

The Best Interests of the Child: Myanmar Customary Law Perspective

Khin Khin Oo

Abstract

While family is the basic unit of society and as such is entitled to receive comprehensive protection and support, the legal protection or measures that a society can afford to the family vary from country to country and depend on different social, economic, political or cultural conditions. Conceptions of childhood and perceptions of children's relationships with their families and with society of one country can be learnt by observing its family law. The present work will focus on the ability of the Myanmar customary law to implement the best interests of the child.

Introduction

Every nation has its own social, cultural and customary characters. Countries often draw up their laws in accordance with the customs, culture, religion etc. Particularly family law, i.e., the private law aspects of marriage, divorce, inheritance, succession and adoption, reflects contemporary values and beliefs about the family of the society concerned. It also tells us about the conceptions of childhood and perceptions of children's relationships with their families and with society. Indeed, the principle of the best interests of the child, as embodied in Article 3(1) of the United Nations Convention on the Rights of the Child, has been important in family law matters in various countries. It is aimed to study the importance and implementation of the child's best interests in Myanmar customary law context.

Principle of the best interests of the child

The Convention on the Rights of the Child (CRC) was adopted by the General Assembly of the United Nations on 20 November 1989, and it entered into force on 2 September 1990. Myanmar acceded to the Convention on 16th July 1991 with reservations on articles 15 and 37 and it became a State Party to the Convention on 14th August 1991. In order to implement the rights of the child embodied in the CRC, the Child Law was

promulgated on 14th July, 1993 and the reservations were also withdrawn on 15th October 1993.

One of the pivotal provisions of the UNCRC is its article 3, which states that "the best interests of the child shall be a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies". It has also been characterized as an umbrella provision. In each and every circumstance, in each and every decision affecting the child, the various possible solutions must be considered and due weight given to the child's best interests. But the Convention does not and could not seek to provide any definitive statement of how a child's best interest would be served in any given situation, since the precise implications of the principle will vary over time and from one society, with its own cultural, social and other values, to another. It will vary from child to child and according to each individual child's situation.

Myanmar, which has been traditionally giving priority to the best interests of children, endeavors with its utmost effort in order to implement the Convention in accordance with its socio-cultural contexts and legislative system.

Rights of the child under Myanmar Customary Law

Myanmar customary law

Myanmar customary law is the law which applies to all Buddhists in Myanmar as the personal law. It mainly concerns family matters, such as marriage, divorce, inheritance and matrimonial rights. Myanmar customary law evolved from the customs that had been followed by the Myanmar people since the ancient times. It is not an enacted law. It was developed by the courts through the legislation, doctrine of binding precedent and some principals of Dhammathats which are suitable with social environment of the existing Myanmar society. Accordingly, there are four sources of Myanmar customary law, namely, Dhammathats, customs, judicial precedents and legislation.

The Dhammathats or treatises of rules, which are in accordance with custom and usage and which are referred to in the settlement of disputes relating to person and property, are a principal source of Myanmar customary law. Yet to ascertain the modern Myanmar customary law, not

only the Dhammathats but also decided cases and the prevailing customs and practices of the present day Myanmar Buddhists must be referred to. The prevailing customs of Myanmar is one of the sources of Myanmar customary law. Judicial precedents constitute the third and perhaps the most important source of Myanmar customary law. The scope of Myanmar customary law came to be defined by judicial decision. Where there were gaps in it, they were filled by legislation. The Registration of Kittima Adoptions Act was enacted to facilitate the proving of Kittima adoption among persons governed by the Myanmar customary law, The Buddhist Women Special Marriage and Succession Act to protect Buddhist women who entered into union with non Buddhist resident in country. Legislation will supersede customary law where that customary law is considered obsolete or the former strengthens the latter where it is considered inadequate. By this way Myanmar customary law has developed.

Definition of the child

Article 1 of the UNCRC mentions that “For the purpose of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier”.

There are different ranges of age demarcation for the term of child under the various areas of law in Myanmar.

Section 2 (a) of the Child Law defines that "Child" means a person who has not attained the age of 16 years. Section 2 (b) of the Child Law "Youth" means a person who has attained the age of 16 years but has not attained the age of 18 years.

According to the Majority Act section (3), a person shall be deemed to have attained his majority when he shall have completed his age of 18 years and not before, and, a person for whom a guardianship is appointed by the court shall be deemed to have attained his majority when he shall have completed his age of 21 years and not before. However, Section (2) (a) of the said Act specifically excludes the issues under the family law from its purview as follows ; “Nothing herein contained shall affect the capacity of any person to act in the following matters (namely) – marriage, dower, divorce and adoption; the religion or religious rites and usages of any class of person”. Where there is a conflict between the enacted law and the customary law, the enacted law will prevail. Hence, to

ascertain the definition of the child for the purpose of marriage and adoption, we have to be guided by the Myanmar customary law.

Under Myanmar customary law, 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. 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. A boy reaches his majority when he attains puberty and a girl child, except in the case of widow or divorcee, reaches her majority when she completes 20 years of age for the purpose of marriage under Myanmar customary law.

For the purpose of adoption, there is no age limit and a child of any age can be adopted. Although usually children of tender age are adopted, even an adult may be adopted with his or her own consent. And also there is no provision for age difference between adopter and adoptee.

Legitimacy

Fortunately the concept of unregistered marriage by custom and cohabitation recognized in Myanmar marriage laws has a useful effect on preventing discrimination in the law on the rights of legitimate and illegitimate children. 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".

Although polygamy among Myanmar Buddhists is undoubtedly coming to be looked on with more and more disfavor, it is still being recognized by the court as legal. And as a consequence of legal recognition of polygamy, the second wife (not being an inferior 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. Hence children of second marriage during the subsisting of first marriage tie also become legitimate ones of such father if their parents were openly living as husband and wife. Generally there are not much different rights between legitimate and illegitimate child apart from the inheritance rights under Myanmar Customary Law as an illegitimate child is ordinarily not entitled to inheritance. Consequently it prevents the problem of depriving child's identity.

The Evidence Act section 112 stipulates that any child born during a valid marriage between a woman and her spouse, or within 280 days dissolution of the marriage with the mother remaining unmarried, it shall be conclusively proved that the offspring is legitimate. A suit by a child for a declaration that he is the legitimate son of the defendant is also maintainable under section 42 of the Specific Relief Act.

Right to name

The names in Myanmar family are individual names. Names do not mean surnames, middle names or Christian names. The wife does not need to take her husband's name, but keeps her own name. The child also has his own name. Unlike western culture, there is no law or custom which dictates that the father's name should be adopted by the child. Myanmar culture allows the parents' or the guardians' freedom to choose an individual name for each child without much formality, with no resort to courts. Thus under Myanmar culture, the problem of depriving a child of his name does not arise. In fact the giving of a child's name is a part of Myanmar culture and life.

Parental responsibilities

A very close parent-child relationship exists in Myanmar family and extended family still prevails in Myanmar society. Children are born into the family, or brought into it from another marriage or by adoption.

Traditionally, parents have the duty to nurture their children to be healthy, intelligent, clever and polite since they were born. The common responsibility of the parents is reflected by the Dhammathats in Myanmar. The duties of the parents are; to prevent their children from misconduct, to show them the way to good conduct, to make them learn arts and sciences, to give them in marriage to suitable persons and to give them their inheritance at the proper time. It is a fine tradition of Myanmar which is being observed throughout the generations.

In parallel, responsibilities of the parents enshrined in UNCRC are also reflected by sections 11 of the Child Law as guiding principles. Section 11 of the Child Law says that "Maintenance, custody and care of children, cultivating and promoting the all-round physical, intellectual and moral development of the child shall be the primary responsibility of

parents or guardian". Yet not every incident of parental responsibility lends itself to legal enforcement. Only the more concrete including a parent's financial responsibility and that of providing the child with optimal living arrangements are enforced by the law of maintenance and, of the responsibility relating to guardianship and custody. These rights are implemented by the respective legislations such as The Guardians and Wards Act, The Criminal Procedure Code etc.

Right to claim maintenance

Under Myanmar customary law, Myanmar husband and wife have certain duties towards each other. The chief duty of the husband is to maintain his wife and children. Section 11 of the Child Law says that "The child shall be entitled to a monthly allowance for maintenance from his parents who fail or refuse to maintain him".

A child has two remedies available for securing maintenance. The first is a suit in a civil court, in which a decree may be obtained for an amount commensurate with the status or means of the party liable. The second remedy is a proceeding under the Criminal Procedure Code. It is a cumulative remedy. The summary procedure under the Criminal Procedure Code is designed to extend speedy relief to the children to meet their minimum needs food, clothing and shelter and simple essential education. For maintenance to keep the children in circumstances more becoming of their station in life, they must go to a civil court and file a suit. This remedy is open to a wife or child either legitimate or illegitimate. The personal law of father is not to be taken into consideration and the enacted law overrules the personal law in this respect.

The word child for the purpose of maintenance is not defined in the Criminal Procedure Code. The term "child" in section 488 of the Code means an offspring and it has nothing to do with the Majority Act. Child maintenance has no age limitation and it is the liability on the father for as long as the child cannot support himself. Hence every able-bodied healthy man in Myanmar is obliged to maintain his child. Even as a phonygi, when he has clandestine intercourse with a woman and a child is born as a result, he is liable to maintain it.

Custodial right of the child

Family tie is severed by divorce. There are several grounds for divorce in Myanmar customary law, most of which are universal; e.g. cruelty, desertion, adultery. One special feature of Myanmar family in this matter, however, is that 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. 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.

The rights of the children of a mutually divorced couple seem to depend upon the arrangement made at the time of the divorce as to which branch of the two families they shall belong to. It is for the parting parents to arrange and agree on which children should go with whom. In fact, Myanmar children are bound by the arrangements made by their parents at the time of divorce regarding the custody of children. The parents have an unfettered discretion to arrange this matter in any way they pleased. But the court will not support the father's or mother's rights against the interests or welfare of the child, and the wishes of the minor, who is old enough to form an intelligent preference, are paramount.

Where the divorce is through the fault of one party, it would be for the moral, bodily and intellectual wellbeing of the minors that they should continue to live with the innocent person. But it is not a strict rule as every faultless parent cannot always have the custody of the child against the interests of the child. The most paramount consideration is the best interests of the child.

If there were any questions regarding the custodial right or the parties cannot reach an amicable end by themselves, one has to refer to the Guardians and Wards Act and not to the Myanmar customary law or any other personal law to which the parties are subjects. Courts' recent decisions clearly show that the welfare of the child is of the most paramount consideration in custody proceedings not only of the parents or guardians concerned but also of the residing court.

Adoption

Adoption is recognized and practised in Myanmar society for a long time under Myanmar customary law. In fact, adoption is an honoured institution among Myanmar families. Although Dhammathats mentioned several types of adoption, there are only two types of adoption in present day practice, namely Kittima and Apatitha. The Kittima is the full adoption of a son or daughter with the expressed intention that he or she shall inherit according to the Myanmar customary law. An Apatitha child is one who has been adopted casually and without any express intention on the part of the adoptive parents that the child shall inherit. In either case adoption is legal in Myanmar. Kittima adoption, customary adoption facilitated by The Registration of Kittima Adoptions Act operative from 1st April 1941, will be emphasized for present purpose.

A child of any age can be adopted. Usually children of tender age are adopted. Even an adult may be adopted with his or her own consent. But before an adult can be declared to be the adopted child he himself has to renounce his own parents and all claim to their estate and declare that he has accepted the position of a child with all its rights and liabilities in the new family. The adoption of nephews or nieces is most common and relationship is no bar to the selection of a child for adoption. Although the adoption of a pure foreigner is not against the sentiment of a Myanmar Buddhist and he could anyhow inherit the moveable property of the Myanmar adoptive parents, the Kittima adopted child who is a foreigner cannot become a Myanmar citizen automatically.

As regards the capacity to be an adopter, any person who is competent to contract can adopt a child. It can, generally, be said that except a phongyi, any major unmarried person or one of a married couple with the consent of his or her spouse can adopt another as his or her child notwithstanding the existence of his or her own child or during the lifetime of the first adopted child. However no adoption is permissible in Myanmar for those who are subjects to Mohammedans and Christian personal laws under Section 2 of the Registration of Kittima Adoptions Act. Moreover according to the Section 25 of the Special Marriage Act, no person professing Hindu, Buddhist, Sikh or Jaina religion who marries under the Special Marriage Act shall have any right of adoption. Therefore the even Buddhist man or woman who married under the Special Marriage Act loses the right of adoption under Myanmar customary law.

The essential condition is that the act of adoption is performed in full consciousness of what is being done. There must be, on the other hand, the consent of the natural parents or relations of the child (in the absence of natural parents) to give it in adoption with the understanding that the child shall thenceforth belong to the new family, and on the other hand, the taking of the child by the adoptive parents with the intention that the child shall inherit in the new family. The Kittima child is entitled to all the rights of a natural child of the adopter except in three cases.

1. A Kittima child cannot be an orasa.
2. He cannot sue for a quarter share of the adoptive parent's estate on the death of one adoptive parent from the surviving adoptive parents.
3. A Kittima child loses the right to inherit if the adoptive parents forsake their Buddhist faith and embrace Christianity or any other faith which does not recognize adoption.

The deed of adoption shall be executed in accordance with the section 5 of the Act.

With the aim of enabling the orphans to have a family life and promoting their interests, adoption services for institutionalized children are being carried out by the Social Welfare Department. Generally speaking, therefore, there are two possible ways to adopt the child in Myanmar, one is adoption of the children under the guardianship of his or her own parents or guardian, and the other is the adoption of the children from residential nurseries under the supervision of the Social Welfare Department.

In the case of private placements, the adoptee must fulfill the conditions laid down by the Myanmar customary law and also the Registration of Kittima Adoptions Act. There is no official assistance in private placements and children are brought to the attention of potential adopters by a variety of private introduction. The potential adopters act as they see fit from that time onwards. It is only when the prospective adopters are going through the proceeding at the Registration Office for the publicity and notoriety purpose under the section 5 of the Registration of Kittima Adoptions Act for Kittima adoption that there is any official scrutiny. By contrast, in the case of placements by official intervention of Social Welfare Department, the adopted parents must abide not only by

above mentioned Act but also by the Child Law and its Rules and conditions laid down by the Department itself as additional requirements. Both practices base upon the well established principle of the Myanmar customary law, i.e., the Kittima adoption is the full adoption of a son or daughter with the intention that the child shall inherit.

Conclusion

Nature of family pattern, teachings from Myanmar customs and culture make the family members in a harmonious relationship and prevent problems in the family. In fact, rights of the child given by enacted laws and customary law are quite comprehensive and they are also keeping with the best interests of the child as embodied in the CRC on the one side. On the other side, new phenomena have arisen due to rapid social and economic changes. So it will be most feasible to have new statutory laws concerning family law matters, based on the well established methods and concept of Myanmar customary law, particularly in the area of adoption, maintenance and custody, in line with the Convention on the Rights of the Child, to further promote the best interests of the child.

Acknowledgements

I would like to express my deepest gratitude to U Kyaw Ye Htun, Rector of East Yangon University. I am also grateful to Pro-Rectors Dr. Kyaw Kyaw Khaung and Dr. Marlar Aung of the same University for their expert comments and suggestions. A special word of gratitude should be extended to Professors Dr. Thida Oo, Head of Department, and Dr Myint Thu Myaing, Department of Law, East Yangon University for the encouragement and advice on the topic. I also would like to express my special thanks to the ones who involved in their own ways during the course of this research.

References

Acts and Laws

Buddhist Women Special Marriage and Succession Act, Myanmar Act No 32 of 1954, Myanmar Code Volume XI, p.2.

Child Law, SLORC Law No 9 of 1993.

Criminal Procedure Code, India Act No 5 of 1898, Myanmar Code Volume VIII, p.140.

Evidence Act, India Act No 1 of 1872, Myanmar Code Volume XII, p. 469.

Interpretation of Expressions Law, 1973.

Majority Act, India Act No 9 of 1875, Myanmar Code Volume XI, p 121.

Registration of Kittima Adoptions Act, Myanmar Act No 14 of 1939, Myanmar Code Volume XI, p.1.

Specific Relief Act, India Act No 1 of 1877, Myanmar Code Volume XI, p 390.

Books

Aung Khin Tint. (1974). *Family Law*. (1st ed.). Yangon.

Mitra, B.B. (1954). *The Code of Criminal Procedure*. (12th ed.). Calcutta: Eastern Law House.

Ba Maw. (1992). *Marriage Laws of Myanmar: The Myanmar Buddhist, Muslim, Christian and Hindu Marriage Law*. (1st ed.). Yangon.

Chan Toon. (1894). *The Principles of Burmese Buddhist Law*. Rangoon: Myles Standish & Co.

E Maung. (1937). *Burmese Buddhist Law*. Rangoon.

Maung Maung, Dr. (1963). *Law and Custom in Burma and the Burmese Family*. The Hague: Martinus Nijhoff.

Mya Sein. (1993). *Myanmar Customary Law*. (8th ed.). Yangon: Sittethaw Publishing House.

Tin Aung Aye, Prof, Dr. (2004). *Interpretation of Statute Law and Treaty*. (1st ed.). Yangon: Cho Tay Than Publishing House.

Cases

Daw Kyi Kyiv s. Mrs Mary Wain, 1971 BLR 52 (C C).

Daw Theik vs. Crying Ah Lin, 1951 BLR (SC) 133.

Ma E Sein vs. Maung Hla Min, 3 Ran 455.

Ma Hnin Zan vs. Ma Myaing, 13 Ran 487.

Ma Woung Shwe Lin vs. Union of Myanmar, 1970, B.L.R (CC) Full Bench 222.

Mg Shwe Ba vs. Ma Thein Nya, 1938 RLR 673.

Mg Thein Mg vs. Ma Saw , 6 Ran.340.

Po Cho vs Ma Nyein Myat, 5 L.B.R. 133.