] then she is a *mayapyine* (co-wife/parallel wife)."<sup>193</sup> In another part of the ruling, Maung Maung stated that in the original suit, *Daw Kyi Kyi*, the second wife of U Htin Wain, had used the word *mayapyine* in arguing that she was entitled to an equal share of U Htin Wain's estate.<sup>194</sup> Regardless of who first formulated or "devised"<sup>195</sup> the phrase "parallel wives," it was the Chief Court and Maung Maung as Chief Justice who first brought the phrase into judicial discourse — indeed legal

190. For a translation of those sections, see *supra* note 179.

191. *Mayapyine* was translated by Maung Maung as "co-wife" in the *Daw Kyi Kyi* ruling (*supra* note 177, at 59). The Burmese word *pyine* (*maya* being "wife") is defined in *Myanmar-English Dictionary* as "compete; vie; rival; parallel." See *supra* note 98, at 289.

192. Maung Maung inferred that the *Dhammathats* did use the words *mayagyi* (previously translated as "bigger/superior wife") and *mayange* ("lesser/inferior wife"), but the translation of these terms "has caused further confusion." See *Daw Kyi Kyi*, *supra* note 177, at 59. One senses that the terms, even in the vernacular, could be "confusing." Eight years earlier, in 1963, Maung Maung had written "[w]hen there are more wives than one, every wife-*maya* — wishes to describe herself as the *maya gyi*, the chief or head, and call the others *mayange*, the 'little or small' and in Burma, as elsewhere, women do not regard the entry of other women into their men's lives, in ways big or small with any enthusiasm." See Maung Maung, *supra* note 9, at 86. E Maung, writing in 1970, about a year before the ruling in *Daw Kyi Kyi*, was more specific in relation to the usage of the words in one prominent *Dhammathat*: "[t]he 'inferior' or 'lesser' wife of the *Manugya*...is 'inferior' or 'lesser' only in the sense that her marriage is posterior to that of the 'superior' or 'head' or 'great' wife." E Maung, *supra* note 5, at 51.

193. *Daw Kyi Kyi*, *supra* note 177, at 55.

194. *Id.* at 59. It was in this part of the ruling that Maung Maung used the translated phrase ("co-wife") in brackets immediately following the phrase *mayapyine*.

195. Note that Huxley stated that "Maung Maung using the skills he had acquired as a journalist has devised [the] phrase" *Lawkabalataya* in the *Maung Ko Gyi* case. Huxley, *supra* note 19, at 18. In fact, Maung Maung did not "devise" the phrase *Lawkabalataya*. As Huxley himself stated, it is in the Buddhist scriptures. *Id.* Instead, Maung Maung linked *Lawkabalataya* with the term "exploitation of man by man." This has been strongly argued to be an extension or refinement, or perhaps even an inappropriate use of the term. Here in *Daw Kyi Kyi* though, the phrase *mayapyine* can truly be said to have been "devised" or put into judicial operation by Maung Maung and the Chief Court, even if the term was initially suggested either by E Maung, *Daw Kyi Kyi* or her lawyers.

judgment — and thenceforth into the Burmese legal lexicon and even into colloquial usage.<sup>196</sup> The use of certain phrases in American constitutional law such as “all deliberate speed,” “chilling effect,” “content neutral” and “suspect classification” can be said to have created new avenues, so to speak, in American constitutional law. A reorientation of one aspect of Burmese matrimonial relations in a system that allows but does not encourage polygamy could be said to have occurred as a result of the Chief Court’s ruling in *Daw Kyi Kyi*. At least, this change took place at the level of official terminology subsequent to the devising of the phrase *mayapyine* in the *Daw Kyi Kyi* ruling.

### 3. Differences with *Maung Ko Gyi* and Policy/Principle Analysis

As stated earlier, E Maung criticized certain observations made by Chief Judge Maung Maung in the 1965 *Maung Ko Gyi* case. In the case of *Daw Kyi Kyi* in 1971, E Maung appeared as *amicus curae* and suggested to the Court that the differentiation of *mayagyi* (“chief wife”) from *mayange* (“lesser wife”) was not in accordance with Burmese customary law. He also suggested that it was better to describe such wives as first wife and second wife than as “chief wife” and “lesser wife.”<sup>197</sup> In this case, both Maung Maung as Chief Justice and E Maung as *amicus curae* were of the same view about the issues, including equal inheritance, concerning “parallel wives” in Burmese customary law.

Furthermore, the possible dichotomy of the “choice” or preference between positive laws and customary laws which arose in the *Maung Ko Gyi* case did not arise at all in this case. Maung Maung’s legal orientation in *Daw Kyi Kyi* could be described as “positivist,” since he was emphatic of the Chief Court’s duty in enforcing the provisions of the *Special Marriage Act*. In Maung Maung’s own words: “what is conferred as a right by the *Special Marriage Act* cannot be taken away by the courts.”<sup>198</sup>

In his critique of Maung Maung’s reasoning in *Maung Ko Gyi*, E

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196. The author recalls that in an argument before what was then the highest court, the Central Court of Justice (sitting for that particular session in Mandalay), in around 1978 — seven years after the judgment in *Daw Kyi Kyi* in 1971 — counsel on one side chided the other counsel for using the terms *mayagyi/mayange* (“chief wife/lesser wife”) instead of the term *mayapyine*. Such use of the term was inadvertent, since the case argued did not deal with family law matters. Yet the chiding counsel felt it was “politically correct” (perhaps even required) to correct his opponent’s “misuse” of terms. Compare Matthew D. J. Conalgen, *Justifying Politically Correct Language: A Fresh Start*, 9:3 PUBLIC LAW REVIEW, 183-195 (1998).

197. *Daw Kyi Kyi*, *supra* note 177, at 55.

198. *Id.* at 59.

Maung has stated that the decision by Maung Maung that “[marriage] customs of [a] social system must invalidate any positive enactment not consistent with it ignores the fact that customary laws are by § 13(1) of the *Burma Laws Act* subject to any positive enactment to the contrary.”<sup>199</sup> In *Daw Kyi Kyi*, however, the conflict was, unlike in *Maung Ko Gyi*, not between Burmese customary laws and the provisions of the *Contract Act*, but between Burmese customary law, given the imprimatur of a Legislative enactment (the *Special Marriage Act*), and any contrary customs as well as other Acts such as the *Christian Marriages Act*. Hence, the “positivist” thinking of Maung Maung in *Daw Kyi Kyi* is not, as it ostensibly is in *Maung Ko Gyi*, only due to the fact that there was not a choice or a possible conflict between customary law and enacted laws. Indeed, it is also reflected in his exposition that “by operation of [enacted] law,”<sup>200</sup> specific principles of Burmese customary law would be applied in the determination of a dispute, instead of any other inconsistent legislation, customary, religious or personal laws.

Using the broad definitions of “principle” and “policy” as defined by Ronald Dworkin, it could be argued that the Burmese legislature made a “policy” decision to legislate the *Special Marriage Act*. It wished to improve the lot and uplift the situation of Burmese Buddhist women who were married to or had cohabited with non-Buddhist men — in other words, to make a section of the hitherto disadvantaged Burmese community “better off.” And it could be argued that the Chief Court in *Daw Kyi Kyi* made a “principled” decision to implement the “policy-oriented” legislation of the Burmese Parliament on “rights-based grounds.” This “rights-based decision” can perhaps be further explained in that “the impact on a particular group of people” — Burmese Buddhist women who hitherto had generally been treated as “paramours” of non-Buddhist men — would be adversely affected if the Chief Court were to rule otherwise.

#### 4. “Wider than the *Dhammathats*”: Judicial Recognition of Changing Trends in Burmese Customary Law?

In the ruling, Maung Maung pointed out “by the way” that the term “Buddhist *Dhammathat*” used in the 1954 *Special Marriage Act* was a “misnomer” and that there appeared to be a slight mistake in the drafting of

199. E Maung *supra* note 5, 18-19.

200. In fact, Maung Maung, in his ruling written in Burmese, used the words “by operation of law” in brackets in English. *Daw Kyi Kyi*, *supra* note 177, at 58.

the law.<sup>201</sup> He stated that the Act actually meant “Burmese Customary Law” rather than “Buddhist *Dhammathat*.” Even though Burmese customary law was primarily derived from the *Dhammathats*, continued the Chief Justice, it was constantly being strengthened and enriched by Burmese history, culture, social mores and practices. Maung Maung asserted that Burmese customary law is “bigger” and “wider” than what is stated in the *Dhammathats*. The usage of “Buddhist *Dhammathat*” is incorrect also because the customary law concerning family matters for the Burmese is not religious law.<sup>202</sup>

Though used in criticism of the particular wording in the *Special Marriage Act*, the statement that “Burmese customary law” is wider than the *Dhammathats* can also be construed as a possible justification for the decision of the court in *Daw Kyi Kyi*. Unlike the *Maung Ko Gyi* case, not a single extract from the *Dhammathats* was reproduced in the judgment, in support of the proposition either that “parallel wives” (*mayapyine*) are entitled to an equal share of their husband’s estate, or that the wives indeed are “parallel” (co-wives, in the Chief Court’s terms) and equal.<sup>203</sup> A similar argument was proffered by E Maung as *amicus curae* in *Daw Kyi Kyi* when he stated that “the Burmese customary law dealing with family matters among Burmese Buddhists is decided not merely by reference to the *Dhammathats*. What is of essential relevance in the *Dhammathats* are extracted and created into and modified by case law.” E Maung also argued that through such a process of adaptation and modification, Burmese customary law is constantly progressing.<sup>204</sup> It should be stated that such a line of reasoning is not new. Thirty-six years before, Judge Page of the High Court of Judicature at Rangoon stated:

The value and the sanction of the common or customary law is that it can be moulded to conform to the ever changing habits and circumstances of a people as one generation succeeds another; and it has become necessary for the Courts in Burma from time to time in recent years to restate the common law of Burma in the light of new conditions of life that have come into being, discarding as obsolete ancient rules that no longer accord with the outlook or the habits of the people, and remodeling the ancient law to meet the exigencies of

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201. *Daw Kyi Kyi*, *supra* note 177, at 60.

202. *See id.* In a footnote, and in support of his proposition, Maung Maung cites his own book, *Law and Custom in Burma and the Burmese Family*, *see supra* note 9, and U Mya Sein, *see supra* note 37.

203. Maung Maung, writing in around 1963, stated how each wife in a Burmese Buddhist polygamous marriage wanted to describe herself as the “chief wife” (*mayagyi*). This points to a perception among the wives that the “chief wife” is, or at least was, “more equal than the others.”

204. *See Daw Kyi Kyi*, *supra* note 177, at 56.

modern life.<sup>205</sup>

Even though the Chief Court in *Daw Kyi Kyi* appears to have gone beyond the *Dhammathats* (the “original texts”) in ascertaining and ruling on the rights to equality of “parallel wives,” it was in the nature of judicial recognition of the evolving and progressive trends of Burmese customary law. It was not so much “judicial activism,” if such a term is defined as an action of “a judge, who is discontented with the result held to flow from a long accepted legal principle, deliberately...abandon[s] the principle in the name of justice or social necessity or of social convenience.”<sup>206</sup>

It should be stated that sixteen months after Maung Maung observed in *Daw Kyi Kyi* that Burmese customary law is “bigger, wider than the *Dhammathats*,” a different bench of the Chief Court, in *Daw Khin Mya Mar*,<sup>207</sup> overruled the consummation requirement of *Ma Hla Me*.<sup>208</sup> It was even more categorical about the non-necessity of strictly following the *Dhammathats*:

It cannot be denied that the customs that were in existence at the time the *Dhammathats* were written were different from the social system and culture of today. Since some of the customs described in the *Dhammathats* are very much contrary to current social mores and culture there is no need to follow the *Dhammathats* strictly. For example it can be easily seen that some of the matters mentioned in the *Dhammathats* such as the *kwan* system [“slavery”],<sup>209</sup> the right of parents to sell their children, and the right of the husband to sell his wife, are totally contrary to the customs that are being accepted

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205. *Maung Thein Maung v. Ma Kywe*, 13 ILR (Rangoon Series) 412 (1935). This statement was cited by Mr. Justice E Maung in *Dr. Tha Mya v. Daw Khin Pu* 1951 BLR (SC) 108, 116 (*see supra* note 50) with the comment that it was (as of 1951) “[t]he strongest expo[sition] of the theory of living usage predominating over the directions of the *Dhammathats* in the corpus of Buddhist Law.” *Id.* But compare these statements made in 1935 and 1951, respectively, to Huxley’s 1997 statement, “For the next fifty years it is more important that dhammathat law is stable and unchanging than it is perfect.” Huxley, *supra* note 19, at 19.

206. Sir Owen Dixon, *Concerning Judicial Method*, 29 AUSTRALIAN LAW JOURNAL, 468, 472 (1956). A “curiosity” here is whether E Maung’s criticism of the decision by Maung Maung in *Maung Ko Gyi* is also couched in those terms, especially as regards Maung Maung’s “abandonment” of a long standing positive law principle as embodied in the *Contract Act* (which stated that minors cannot sue or be sued) which according to E Maung applied not only to commercial or mercantile dealings but also to “all consensual dealings.” E Maung, *supra* note 5, at 18.

207. *Daw Khin Mya Mar*, Civil Appeal No.18 (1972), Chief Court (Full Bench). The judgment was given by the Chief Court in October 1972. (The judgment in *Daw Kyi Kyi* was given by the Chief Court in June 1971.) Only one judge, U Thet Pe, was on the bench in both the *Daw Kyi Kyi* and *Daw Khin Mya Mar* cases.

208. *Ma Hla Me*, *supra* note 23.

209. The Chief Court did not state the names of the *Dhammathats* in which such matters are mentioned. As for the *kwan* system not being fully akin to slavery, *see* Michael A. Aung-Thwin, *supra* note 127.

and practiced nowadays.<sup>210</sup>

The judicial recognition of current customary laws “beyond the *Dhammathats*,” and the need to incorporate them in judicial decisions, were expressed by the Chief Court in both *Daw Kyi Kyi* and *Daw Khin Mya Mar*. In *Daw Khin Mya Mar*, the Chief Court even stated that some of the archaic and outdated statements and rules in the *Dhammathats* must be rejected. Hence, the need to go “beyond the original texts” was being developed by the Chief Court. The desirability, indeed, at times, the necessity of going beyond the original texts can be judicially recognized in this manner because of the non-religious or non-ecclesiastical nature of this genre of law, though it was known for some time as “Burmese Buddhist law.” In strict religion-based systems, it would not be possible to reject or to suggest going beyond the original texts, but only to reinterpret them subtly.<sup>211</sup> Rejection of the *Dhammathats* is also illustrative of their characterization as “neither law reports, nor legislation, nor religious texts.”<sup>212</sup> Their unique and symbiotic role in Burmese customary law is highlighted as well.

## VI. CONCLUSION

This article has discussed court decisions pertaining to Burmese family law. The decisions in these cases were given from the late 1920s to the early 1970s. Most of the decisions discussed were made, if not by the highest courts of the land, then at least by the higher courts of colonial and independent Burma.<sup>213</sup> In terms of the time in which the decisions were made, two cases dealing with issues of what was then known as Burmese Buddhist law, *Ma Hla Me* and *Ma Thein Nwe*, occurred during the colonial

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210. *Daw Khin Mya Mar*, *supra* note 42, at ¶ 15. The Chief Court made this statement in the context of its rejection of the statements or inferred statements from the *Dhammathats* that “consummation” was necessary to constitute a valid marriage in Burmese customary law. Contrast this Burmese Chief Court’s argument of 1972 with the following ruling of the Supreme Court of Zimbabwe in 1999 that: “[t]he estate of the deceased, who had died intestate having been married under the customary laws, was to be considered under the customary laws which preferred male heirs to female heirs... [provisions of the Zimbabwe constitution dealing with] the prohibition of discriminatory treatment were... expressly excluded from matters such as succession and devolution of property on death... the discriminatory aspect of the customary laws were saved by this express exception to the Constitution.” *Magwey v. Magwey*, 3 LRC (Law Reports of the Commonwealth) 35 (1999), as cited in THE COMMONWEALTH LAWYER 7 (March 2000).

211. See, e.g., Weeramantry, *supra* note 55, at 75; Thomson *supra* note 55, at 78-83.

212. Huxley, *supra* note 13, at 22-23.

213. The decision in *Ma Hla Me* (about “consummation”) and in *Ma Thein Nwe* (about “matrimonial faults”) were decided by the High Court of Judicature in Rangoon in 1930 and 1929, respectively. The decision in *Maung Ko Gyi* (“matrimonial promises”) was made by the Chief Court (then the highest court) in 1965. The decision in *Daw Kyi Kyi* (“parallel wives”) was also given by the Chief Court in 1971.



era. Three cases decided by the Chief Court of Burma during the mid-1960s to the early 1970s, *Maung Ko Gyi* (1965), *Daw Kyi Kyi* (1971), and *Daw Khin Mya Mar* (1972), were also discussed. One 1972 case by the Chief Court of Burma, *Daw Khin Mya Mar*, explicitly overruled a 1930 decision of a British judge, *Ma Hla Me*. The oldest ruling discussed in considerable detail in this article was that of a 1929 decision by two British judges, *Ma Thein Nwe*, which held that under Burmese Buddhist law, the husband's adultery alone would not entitle the wife to divorce the husband, but the wife's adultery would be sufficient cause for the husband to divorce the wife. This ruling apparently still stands today.

In discussing these rulings, a "descriptive" approach has been used to a large extent, because descriptive and detailed narration facilitates a fairly extensive commentary on the cases. The wide-ranging commentary is intended to enhance the amount of discussion and the quality of discourse on aspects of Burmese law. Such discussions are comparatively sparse in contemporary academic legal writings. The relative paucity of materials discussing modern Burmese law from a comparative and jurisprudential viewpoint is especially discernible in relation to post-1962 changes in judicial structure and independence, legal orientation and ideology. The author has attempted to provide factual information and critical commentary on some post-1962 cases. Some of the decisions in this article have probably been described and discussed for the first time in the English language.

Lastly, one theme of this article, if not one of the major themes, is to extend a certain trend that can be discerned from this apparently eclectic mixture of Burmese case law into other judicial or legal systems, or to general legal theory. In the Fifth Bar Association Lecture given in New Delhi, India,<sup>214</sup> Justice Michael Kirby (of the High Court of Australia) quoted Sir Owen Dixon, "[o]ne of the greatest of Australia's Chief Justices," who stated in 1952:

Close adherence to legal reasoning is the only way to maintain the confidence of all parties in Federal conflicts. It may be that the court is thought to be excessively legalistic. I should be so sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.<sup>215</sup>

Justice Kirby indicated that the High Court might have somewhat retreated

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214. See The Honorable Michael Kirby, *Judicial Activism* 27 WALR 1 (1997).

215. *Id.*, quoting 83 CLR xi, xiv (1952). Chief Justice Sir Owen Dixon was probably referring to Australian constitutional law and disputes arising therefrom. However, compare this statement: "Of all the compartments of law, the least insulated from politics is the constitutional; indeed constitutional law may be described as the rationalisation in legal form of the outcome of political dispute." PETER WESLEY-SMITH, *CONSTITUTIONAL AND ADMINISTRATIVE LAW IN HONG KONG* 21-22 (1994).

from this "strict and complete legalism," as can be seen in the "innovative legal principles which have been stated by the High Court of Australia in the past decade."<sup>216</sup>

One of the implicit points of this article is that as far as Burmese case law is concerned, a "strict legalism" has not been followed and that deviation from "strict legalism" would be, in some cases, not particularly bad, and may even be good.<sup>217</sup> Moreover, the author believes that such a "strict legalism" may not always, or even most of the time, be characteristic of court decisions regardless of the political system in which courts operate. The author does not deny that the political system within which the judiciary operates can vary greatly from country to country and, as he has explicitly stated, within a particular country during different times. The state of the Burmese judiciary pre- and post-1962, as explained in this article, would be a testament to that fact.<sup>218</sup> Still, it is the author's belief that despite what the "legal purists" would say, legal, political, social and cultural issues and factors cannot always be delineated in judicial decisions and thinking, or even in the nature of judicial institutions.<sup>219</sup>

Perhaps this point can be further explained by reference to the title of an article whose author became Chief Justice of Australia about forty-five years after Sir Owen Dixon. Excerpts from The Honorable Murray Gleeson's Speech to the Sydney Institute on March 16, 1999, were reproduced in the *Law Institute Journal of Victoria* under the title "Legal Oil and Political Vinegar."<sup>220</sup> The implication of that article is that "law" and

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216. Kirby, *supra* note 214, at 3.

217. See, e.g., E Maung's criticism of Maung Maung's decision in *Maung Ko Gyi*, which can be described as "legalistic" or positivistic. The author thinks that the Chief Court's not following a "strict legalism" in the case — even if some reservations can be expressed to its ideological rhetoric — is a "good thing."

218. Burma may be unique in changing (in most cases for the worse) from a Westminsterian system with an independent judiciary to a one party state (de facto since 1964, de jure since 1974, until 1988). In this state, the judiciary explicitly accepts the leadership of the single ruling party. In 1988, there was a change to a praetorian system where the military dominates the judiciary. Such a change is unique among Asian countries with a British common law heritage. See Myint Zan, *supra* note 13, at 223-24, 277.

219. Perhaps the author's primary interest and specialization in international law contributed to this belief. See Myint Zan, Letter to the Editor, *THE WEEKEND AUSTRALIAN* (Sydney) February 3-4, 1995; Myint Zan, *Haiti and Humanitarian Intervention*, *ASIAN DEFENCE JOURNAL* 4-6 (January 1995); Myint Zan, *The Mabo Judgment: Third Thoughts and Associated Cases*, *MALAYSIAN LAW NEWS* 26, 28 (February 1994); Myint Zan, *Some International Law Issues and Lessons from the Cambodian Past*, 1 *MALAYAN LAW JOURNAL*, cxlv, clxix-clxxi (1992). Notwithstanding that the intermeshing of law and politics is most prominent in the field of international law, the author believes that "politics" can be involved in domestic law and domestic judicial decisions as well. The difference would be one of degree, not a total absence of political factors or issues in legal decisions.

220. See The Honorable Murray Gleeson, *Legal Oil and Political Vinegar*, 73(5) *LAW INSTITUTE JOURNAL OF VICTORIA*, 50-54 (1999).

“politics” are, like oil and vinegar, totally different. They would not or should not mix. Politics is “vinegar,” something “sour” and unpleasant for a “strictly legalistic approach.” Such a “purist” attitude has been criticized — some would say already debunked — by, among others, legal realists,<sup>221</sup> critical legal studies scholars,<sup>222</sup> feminist legal scholars,<sup>223</sup> and even a student reviewer of an Australian constitutional law textbook.<sup>224</sup> In the apt and memorable words of Margaret Davies:

The exclusion [in the context of the “oil” and “vinegar” analogy one might add the delineation and even degradation of “political vinegar” over that of “legal oil”] and effective suppression of matters other than those which are determined to be “legal” cannot be seen to be politically neutral, although the power of the ideology of “objectivity” is such that in the past it has been seen in precisely this way, and continues to be. The point is that the separation of law from non-law is a political separation because it sets up an authoritarian notion of jurisprudential correctness. The exclusion of politics is as political as its inclusion.<sup>225</sup>

This article has been mainly, though not exclusively, about Burmese law — especially case law studied from jurisprudential, comparative, historical, cultural *and* political perspectives. A theme of this article is to highlight or illustrate that, in the above examples of Burmese cases in particular, and judicial decisions from and laws of other legal systems in general, “law” and “non-law” cannot always be delineated or “distinguished” like “oil” and “vinegar.”<sup>226</sup> Across jurisdictions, legal and

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221. See, e.g., Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUMBIA LAW REVIEW 809 (1935).

222. See, e.g., Peter Gabel and Jay Feinman, *Contract Law as Ideology*, in DAVID KAIRYS (ED.), *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 103 (1990).

223. See, e.g., Margaret Davies, *Asking the Law Question*, *supra* note 80, at 88.

224. See, e.g., Emily Langston, book review, *G. Winterton, H.P. Lee, A. Glass and J. Thomson, Australian Federal Constitutional Law: Commentary and Materials*, 18(1) UNIVERSITY OF TASMANIA LAW REVIEW 168 (1999), where Langston states that the book under review “is an impressive attempt to mesh materials from academic, judicial and *political* arenas recognising the *hybrid* nature of the forces underlying constitutional law.” (Emphasis added.)

225. Davies, *supra* note 80, at 88.

226. Compare this remark by an Australian law teacher: “Thomas Reed Powell once famously observed that ‘if you think about something which is attached to something else without thinking about what it is attached to, then you have what is called a legal mind.’ Hopefully as teachers we give our students much more than this frightening focus. As scholars, it seems to me, our obligation is to explore the things that the law is attached to and to analyse the consequences of the law upon the attachments.” Ross P. Buckley, *Legal Scholarship for New Law Teachers*, 8(2) LEGAL EDUCATION REVIEW, 181, 211 (1997) (internal citations omitted).

At the XVI Law Asia Conference held in Seoul, South Korea, in September 1999, the author was briefly introduced to Chief Justice Murray Gleeson. The author stated that he had quoted the Chief Justice. He showed the Chief Justice an outline of this paper, which was to be presented at one of the sessions at the Conference. The last page of the outline included a quotation from His Honor’s speech

political systems and cultures, at least some judicial decisions and laws may be compounded, so to speak, of legal, political, social, historical and cultural matters — hybrids of all sorts of vinegar and all types of oil.

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about “Legal Oil and Political Vinegar,” with the author’s brief comment on the quotation. The Chief Justice looked at the outline of the paper for a few seconds, returned the paper, and left without saying a single word. The non-verbal behavior of the Chief Justice indicated that this author had made a “vinegary” incursion on the realm of purist legal oil and “dignity.”