

Some Incidents of Marriage under Myanmar Customary Law

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Abstract

Marriage is a contract as well as an institution which produces rights and duties different from the great class of contracts. The forms of marriage and the incidents of the status of husband and wife may vary in different countries. It forms an important element in every advanced society and decides the questions of legitimacy and inheritance as well as adultery and bigamy. When the contract of marriage has been formed, the status of husband and wife is created, from which certain legal incidents arise. The present work is aimed to study some incidents of marriage under Myanmar customary law.

Key words: marriage; marriageable age; proof of marriage; polygamy; divorce.

Introduction

Every citizen of a country has the right to freely follow one's customs, culture and traditions and profess the religion of his choice subject to certain limitations. These fundamental rights are expressly declared by the respective constitutions. In Myanmar, there are four main religions, namely – Buddhism, Hinduism, Islam and Christianity. Accordingly, they have their own family laws and are governed by their respective family laws which mainly concern with family matters, such as marriage, divorce, inheritance and matrimonial rights. The Myanmar Laws Act, 1898 vests force and validity in customary law in its Section 13 (1) that: “Where in any suit or proceeding in Myanmar, it is necessary for any court to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution, the Buddhist Law in cases where the parties are Buddhists, the Mohammedan Law in cases where the parties are Mohammedans, the Hindu Law in cases where the parties are Hindus shall form the rule of decision except in so far as such law has, by legislative enactment, been altered or abolished or is opposed to any custom having the force of law”. Except in these family law cases they all are governed by the laws of the land without any exception. Within the framework of this research, some incidents of marriage under Myanmar customary law will be analyzed as the majority of the people are the Buddhists governed by the said family law.

Materials & methods

In drawing up this research, principles and legal norms of Myanmar customary law and other relevant provisions relating to marriage under various statutes , namely, Myanmar Laws Act, Buddhist Women Special Marriage and Succession Act, Christian Marriage Act, Special Marriage Act, Contract Act, Penal Code and Criminal Procedure Code, are studied together with leading cases and not leading but prominent cases.

Sources of Myanmar customary law

Myanmar customary law is the law which applies to all Buddhists in Myanmar as the personal law which mainly concerns family matters. It evolved from the customs that had been followed by the Myanmar people since the ancient times. The Dhammathats or treatises of rule which are referred to in the settlement of disputes relating to person and property are a principal source of Myanmar customary law. In the case of *Limchimneo (a) Daw Kyin Nyun vs. Limgeoksoo (a) Mutu (1956)*, it was laid down that Myanmar customary law can be gathered from the Dhammathats which are suitable with present social environment of the existing Myanmar society and from the decided cases and the prevailing customs and practices of Myanmar. Actually some of the Dhammathats have fallen behind as time moves on. Case law and the doctrine of precedent also played an important role in developing and refining legal doctrines in Myanmar customary law. Judicial precedents constitute the third and today the most important source of Myanmar customary law. The judicial recognition of current customary law beyond the Dhammathats and the need to incorporate them in judicial decisions were expressed by the then Chief Court in both *Daw Kyi Kyi vs. Mrs. Mary Wain (1971)* and *Daw Khin Mya Mar (a) Mar Mar vs. U Nyunt Hlaing (1972)* cases. Some of the cases need to solve the mixed question of law and facts. If there were no provisions upon those questions and there were gaps in it, they were filled by legislation, as for example, The Registration of Kittima Adoptions Act and The Buddhist Women's Special Marriage and Succession Act. Legislation will supercede customary law which is considered obsolete or the former strengthens the latter where it is considered inadequate. Through such a process of application, adaptation, modification and legislation, Myanmar customary law is constantly progressing.

Nature of marriage under Myanmar customary law

Under Myanmar customary law, marriage is a civil institution into which the Buddhist religious elements enter not at all. Both men and women enjoy equal rights in all aspects- legal, social and cultural. Myanmar marriage not only determines the questions of legitimacy and inheritance but imposes a liability on the husband to maintain his wife and children and to remain faithful to wife. In fact, marriage under Myanmar customary law is both a consensual and civil contract and an institution which creates the status of husband and wife from which certain legal incidents arise. Myanmar word for marriage, *ein-daung-pyu*, means setting up a house.

Essentials of valid marriage

Although Dhammathats, the primary source of Myanmar customary law, do not specify the essential conditions of the contract of marriage, certain requirements are prescribed by customs to constitute a valid marriage. They are as follows:

1. The man should attain his puberty.
2. The woman should be a spinster above and 20 years of age, a widow, a divorcee, or a spinster under 20 years of age who has obtained her parents' or guardians' consent.
3. The parties must give their mutual and free consent to become husband and wife presently.
4. The parties must be mentally competent to contract as tested by section 12 of the Contract Act.
5. The woman must not have an existing valid marriage. If it is so, that other man shall be punished under the section 497 of the Penal Code as adultery.
6. The parties must live together as husband and wife publicly. In the absence of direct proof, marriage may be inferred from conduct of the parties or established by reputation.

No ceremony of any kind is essential under Myanmar customary law to constitute a valid marriage. At one time, there must be consummation to constitute a valid marriage. Only in 1972, the Chief Court held in the case of *Daw Khin Mya Mar (a) Mar Mar vs. U Nyunt Hlaing* that no consummation was necessary to constitute a valid marriage under Myanmar customary law.

Marriageable age

The Dhammathats suggest that parents should give their sons or daughters in marriage when they reach the age of 15 or 16. It shows that the customary age for marriage was 15 or 16. But they do not fix a limit of age below which a young man cannot marry a girl of his choice without his parents' consent. In the olden days, there were various and different judicial decisions regarding on that matter. In 1928, it was decided in the case of *Mg Thein Mg vs. Ma Saw* that a Myanmar Buddhist boy of any age can enter into a valid marriage without the consent of his parents or guardians when he attains puberty i.e. physically competent to marry.

With respect to marriageable age of girl, Dhammathats enjoin upon parents and guardians the necessity to marry minors before the completion of the 16 years so as to prevent their falling into sin. Manugye permits an unmarried woman above the age of 20 years to marry a man of her choice. As the judicial decisions, there was different jurisprudence in different cases arbitrarily. This point was set at rest by a Full Bench decision of Rangoon High Court in *Ma Aye Sein vs. Maung Hla Min* case, which declared that, except in the case of widows or divorcees, a girl under 20 years of age cannot contract a valid marriage without the consent, either express or implied, of her parents or guardians. This case is still in force and there is no other leading case regarding on this point up to now.

Marriageable age is set when a girl may marry without parental consent, and a lower age is set when she may marry with parental consent. By referring to Section (2) of the Buddhist Women's Special Marriage and Succession Act, the minimum statutory marriageable age for the girl is 14 years of age with parental consent. Section 375 of the Penal Code provides that a man is said to commit rape if he has sexual intercourse with a woman who is under 14 years of age with or without her consent. Section 361 of the Penal Code further provides that whoever takes or entices any minor under 16 years of age of a female out of the keeping of the lawful guardian of such minor is said to kidnap such minor from lawful guardianship.

Therefore, the marriage of a minor girl under 14 years with or without the parental consent is totally prohibited by Penal Code and Myanmar customary law. If a girl, who is above 14 years but under 16 years, marries a man without her parents' consent, that man still has criminal responsibility for kidnapping such minor under the Penal Code. But in the case of a woman who has attained the age of 18 years but not completed her 20 years of age get

into the contract of marriage without the consent of parents or guardians, the person involved in such marriage has no criminal responsibility. However, the woman cannot enjoy the matrimonial proprietary rights given by the customary law, only when she reaches her 20 years of age.

Consent and capacity of the parties

The most important element of the Myanmar Buddhist marriage, which is commonly described as a consensual contract, is consent. Consent must be free and voluntarily. Consent is said to be free when it is not caused by coercion or undue influence or fraud or misrepresentation or mistake under section 14 of the Contract Act. Consent given under such circumstances is not the consent required by law.

In the early days, parents' consent and agreement played the principal role of the marriage. Today, vital consent on which a marriage must be founded is that of the parties themselves. *Maung Sein Nyunt vs. Ma Aye Kyi (1962)* case clearly pointed out that no longer can a father or mother give away an unwilling minor daughter into marriage. If the consent given by the man and the woman is not free, the marriage will not be valid and binding on them. However consent of the parents or guardian is still essential to the validity of marriage of a minor girl. Minor's incapacity to enter into a contract of marriage must be supplemented by the consent of parents or guardian of the minor.

Breach of promise of marriage

A Myanmar Buddhist man and woman who are of the age of majority could make a valid promise of marriage at any time. It was held in *Mg Tun Aung vs. Ma Aye Kyi (1936)* case that if one of the parties failed his or her promise, the other party could sue for damages for breach of promise of marriage not according to Myanmar customary law but according to the Contract Act. A minor cannot therefore sue for damages for breach of promise of marriage since he or she is not competent to enter into a valid marriage.

Maung Tun Aung case was overruled by *Maung Ko Gyi vs. Daw Ohn Khin* case in 1965. The learned Chief Judge, Dr. Maung Maung, stated that in matters regarding marriage and cohabitation among Myanmar Buddhists, Myanmar customary law must be the primary focus of reference. 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 the goods. They are considered delicate and important social matters. The promise made by the major to the minor girl 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. Myanmar custom and culture need to be deeply 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. Accordingly it was held that a suit for damages against an adult man who breached his promise to marry can be made by the parents of the minor girl.

In *Maung Thein vs. Ma Thet Hnin* case, the question whether the breach by the father of his promise to give his son in marriage to a young woman or to make his son marry her and to give the couple marriage presents suitable to his position in life, affords the girl or her parents or both any cause of action for damages was raised. It was decided that there was no cause of action for damages for the breach of promise of marriage against the parents of a Myanmar Buddhist boy by the girl or her parents. Similarly no action for damages for the breach of promise to give their daughter in marriage could be maintained.

However in 2010, in the case of *Mg Ye Nyein Aung & two others vs. Ma Khin Sann Nwe*, the Supreme Court held that it is possible for the court to pass the decree for damages for breach of promise of marriage not only upon the minor boy who does not keep his promise of marriage but also upon parents of such boy who breach their promise to give their son in marriage to a young woman in front of elders from both side. The court also states that the same jurisprudence can also be seen under section 48 of the Child Law which reads as "The juvenile court can also pass an order directing the parents or guardian to pay compensation for injury, loss or damage caused to any person by the act of the child". Nowadays, therefore, an action for damages for the breach of promise of marriage can be brought upon by the girl or her parents against both Myanmar Buddhist boy himself and his parents or guardian according to Myanmar customary law. This case well illustrates that judicial precedents are playing more important role in developing and refining legal doctrines in Myanmar customary law nowadays.

Proof of marriage

Proof of marriage is one of the difficult problems in Myanmar customary law because no ceremony is legally necessary in order to constitute a valid marriage between two Myanmar Buddhists. *Ma Aye Mi vs. Ma Kyi Kyi (1948)* case affirmed that under Myanmar customary law no ceremony is required in order to constitute a valid marriage, all that is necessary being the consent of both parties. *Ma Kyin Mya vs. Maung Sit Han (1937)* case also held that if any ceremony takes place, it is evidence of the intent and no more than evidence whereby the fact of mutual agreement can be proved. Ceremony itself is not a mean of creating the marriage tie. In the present state of society almost no marriage is contracted without some sort of show, entertainment or ceremony or without the knowledge of the people of the locality where the parties reside.

It is popular among Myanmar young people to go to a Judge or Magistrate and sign affidavits in the presence of a few friends and elders stating their competence and intention to marry. *Maung Kyi vs. Ma Ohn Myint (1968)* held that even though there are no prescribed rules or procedures to make affidavit of marriage, it is a valid marriage if the couples attaining the age have taken an oath before the Court to get married with mutual consent. Affidavits for marriage show the competency and mutual consent of parties as documentary evidence having legal sanctity. Hence, the Supreme Court directed that in making affidavits for marriage, it is necessary for the Judge to arrange whether or not each party has attained the age of majority, whether or not the woman has an existing valid marriage and whether or not they have freely consented to the marriage. In making affidavits for marriage contract, all essentials of a valid marriage shall be considered by Myanmar customary law itself. In addition, the parties to the marriage must also fulfil the requirements of Majority Act and Contract Act in order to make valid contract and to sworn an oath before the court. All the requirements under the Myanmar customary law cannot be dispensed with by Majority Act and Contract Act. Therefore marriageable age for boys for the purpose of court marriage is 18 years. For girls it is 18 years with parental consent and 20 years without parental consent.

Affidavits for marriage show the competency and mutual consent of parties as documentary evidence having legal sanctity. This is the trend of marriage today. In the absence of direct proof, such as holding marriage ceremony or making affidavits of marriage, mutual consent may be inferred

from the conduct of the parties or established by reputation. Consent of the parties to marry, their intention to enter the status of husband and wife, are the large factors in marriage, proof of which therefore turns on conduct showing the consent and the intention.

S.Anamalay Pillay vs. Po Lan case states that when a man and a woman have openly lived together as husband and wife for many years in the same house and they have been regarded as such by their friends and relations who have seen them so, a presumption arises that the couple intended a valid union. *U Tun Yin vs. Maung Ba Han (1948)* case decided that where there is a dispute and where marital status has to be determined from repute and the conduct of the parties themselves and the conduct of the neighbours and friends, who treated them as though they were husband and wife, can be admissible as evidence from which the status is to be inferred. A bare statement by a witness that certain couples are husband and wife is not evidence of repute.

Ma Kyin Mya vs. Maung Sit Han (1937) case stated that where a man has a wife and visits another woman with whom he never goes out in public, or associates her with his relatives and friends, such woman cannot claim to be a wife. In the case of *Maung Maung vs. Ma Sein Kyi (1940)*, it was held that cohabitation means living in conjugal relationship, not a clandestine arrangement. There must be an open avowal of the married status, going together to the pagoda and the monastery and eating together in public being conduct of such nature. Conduct must lead friends, neighbours and relatives to accept the parties as husband and wife.

In the case of *U Pu Lay vs. Daw Chit (1976)*, U Pu Lay applied for the dissolution of marriage on the ground that they lived together as husband and wife in the same house for over 20 years at Tuntay Township. But the respondent Daw Chit argued that their relationship was not that of husband and wife; she treated U Pu Lay with respect because he was much older than her though she admitted their living in the same house. The Central Court held that the only fact of living together for 20 years in the same house did not constitute a valid marriage. There were no other sufficient circumstances indicating that they were related as husband and wife. In order to constitute a valid marriage under Myanmar customary law, the parties must live together as husband and wife publicly. Therefore there would be no divorce without amounting to a valid marriage.

In the case of *Daw Chit Chit vs. Daw Sann Yin (1990)*, Daw Chit Chit claimed a share in estate of deceased U Thet Htun on the ground that she was his widow also. The burden of proving marriage lied on her. There needed to be clear and unequivocal recognition of her status as such. Whether U Thet Htun and Daw Chit Chit lived together and admitted their status, whether they behaved towards each other as husband and wife, whether they visited relatives and friends in each other's company, whether they went together to places of worship, whether they acted jointly in making or taking conveyances of property, whether she had good character and decent life position, whether on the death of U Thet Htun, she behaved like a widow at the funeral, and their other similar conducts indicated that they were not related as husband and wife under Myanmar customary law. Accordingly the Court decided that status of husband and wife had not been established between deceased U Thet Htun and Daw Chit Chit under Myanmar customary law.

Polygamy

The practice of polygamy is recognized by the Dhammathats and is still legal in Myanmar. Therefore, under Myanmar customary law, a Myanmar Buddhist husband can have more than one wife at any given time during the continuance of the prior lawful marriage if he can maintain them all by his own skill and labour and give all of them equal status.

Designating wives who are thus of equal status as first wife and second wife is more precise and correct than old usages of *maya-gyi* (superior wife) and *maya-nge* (inferior wife), since such terminology leads to inequality and discrimination among the wives. Judicial decisions also recognized the status of first wife and second wife if a man married more than one wife. With the Chief Court's decision of *Daw Kyi Kyi vs. Mrs. Mary Wain* case in 1971, as a consequence of legal reorganization of polygamy, the second wife has the same status as the first wife and the two women occupy identical positions, both in respect of personal rights and as regards the ownership of property. They are parallel wives (*maya-pyine*) known as first wife and second wife sharing their husband's estate equally.

Apart from lawful wife, a husband may also enter into and maintain conjugal relations with a woman whose position falls short of that of a lawful wife. *Maung Tha Dun vs. Ma Thein Yin* case, where a Myanmar Buddhist man having a lawful wife in one place keeps a woman at another place, who receives his visits unknown to the first wife but with prior knowledge of the existence of the man's first wife. The woman takes no part in the business of

the man, and is not publicly recognised as of an equal status with the first wife. In such a case the other woman cannot be said as second wife. The same concept is applied in the case of *Daw Chit Chit vs. Daw Sann Yin* of 1990 which has already been elaborated and discussed under the heading of proof of marriage.

The negative impact of recognized system of polygamy can be seen in *Ma Thein Nwe vs. Maung Kha* case. It was held that since the practice of polygamy was sanctioned by the Dhammathats, the adultery by itself on the part of the husband did not entitle the wife to claim a divorce. Only in 1918, starting with Full Bench ruling in *Maung Hme vs. Ma Sein*, except in certain cases, if a Myanmar Buddhist husband takes a second wife without his first wife's consent, she has a right to divorce him. According to Dhammathtas, there are some exceptional cases for the first wife not having divorce right. These are the first wife's bearing daughters only, her being afflicted with leprosy or similar diseases, and her immodest conduct. If any of these grounds exists, the husband does not need the wife's consent in taking a second wife; i.e., the husband's adultery *per se* is not a matrimonial offence entitling the wife to a divorce; only in the absence of those grounds, the wife, whose dignity is injured by the second marriage, may file for divorce.

In *U Ba Kyi vs. Daw Mya Yee (1982)* case, it was held that if a Myanmar Buddhist husband takes a second wife without his first wife's consent, she has a right to divorce him even if she claims such right ten years after her husband's new marriage. It was an unreported case decided by Supreme Court of Mandalay. *Ma Thein Nwe* case and *Maung Hme* case, mentioned earlier, have not been formally overruled yet. In deed taking a second wife during the life time of first wife without her consent ordinarily constitutes a serious matrimonial fault. In such circumstances the first wife might be entitled to an automatic divorce, if she wished to terminate their marriage tie.

Even though Myanmar Dhammathats allow polygamy, present day Myanmar society does not encourage it. In ordinary life a man with more than one wife is talked of as not being a very respectable person. However, it is still being recognized by the court as legal. It appears that the idea in the Dhammathats is obsolete and no longer consonant with present day Myanmar social custom.

Paternity

As a consequence of legal reorganization of polygamy, children of the second marriage during the subsisting of first marriage tie become legitimate ones of such father if their parents were openly living as husband and wife. Also a child of mixed marriage between Buddhist mother and non-Buddhist father, whose marriage is performed under the Buddhist Women's Special Marriage and Succession Act or presumed by it, shall be deemed to be legitimate child of such father. An illegitimate child is defined as a child, male or female, begotten by a man or woman in pleasure by mutual consent, but who shall not openly live together: called *Kilita*. Generally there is not much difference in rights between legitimate and illegitimate child apart from the inheritance rights under Myanmar customary law. As a rule, an illegitimate child is ordinarily not entitled to inherit. They are entitled to inherit only in the absence of other heirs. Burgess JC, in *Ma Hlaing vs. Ma Shwe Ma*, also pointed out that illegitimacy is not a word which appears in the original Myanmar, and that what is meant by the Myanmar expression is an incompetency to inherit under certain conditions, or an inferiority and postponement of claims to inherit to those of legitimate heirs.

Maintenance

Under Myanmar customary law, Myanmar husbands and wives have certain duties towards each other. The chief duty of the husband is to maintain his wife and children. The husband's responsibility to maintain the wife and children is not only a social but also a legal responsibility. If the husband neglects or refuses to maintain his wife and children, they can claim for maintenance. Both a wife and a child either legitimate or illegitimate have two remedies available for securing maintenance from the day the suit is instituted, but not before. The first is a criminal proceeding under section 488 of the Criminal Procedure Code of 1898. The second remedy is a civil suit in a civil court according to the Myanmar customary law. It is a cumulative remedy. In the criminal court the maximum sum that can be realized is Kyats 100 per month to meet her minimum needs food, clothing and shelter and to the children for their similar needs and simple essential education. For maintenance to keep them in circumstances more becoming of their station in life, the wife and children must go to a civil court and file a suit. In the case of *Dr. Tha Mya vs. Ma Khin Pu & another (1940)*, the High Court decided that as the general rule, the wife is entitled by way of maintenance to an amount, which is one third of the income acquired by the exertion of her monogamous

husband. But when the husband takes a second wife the amount of the maintenance to which the first wife is entitled to one-sixth of his income. However if a wife has maintained herself, she cannot sue her husband for maintenance. Maintenance suit only lies in the Civil Court by a wife against her husband when she has no sufficient means of her own. In civil maintenance suit if the husband fails to comply with the court's decree, the decree will be executed by the court against him in the manner as the title of decree of money, attachment and sale of his property or both according to the Civil Procedure Code. The exact amount of child maintenance under civil suit cannot be ascertained as it depends not only on the needs of the children but also the paying capacity and circumstances of the father.

Restitution of conjugal rights

Under Myanmar customary law, a suit for restitution of conjugal rights by a Myanmar Buddhist husband or wife can be maintained at a Civil Court. Such suit must be founded on a subsisting marriage, and either the wife, or the husband, may file it. The plaintiff must prove absence of fault on his or her part, and that the defendant has withdrawn from cohabitation without justifiable cause. Illtreatment or desertion by the plaintiff is also a good defence to the suit. In a suit for restitution of conjugal rights by the husband, he should be free from offences relating to marriage. Husband's adultery constitutes a good defence for the wife against his suit for restitution of conjugal rights. However, in the case of *Khun Mg Ngwe vs. Daw Nan Saw (1991)*, the wife got the decree for restitution of conjugal rights against her husband who has left their subsisting valid marriage to have second marriage.

Divorce

Marriage tie is as easily dissolved as it is contracted among Myanmar Buddhists. Mutual consent can bring the marriage to an end. In such a case, they can end the marriage without resort to the Courts or the administrative authorities. *U San vs. Ma Hla Chit (1966)* case stated that when the husband and wife no longer desire to continue the marriage tie, they may both agree to dissolve the marriage. Therefore there is no difficulty. A mutual consent divorce is valid without a decree of the civil court or a registered deed of divorce or the presence of elders under Myanmar customary law or any statutory law.

Daw Hla Kyi vs. Daw Helen (2003), the Supreme Court held that when the husband and wife no longer desire to continue the marriage tie, they

can dissolve the marriage with mutual consent without making a registered deed. If, however, a deed of divorce be drawn up, it must be a deed of properly executed and signed by both parties. Therefore signature of the wife alone on the divorce deed shall not constitute the mutual consent divorce. Consequently it is not a valid divorce deed under Myanmar customary law.

Several grounds for divorce in Myanmar customary law are universal; e.g. cruelty, desertion, adultery. When serious matrimonial faults or offences are put forward as grounds for divorce, the parties either accept a settlement, under arbitration of elders and friends, for partition of property and children, and part or they may go to the Courts for a decree. Only in such case, there will be court's intervention.

In the case of *Daw Hla Hla Win vs. U Ba Shin (Unsound person represented by his guardian U Hlaing) (1991)*, Myanmar Buddhist wife applied for the dissolution of marriage on the ground of her husband's insanity by referring the Dissolution of Muslim Marriage Act. Section 2 (1) (e) of said Act provides that a woman married under the Muslim Law shall be entitled to obtain a decree for the dissolution of her marriage when the husband has been insane for a period of at least one year. The Supreme Court held that under the principles of Dhammathats or that of Myanmar customary law, Myanmar Buddhist wife never has such kind of ground for divorce though the court acknowledged well that she may have hard time and difficulties in her married life when her husband is suffering from insanity. It also pointed out that; rights of married women under the Mohammedan law cannot be compared and contrasted with that of Myanmar Buddhist women as the former's rights are lesser than latter's.

The negative impact of recognized system of polygamy in the area of ground for divorce has already mentioned in *Ma Thein Nwe vs. Maung Kha* case under the heading of *polygamy*. Generally and theoretically, taking of second wife without his first wife's consent is not a matrimonial offence entitling the wife to a divorce if there were some defect on the part of the wife; only in the absence of those grounds, the wife, whose dignity is injured by the second marriage, may sue for divorce.

Special marriage laws

Myanmar customary law contains no prohibition forbidding marriage between a Myanmar Buddhist and a person of another race or religion. Therefore, in the case of mixed marriages between Buddhists and non-

Buddhists, conflicts have occurred in the choice of law between Myanmar customary law and non- Buddhist spouse's customary law.

The Christian Marriage Act, Special Marriage Act 1872 and the Buddhist Women's Special Marriage and Succession Act (1954) are intended to provide a legal form of marriage between Buddhist and non Buddhist.

A Christian can contract a valid marriage with non-Christian according to Christian Marriage Act. If a Myanmar Buddhist man marries a non- Buddhist woman, the governing law to legalize their marriage is not Myanmar customary law but either Christian Marriage Act or Special Marriage Act. In the case of *U Aye Hlaing vs. Daw Nartarlyar (a) Daw Buthee (1977)*, it was held that Christian Marriage Act lays down series of rules and procedures to constitute a valid marriage. The parties intending to marry under the said Act shall be solemnized in accordance with the respective provisions. The marriage may be performed either in a religious ceremony or at the Registrar's Office. Cohabitation between Myanmar Buddhist husband and Christian wife without having formal solemnization shall not constitute a valid marriage.

The Special Marriage Act of 1872 was amended in 1923 and amending Act is expedient to provide a form of marriage for non- Buddhist and Buddhist, and to legalize certain marriages the validity of which is doubtful. When Buddhist man or woman who married non-Buddhist under said two Acts, their marriage is special marriage and fall outside Myanmar customary law and is governed in question of divorce by the Divorce Act and in question of succession by the Succession Act. He or she lost the right to adopt the child. Therefore, although these two Acts make possible for Buddhist and non-Buddhist to marry, such marriages took the families outside the pale of Myanmar customary law.

The Buddhist Women's Special Marriage and Succession Act was passed by parliament in 1954 to protect the interests of the Buddhist women who married non-Buddhists. Principles of Myanmar customary law relating to succession, divorce and adoption are applicable to this couple under the 1954 Act. The Act sought to make Myanmar customary law as territorial and not personal.

In *Daw Saw vs. E.M. S Mac Tung's Estates (1966)*, a Myanmar Buddhist wife applied for succession certificate regarding a property of deceased Mohammedan. The father of the deceased filed a rival application

for succession certificate. The deceased and Myanmar Buddhist wife were living as husband and wife since 1926. The father of the deceased contended that Mohammedan Law would apply to the partition of property. The Chief Court did not accept the contention and pointed out that the Buddhist Women's Special Marriage and Succession Act 1954 was passed for protection of the rights of Myanmar woman. The wife of the deceased has full right to inherit the property of deceased. Therefore succession certificate must be issued to the wife.

The equality nature of Myanmar customary law can be found in *Daw Ah Mar vs. Daw Hla Tint & seven others case of 2003*. Under Buddhist Women's Special Marriage and Succession Act, Myanmar Buddhist wife Daw Ma Ma Lay shall inherit estate of deceased Mohammedan husband U Ba Thien. If Daw Ma Ma Lay passed away, their children would inherit. Under Myanmar customary law, there are no provisions prohibiting the right of inheritance of a deceased Buddhist's estate to his or her non Buddhist children. Therefore, non-Buddhist son can inherit the estate of deceased Myanmar Buddhist mother Daw Ma Ma Lay.

Though the Act gives the protection of all Buddhist women who enter into union with non-Buddhist residents in the country, the Supreme Court and the Attorney General Office strictly directed and prohibited their subordinate offices not to sign affidavits for marriage between a Myanmar Buddhist woman and an alien from any foreign country.

Findings

- Marriageable age is set when man and woman may marry without parental consent, and a lower age is set when they may marry with parental consent. However, the lowest marriageable age cannot be exactly ascertained particularly the marriageable age of girl. The provisions on the minimum age for marriage can be found only in the enacted laws such as The Christian Marriage Act, The Special Marriage Act and The Buddhist Women's Special Marriage and Succession Act. However, these laws are suitable not for marriages between Buddhists, but for marriages between Buddhist and non- Buddhist spouse. It is proposed to fix the minimum age for marriage as 18 years for both boy and girl to conform to present day situation.
- Although matters concerning marriage and establishing family cannot be considered on the same level as mercantile and commercial dealings by referring to the Contract Act, even some essentials of valid marriage under

Myanmar customary law have to be decided not only by principles of Myanmar customary law but also by provisions of the Contract Act. According to the researcher's personal own view, marriage is a social contract as well as an institution which produces rights and duties different from the great class of contracts. Therefore it may be more convenient to decide the issues of marriage by balancing its own jurisprudence based on well established principles of marriage under Myanmar customary law on the one hand, and references made under the Contract Act on the other hand.

- Though polygamy is comparatively rarely practised in this period of community, a man taking more than one wife is still legally acceptable. This recognized polygamy system gives unwelcomed effect to the first wife, whose dignity and mentality is injured by the second marriage. Conversely it favours the man who is unfaithful to his already wedded life and his prior wife. It also favours the woman who is willing to be a second wife having parallel status of first wife for some social and financial reasons. It is proposed with respect that polygamy system should be abolished.
- The chapter on the law of maintenance, particularly the Criminal Procedure Code, which was introduced into Myanmar under British colonial rule, imposed an obligation on a husband and refers to the amount to be paid as 100 kyats per month. Although 100 kyats per month as monthly maintenance was quite reasonable and acceptable and also could cover the actual expenses of them at that period, it is time to review and amend this law which is out of line with family values and current economic realities in Myanmar.
- Among four sources of Myanmar customary law, judicial precedents constitute the third and the most important source of today Myanmar customary law. Judicial decisions of *Mg Ye Nyein Aung & two others vs. Ma Khin Sann Nwe* (2010), *Daw Hla Kyi vs. Daw Helen* (2003), *Daw Hla Hla Win vs. U Ba Shin (Unsound person represented by his guardian U Hlaing)* (1991) and *Daw Ah Mar vs. Daw Hla Tint & seven others* (2003) cases well illustrate that judicial precedents are playing important and vital role in developing and refining legal doctrines of Myanmar customary law nowadays. It can also be clearly seen that judicial decisions have culled out their essence in a large measure. However, decisions can only be rendered on questions that are brought to the Courts.

Conclusion

The present work has briefly discussed some incidents of marriage under Myanmar customary law. In conclusion, it is submitted with respect that it may be most feasible to establish statutory marriage system based on the fine and well established customary marriage system in order to move uncertainty of marriage, to facilitate the proving of validity of marriage, to practice monogamy, and to settle the issues arising out of marriage. In conjunction with the suggestions made by the researcher about marriage law, it is of interest to mention the *obiter dictum* of the Learned Chief Judge Dr., Maung Maung of the then Chief Court in *Daw Kyi Kyi vs. Mrs. Mary Wain (1971)*: “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 mixtures of religion and marriage, the use of personal religion and personal law in deciding matters concerning marriage is no longer in accord with the times”.

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