

A LEGAL STUDY ON SETTLEMENT OF MATRIMONIAL DISPUTES UNDER KACHIN CUSTOM AND TRADITION

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Abstract

This research aims to analyze the settlement of matrimonial disputes by Kachin custom and tradition, which has been rooted since the old days. In deciding their matrimonial disputes, Kachin referred to the *Salangs* (elders). The opinions of *Salangs* (elders) with regarding to the settlement of disputes were respected and followed among the disputants. The principles and opinions of the council of *Salangs* (elders) are gradually developed into Kachin custom and tradition up to present time. Settlement of matrimonial disputes under Kachin custom and tradition is immemorial, reasonable and not opposed to the natural justice. No one can deny that the source of customary law is the common custom of people. Hence, the court should take Kachin custom and tradition into consideration in deciding the matrimonial disputes between Kachin.

Keywords: Kachin, matrimonial disputes, custom and tradition.

Introduction

Kachin is an ethnic group and lives mostly in the northern part of Myanmar, in Kachin State. In Myanmar, each race has its own custom and tradition that governs their day to day relationship with one another. In fact, customs play a primary source of law because the personal laws in Myanmar are mainly based on ancient custom. Although there is no written historical record as a treatise with regard to Kachin custom and tradition, there is a strong memory among the member groups. It is because their custom and tradition are handed over in a verbal form from generation to generation. Section 13(1) of the Myanmar Laws Act (1898) provides that the marriage law has been based on the respective religion. Therefore, the Kachin matrimonial custom who professes in Christianity has been confused with the statutory laws relating to marriage and divorce. This research is to explore the settlement of matrimonial disputes by Kachin traditional means between Kachin who profess Christian and live in Kachin State. The research questions are (1) How Kachin custom and tradition are evolved? (2) Was settlement of matrimonial disputes under Kachin custom ancient, reasonable, in conformity with natural justice and not oppose to the public interest?

Material and Method

This paper uses a qualitative research design and explores Kachin custom with regard to the settlement of matrimonial dispute, judicial decisions and non-judicial decisions but prominent cases. Interviews with selected Kachin who get through or understand the custom well become an important matter in tackling research problem.

Findings

This research finds out that Kachin custom and tradition primarily based on long established custom. The traditional elders aim to conciliate and to reestablish a peaceful relation between the disputants. Moreover, this research indicates that settlement of matrimonial disputes under traditional means is more speedy and flexible than by court because it can be done without

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struggling and wasting time. In addition, it will further help to maintain their dignity as well as to restore peaceful relationship between the disputants. This research illustrates that settlement of matrimonial disputes under Kachin custom and tradition is fairness and not oppose to natural justice. Hence, dispute settlement by Kachin traditional means is in line with the Latin maxim 'Ubi jus ibi remedium.' This research shows that the traditional elders can adjust the amount of compensation based on the prosperity of the parties concerned. In addition, it is learnt that the aim of dispute settlement by Kachin traditional means is consistent with the Myanmar judicial maxim 'to make bigger case smaller and to make smaller case disappear.' Hence, settlement of matrimonial disputes under Kachin custom and tradition is reasonable.

Evolution of Kachin Custom and Tradition

Hanson stated that Kachin custom and precedent as handed down by tradition and interpreted by the chief and village council comprises the recognized law. Each case was decided on its own merits, but there were recognized rules to follow, and a generally accepted measure of punishments or compensation.² This proves that Kachin has had its own custom and tradition for the settlement of dispute as well as the amount of compensation since earlier times.

Trial by Ordeal

Carrapiett described that the form of ordeal practiced by Kachin. When going through the ordeal, each man was required to take the customary Kachin oath that 'may I be eaten by a tiger or die some other violent death' which had to stamp heavily on the ground with his right foot.

Carrapiett noted that the parties were sent into the jungle to cut down bamboos which contained water. Having done so, the bamboos were brought to the site of ordeal and cut open. The water from the bamboos was put, part into the pot and part into two hollow bamboos. Three fires were then started, one at each angel of a triangle. The pot of water was placed on the fire at the apex and left to boil. In it was a piece of lead. On the other fires which were about two feet apart were placed the bamboos. When the water boiled, the disputants were required to walk first one, and then the other, between the bamboos whose mouths were pointing towards each other. From the bamboos, drops of boiling water sputtered forth but did not scald the innocent man's legs. Having passed the bamboos both men were required to dip their hands into the boiling pot and took out the piece of lead. He who was innocent escapes scalding.³

According to personal communication, the interviewee said that the form of oath could be made by placing a sharp sword above one's head, blade facing downwards, and calling upon some great accident or calamity to befall one if lying.⁴

There are also other variations. Both parties placed some uncooked rice in a leaf and tied it into a packet. Each packet was marked clearly for identification. The parties placed these packets simultaneously into a pot of boiling water. After a sufficient interval, each party simultaneously took out his packet by means of a piece of bamboo. The packets were opened. He whose packet contained rice grains which stick, because of imperfect cooking, was declared the loser.⁵

² Hanson, Ola., (1913) *The Kachins: Their Customs and Traditions*. American Baptist Mission Press, Rangoon, p. 65.

³ Carrapiett, W.J.S., (1929) *The Kachion Tribes of Burma: For the information of Officers of the Burma Frontier Service*. Govt Printing and Stationary, Burma, p. 71.

⁴ Personal interview (Myitkyina, Kachin State, 9 January 2019).

⁵ Carrapiett, W.J.S., (1929) *The Kachion Tribes of Burma: For the information of Officers of the Burma Frontier Service*. Govt Printing and Stationary, Burma, p. 71.

A piece of lead was placed in a pot over a fire till it became molten. Each party took the customary oath, and was required to insert a stalk of *Hkundu* grass into the molten lead. He whose grass the lead sticks was declared the loser.⁶

Hanson also noted the other ordeal form that an egg was broken and defendant dipped the end of a stalk of elephant grass into the yolk; if any of the yellow adhered to the grass, he was guilty. If not, he was innocent. Sometime, the *Dumsa* (priest) conducted the proceeding. The contending parties sat facing each other with a long pole in his hand. The priest reciting his incantations implored the *Nat* of thunder to indicate the guilty. As he finished, the lightning, it might be from a perfectly clear sky, would strike out and killed the offender on the spot. According to water test, the accused and his friends stood on the side of a river and the accuser and his party stood on the opposite. Cattle, money or household goods were brought forth, and in the presence of witness, it was agreed that if the accused was proved innocent, his accuser must deliver all they had brought to him. If the opposite proved to be the case, he must lose all on his side. After due the ceremonies of the priest, the chief parties from both sides went down into the stream. The guilty found it impossible to put his head under the water, while he did it with ease if innocent.⁷

George Scott noted that a *Dumsa* (priest) was summoned and went to the jungle with his dah. After invocation, he cast this from him at random. The dah, which had become endued with supernatural power, hit a bamboo which, when it was cup open, was found to contain about a cup full of water. The water was put in a large pot over a fire and when it boiled, the accused had to put his hand into it. If he was innocent, he suffered no hurt.⁸ The foregoing points prove that Kachin tradition and Burmese (Myanmar) tradition are similar in that where there were no witnesses in cases, the parties might submit to trial by ordeal.

Dispute Settlement by Conciliation

With regard to dispute settlement in Myanmar, Dr. Than Tun noted the royal order which was issued by King Badon that 'mitigate the big case and forget the small one'.⁹ Hence, it can be construed that the main purpose of Myanmar judicial system is to mitigate the major case and cease the minor case among the disputants.

There is Myanmar maxim that *Dhammathat* was overruled by *Yazathat* and *Yazathat* was overruled by agreement.¹⁰ Hence, it can be construed that if the agreement was reached by conciliation, it would be legally binding between the disputants.

With regard to dispute settlement by conciliation, Hanson noted that any Kachin who wished to institute a suit should approach the nearest elder by word of mouth or by giving a present of liquor or by providing some presents. There was not expressly provided judge or no

⁶ Ibid.

⁷ Hanson, Ola., (1913) *The Kachins: Their Customs and Traditions*. American Baptist Mission Press, Rangoon, p. 143.

⁸ George Scott, J., & Hardiman, J.P., (1900) *Gazetteer of Upper Burma and The Shan States*. Part I, Volume I, Government Printing, Burma, p. 427.

⁹ Than Tun, Dr., (1989) *The Royal Orders of Burma A.D 1958-1885*. Part Nine, The Center of Southeast Asian Studies, Kyoto University, Kyoto, p. 275.

¹⁰ Aung Than Tun, ခေတ်လေးခေတ်မြန်မာ့တရားဥပဒေ [*Myanmar Law in Four Eras*] Kalaung Pyan Press, Yangon, 1968, p. 94.

court under Kachin customary law.¹¹ This proves that the dispute settlement by conciliation under Kachin custom and tradition has been practiced since ancient times. This fact made the British Government to uphold Kachin custom as Kachin customary law.

Leach also stated that Kachin idea was that disputes were settled by arbitration rather than arbitrary judgment. A lawsuit involved a debt and the settlement of debt was a matter for the *Kasa* (intermediaries) of the disputing parties. The judicial body of a village was a body of arbitrators rather than a bench of magistrates; its function was to give a ruling as to what would be a fit and proper settlement of the issue in dispute.¹²

With regard to punishment for offences, Carrapiett noted that under Kachin custom and tradition, the punishment of whipping, imprisonment or death was never imposed by a *Duwa* (chief).¹³ Tegenfeldt also described that for every type of wrongdoing, compensation in terms of cattle or goods was the acceptance method of settlement.¹⁴

With regard to payment of compensation, Kawlu Ma Nawng stated that if the whole compensation was not paid up after the expiry of a year and the performance of the final peace ceremony, any remaining articles could be demanded slowly from the children or grand-children in the course of generations.¹⁵ Hence, it can be said that the aggressor as well as his family members are bound to pay compensation to the aggrieved family.

With regard to an appeal, Hanson also noted that the decisions of the chief and his adviser were just and equitable. If the parties concerned considered it unjust, they could appeal to the public to reconsider the whole case.¹⁶ Hence, it can be said that the main purpose of Kachin custom and tradition is to achieve harmony and restore peaceful relationships among the disputants.

Hanson also noted that when the agreement was reached between the disputants, the contending parties ate and drank together, dipped their sword in the blood and took an oath that there was eternal peace between them. The losing side had to pay for the feast and there was a special bullock sacrificed by the *Padang nga* (winning side), to announce the joyous fact that they had been victorious.¹⁷ Hence, it is learnt that Kachin custom and tradition primarily based on long established custom.

Due to the influence of the British rule, there were some political, legal and social changes. The Penal Code (1860), the Evidence Act (1872) and the Criminal Procedure Code (1898) were applied to the upper Burma. In the social sphere, Indian Christian Marriage Act (1872) and Indian Divorce Act (1869) were extended to the members of hill-tracts in the Bhamo

¹¹ Hanson, Ola., (1913) *The Kachins: Their Customs and Traditions*. American Baptist Mission Press, Rangoon, p. 64.

¹² Leach, E.R., (1964) *Political System of Highland Burma: A Study of Kachin Social Structure*. The Athlone Press, London, pp. 184 and 185.

¹³ Carrapiett, W.J.S., (1929) *The Kachion Tribes of Burma: For the information of Officers of the Burma Frontier Service*. Govt Printing and Stationary, Burma, p. 30.

¹⁴ Tegenfeldt, Herman, G., (1913) *A Century of Growth: The Kachin Baptist Church of Burma*. William Carey Library, United States of America, p. 43.

¹⁵ Ma Nawng, Kawlu., (1944) *The History of the Kachins of the Hukaung Valley*. tr J.L. Leyden, Time of India Press, Bombay, p. 72.

¹⁶ Hanson, Ola., (1913) *The Kachins: Their Customs and Traditions*. American Baptist Mission Press, Rangoon, pp. 69 and 70.

¹⁷ Ibid.

and Myitkina District. The rules regulating the procedure for the trial of suit and other proceedings of civil nature entered into force in Kachin Hill.¹⁸

With regard to civil cases, if the disputant parties are members of a hill-tribe subject to the jurisdiction of the same headman, the main principles to observe in all civil cases are that no complicated procedure is necessary. In such a case, the Civil Procedure Code (1909) is not required and cases should possibly be settled by the headmen and elders or by agreed arbitrators. If all the parties are members of hill-tribes subject to the jurisdiction of the different headman, the officer receiving the complaint should summon the parties and their headmen for the appointment of arbitrators. If one or more or even all the parties do not belong to a hill-tribe, the case must be tried by a regular court. The officer shall examine witnesses on oath and pass orders with his discretion.¹⁹ It is remarkable that during the British administration, the village headman as well as elders or agreed arbitrators could settle all civil cases in accordance with Kachin custom and tradition.

On 4 January 1948, the Union of Myanmar regained her independence from the British. According to the Constitution of the Union of Burma (Myanmar) 1947, the territory known as the Myitkyina and Bhamo District shall form a constituent unit of the Union of Burma (Myanmar) and be hereafter known as the Kachin State.²⁰ The President of the Union of Myanmar announced that Kachin includes Jinhaw, Atzi, Lashi, Maru, Yawyin (Lisaw) and Nung (Hkanunk, Rawang).²¹

A landmark challenge on Kachin matrimonial custom was initiated with the British Act, which directed the courts to award the personal matters in accordance with the personal law of the parties depending on their religion. One of these kinds of Act is the Burma (Myanmar) Laws Act (1989). Section 13(1) of the Myanmar Laws Act (1898) provides that the marriage law has been based on the respective religion. Therefore, the Kachin matrimonial custom who professes Christianity has been confused with the statutory laws relating to marriage and divorce.

The word 'customary law' means law consisting of customs that are accepted as legal requirements or obligatory rules of conduct; practices and belief that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws.²² Accordingly it can be said that although the customary law is based on a good ancient custom, every custom will not be a legal custom or customary law.

In the landmark case of *the Union of Myanmar v Nawkhun Zaw Bar*,²³ the term customary law was interpreted by the learned judge, Dr. Maung Maung that every customary law comprises the principles of justice and subtle. In addition, the Court highlighted the vital role of customary law. If the custom having been continuously observed for a long time to maintain security and peaceful relationship, it would obtain the force of law in the State. Every law is powerful if it is embodied in minds of humans. Therefore, the well-known customary laws which are naturally accepted by humans are more powerful than the laws. The case already mentioned proves that if the customs are reasonable and aim to maintain peaceful relationship, no one can deny the crucial

¹⁸ *The Kachin Hills Manual*, (1959) Supt, Govt. Printing and Staty, Union of Burma, Rangoon, pp. 14-15, 25-27, 96.

¹⁹ *The Kachin Hills Manual* (1959) Supt, Govt. Printing and Staty, Union of Burma, Rangoon, p. 187.

²⁰ The Constitution of the Union of Burma (Myanmar) 1947 s 6.

²¹ The Burma Gazette Extraordinary 1955.

²² Black's Law Dictionary (9th edition, 2009) 'customary law'.

²³ (1966) B.L.R (C.C) 1417.

role of tradition and custom. In this case, the court also emphasizes the principle of Myanmar judicial system, 'mitigate the big case and dismiss the small one.'

In *Sarael and 7 others v The Union of Myanmar*,²⁴ the court decided that the obsession cannot be said as a customary law even though such obsession is known as the customary law of particular group. All the customs cannot have the force of law because the courts will not enforce the unreasonable custom. The custom will be obtained the force of law where the rule has been used from time immemorial, is reasonable and not opposed to enactment of legislature. This case shows that the courts never recognize the local customs which are contrary to the statutory law as well as opposed to the natural justice.

According to Salmond, the local custom may be valid and operative as a source of law it must conform to certain requirements laid down by law. These are (i) reasonableness, (ii) conformity with statute law, (iii) observance as of rights and (iv) immemorial antiquity.²⁵

In 1973, Kachin State Cultural Department codified the rules which so called *Kachin Dhale Phyat Htone* (Kachin Custom and Precedent). This codification provides not only for the marital custom but also for the scale of compensation for each dispute.²⁶ According to *Kachin Dhale Phyat Htone* (Kachin Custom and Precedent), anyone can verbally file a suit to *Salang* (traditional elder). The disputants can select the influential elders to form the traditional judicial committee. Before making the decision, the committee investigates the fact of the case and makes an oral contract between the disputants that they will accept the decision of the traditional committee. When the agreement is reached, both parties will drink liquor and exchange gifts as a sign of peaceful relationship between them.²⁷ It is notable that Kachin matrimonial custom and tradition has also taken rooted since the early days and is still binding upon the person concerned. Accordingly, it can be said that the traditional judicial committee is the *ad hoc* decision making committee.

In 2017, a case was filed by a girl for the damages of her pregnancy to the Judicial Committee of Kachin Culture and Literature Association (*Kachin Yoyar Yone*).²⁸ In this case, the boy did not take responsibility when the girl told that she was conceiving a baby. He gave some medicines to abort her pregnancy. Even though the girl did not take the pill, she aborted, unfortunately. The boy admitted in the presence of the elders that they lived together; however, he never gave a love-letter and said anything about his love. The elders pointed out that the act of that man was a great wrong. Finally, the elders held that the man was ordered to pay 6 lakhs as compensation to restore her reputation, to make blessing and to end the suit. This case also shows that settlement of matrimonial disputes by Kachin traditional means is still applicable up to the present time because it is more flexible and speedy than court. This case also illustrates that the man is bound to pay compensation for his willful misconduct. Hence, it is notable that Kachin

²⁴ (1968) B.L.R (S.C.C.A.C) 1.

²⁵ Salmond, (1957) *Salmond on Jurisprudence*, Sweet & Maxwell, Limited 2 & 3 Chancery Lane, 11th edition, pp. 241-244.

²⁶ ကချင်လေ့ဖြတ်တုံး (1973) [*Kachin Custom and Precedent*]. Kachin State Culture Series 1, Kachin State Culture Section, Department of Culture Shrine, Yangon.

²⁷ ကချင်လေ့ဖြတ်တုံး (1973) [*Kachin Custom and Precedent*]. Kachin State Culture Series 1, Kachin State Culture Section, Department of Culture Shrine, Yangon, pp. 1 and 2.

²⁸ Decision by Judicial Committee of Kachin (Jinphaw) Culture and Literature Association, Myitkyina, (10 February 2017).

custom and tradition is in line with the Latin maxim ‘*Ubi jus ibi remedium*’ which means that there is no wrong without a remedy.

In the case of *Wa Yot Yaw v Faw Sone Htu*,²⁹ the appellant (husband) pleaded that he was an aggrieved one because the respondent was committing adultery with his wife. The appellant (husband) did not want to continue their marriage life, and he wanted to get back all the traditional bride price and the marriage feast, which cost him for the marriage ceremony. The wife admitted that having been guilty of adultery. In the presence of traditional committee, the appellant (husband) asked for compensation to the respondent, such as one elephant, one gong with ten spans, one gun, six *pasos*, one cote, one blanket, two pigs and fifty kyats for marriage feast. In this case, the elders pointed out that the adultery by wife was clear. Then, the elders conciliated the amount of compensation. The appellant asked for a cow to wash his face (which means to restore his reputation). Finally, the elders came to the conclusion that the respondent was ordered to pay one elephant, one gong with ten spans, one gun, six *pasos*, one coat, six blanket, two pigs, marriage feast and one cow. This case illustrates that although the adultery is a criminal offence and is punishable by the Penal Code (1861), the parties concerned can settle by conciliation to make the divorce and to pay the compensation to the aggrieved one. This case affirms that the settlement of matrimonial disputes by Kachin traditional means is consistent with the Myanmar judicial maxim ‘mitigates the big case and forgets the small one.’

One of the cases,³⁰ the applicant (wife) asked for a divorce to the Kachin traditional judicial committee on the ground that she could not live together her sister-in-law (her husband’s elder sister) in the same house. Then, she said that if she lived together with her, her marriage life would be ended. The respondent (her husband) contended that it was not possible to live separately because his elder sister was a sick one and he was the only person to care for her. He also urged that if his wife could not live together his elder sister under the same roof, it would lead to divorce between them. Finally, the traditional judicial committee came to the conclusion that the respondent (husband) was ordered to pay 47 lakhs as compensation. This case illustrates that the traditional elders can adjust the amount of compensation based on the prosperity of the parties concerned. It also indicates that if both parties are not able to live together as the spouse and both are willing to make a divorce, their marriage tie can be ended in accordance with Kachin custom and tradition. Hence, settlement of matrimonial disputes under Kachin custom and tradition is reasonable.

Similarly, the dispute arises when the applicant (wife) submitted a complaint to make a divorce to the Kachin traditional judicial committee.³¹ In this case, the applicant (wife) did not prove reasonable cause for a divorce. She said repeatedly four times in the presence of traditional judicial committee that she did not want to continue her marriage life; however, her husband said nothing. Finally, the elders decided that the wife was ordered to pay back all the bride price including a marriage ring paid to the bride, a tickle gold necklace paid to the bride’s mother and a pair of ear plug paid to bride’s elder sister. In addition, the applicant (wife) was ordered to pay

²⁹ Him Thar (1989) သွေးချင်းတို့ဌာနေကချင်ခြေ [Kachin State: The Residence of Our Kinsfolk] Sar Pay Beik Mam Press, Yangon, p. 222.

³⁰ Decision by Judicial Committee of Kachin (Jinphaw) Culture and Literature Association, Myitkyina, (9 October 2015).

³¹ Decision by Judicial Committee of Kachin (Jinphaw) Culture and Literature Association, Myitkyina, (2 May 2016).

back the entire marriage expenses to the husband's relatives. And then the traditional judicial committee fined the applicant (wife) a total of 3 lakhs for no fault divorce. This points out that Kachin custom and tradition recognizes divorce by mutual consent even though there is no reasonable cause to dissolve their marriage tie. Nevertheless, the person who seeks for a divorce without sufficient cause would pay traditional compensation. It also illustrates that settlement of matrimonial disputes under Kachin custom and tradition is consistent with justice and fairness.

On the other hand, the divorce of Kachin who profess Christian must adhere to the procedures of the Myanmar Divorce Act (1869). The said Act never allows divorce by mutual consent as Myanmar Customary Law and Mohammedan Law. If the parties fail to prove any matrimonial fault, there is no way to obtain a decree for divorce.

With regard to cruelty, Jenny noted that cruelty is a ground for divorce under Kachin custom and tradition. One of the cases, a man started beating his young wife after she became pregnant. Particularly after drinking, the man would physically and verbally abuse his wife, beating her so violently which caused her earrings to be ripped out of her ears. After one particular violent beating with a rope, the woman requested a divorce to an *ad hoc* traditional judicial committee. After discussion, the committee decided that the woman could get divorce from the man.³² The already mentioned case proves that cruelty is a ground for divorce under Kachin custom and tradition. It also illustrates that settlement of matrimonial disputes under Kachin custom and tradition is fairness and not oppose to natural justice.

With regard to statutory law, in the case of *Daw Ngwa Masa v U Lau Si*,³³ the respondent alleged his wife (appellant) with his father as well as his daily worker. Moreover, he committed physical violence and attempted to kill the appellant in the drain. The learned judge of Kachin State High Court pointed out that there was physical violence by the respondent which caused to mental violence. However, the judge remarked that there was no evidence that the respondent had been or was living in adultery with another girl. And the learned judge also pointed out that the decree of divorce cannot be upheld by the mere fact of cruelty under Section 10 of the Myanmar Divorce Act (1869). Finally, the decree on divorce passed by the Myitkyina District Court was dismissed by the Kachin State High Court. In this case, the court should not, to a large extent, make reference to the existing statutory laws instead of applying Kachin customs, which are reasonable and consistent with justice and fairness.

Conclusion

Before the arrival of the colonial legal system, there was already settlement of dispute by traditional means among Kachin. Kachin tradition and Burmese tradition are similar in that where there were no witnesses, the parties might submit to trial by ordeal. During the British Colony, the British Government upheld the village headmen as well as the elders to settle all civil cases and the petty criminal cases in accordance with Kachin custom and tradition. This research analyses that the elders always take into consideration to maintain the well-being of the community as well as to provide a satisfactory outcome between the disputants. Hence, settlement of matrimonial disputes under Kachin custom and tradition is reasonable, fairness and not oppose to natural justice.

³² Rouse, Jenny., (2007) *Salt Between Split Beans* . UNDP Access to Justice and Informal Justice System Research, Kachin State, p. 45.

³³ (High Court of Kachin State, Thu Jar, 30 April 2020) 5.

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