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Marriageable Age under Myanmar Customary Law

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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 constitution. 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. Except in these cases, they all are governed by the laws of the land without any exception.

Under Myanmar customary law, marriage is a civil institution into which the Buddhist religious elements enter not at all. 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. Consent is said to be free when it is not caused by coercion or undue influence or fraud or misrepresentation or mistake.
4. The parties must be mentally competent to contract.
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 that no consummation was necessary to constitute a valid marriage under Myanmar customary law.

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. Some cases pointed out that a youth can marry a girl without the consent of his parents or guardians when he was 20 years of age. Some said above 16 years and some said when he attained puberty. In 1928, it was decided in the case of

Mg Thein Mg vs. Ma Saw that a Myanmar Buddhist youth 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 but they expressly maintain that even if the parents and guardians do not pay any regard to this rule enjoyed upon them, it is only when the girl has attained the age of 20 years that she has a right to contract a valid marriage without their consent. 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 E 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.

An age is set when a girl may marry without parental consent, and a lower age is set when she may marry with parental consent. However, the lowest marriageable age cannot be ascertained exactly by the Myanmar customary law, particularly for the girl. On the one hand, by referring to Section (2) of the Buddhist Women's Special Marriage and Succession Act, which is a special marriage Act falls outside the Myanmar customary law, the marriageable age for the girl must be at least 14 years of age with parental consent. On the other hand, section 375 of the Penal Code provides that a man is said to commit rape if who 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 if a girl of under 16 marry a man without her parents' consent, that man has criminal responsibility 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. But the woman cannot enjoy the matrimonial proprietary rights given by the customary law, only when she reaches her 20 years of age. Subsequently or impliedly given parental consent will convert the connection into valid marriage from the time of the unauthorized union.

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 held that even though there are no prescribed rules or

procedures to make affidavit, 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, and these shall not be dispensed with by any other statutory laws, on the one side. The parties to the marriage must, additionally, fulfill the requirements of Majority Act and Contract Act in order to make valid contract and to sworn an oath, on the other side.

Therefore, it may be safely presumed that marriageable age for both boy and girl, for the purpose of making affidavits for marriage at the court house, must be at least 18 years of age with parental consent and 20 years of age without parental consent especially for the girl. But in the case of persons who have attained the age of 16 years but not completed their 18 years of age cannot get into the contract of marriage before the judge with or without the consent of parents or guardians since the persons involved in such marriage have no contractual capacity to make affidavits under respective statutory laws. This is something like the changing trend of marriage system as regards the marriageable age. It may be most feasible to have statutory law prescribing the standard minimum legal age for marriage which is in line with changing situation of the society.