

# Law and Economic Development: The Cautionary Tale of Colonial Burma

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## Abstract

Burmese colonial history suggests that a legal system cannot operate independently from the felt needs of the people who are supposed to obey the law. Despite a monopoly of force for many decades, the British failed to create a sustainable legal system in Burma. Colonial status shifted Burma's economic role from subsistence agriculture to the generation of large-scale exports. By undermining the traditional Burmese legal system and substituting Western international standards of property rights, enforceability of contracts, and an independent judiciary—all attributes of what some consider to be the “Rule of Law”—the legal system amplified and channelled destructive economic and social forces rather than containing them. This paper examines traditional Burmese law, the administration of law in British Burma, and the consequences of the new legal system for the country and its own stability. The paper concludes by suggesting lessons for Myanmar today, and for the study of the “Rule of Law.”

**Keywords:** “Rule of Law,” colonial law, law and custom, law and development, colonial administration, Burma

There is increasing recognition that the apparently simple concept of the “Rule of Law” contains multiple ambiguities,<sup>1</sup> and even contradictions.<sup>2</sup> Case-studies can help to illustrate the contours of the idea and its underpinnings. Perhaps most importantly, the rule of law

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1. Belton (2005); Stephenson (2005).

2. Compare, for example, Belton, *supra* note 1, with the focus of the World Bank Group and International Finance Corporation (2013), p. 2, on what it means to strengthen legal institutions, i.e. “the legal and regulatory framework for getting credit, protecting investors, enforcing contracts and resolving insolvency.”

cannot be considered in isolation from the larger political, sociological, and economic forces that it reflects and helps to channel.

The imposition of British law in colonial Burma offers a case-study of the impact of colonial economic forces that some have argued helped cause Burma's retreat into isolation after World War II.<sup>3</sup> By undermining the traditional Burmese legal system and substituting Western international standards of property rights, enforceability of contracts, and an independent judiciary—all attributes of what some consider to be the “Rule of Law”—the legal system amplified and channelled destructive economic and social forces rather than containing them. This paper contends that, in addition to substantive attributes, the rule of law also requires a perception of legitimacy if it is to succeed. Neglect of this principle in Burmese colonial history, with its emphasis on property rights and enforceability of contract, illustrates how a legal system—even when backed by the monopoly of force that the British possessed—cannot operate independently of the felt needs of the people who are supposed to obey the law. Despite a dominance which continued for many decades, the British were unable to create a sustainable legal system in Burma. For Burma at least, the concept of the “reception” of British law was a distinct misnomer.<sup>4</sup> This lesson can be seen in two aspects of the colonial legal system in Burma, as it functioned (1) to resolve disputes between individuals; and (2) for the colonial government to maintain order in the country so that imperial economic forces could operate in a stable environment. By the end of Britain's rule, the legal system provided neither effective dispute resolution for the Burmese nor stability within which the imperial economic system could successfully perform.

The paradox, of course, was that, while alien to Burma, English law and jurisprudence were integral to the political culture of Britain. In the felicitous phrase of Sir Frederick Pollock, English law was a branch of English politics.<sup>5</sup> By contrast, legal changes imposed upon a country such as Burma in the nineteenth century, without an opportunity for its people to absorb that law into their own culture, institutions, and way of life, can and did lead to disorder and chaos.

The British shifted Burma's economic role from the traditional production of subsistence agriculture to the generation of large-scale rice exports in the empire. The transformation included monetization of the economy and the importation of Indians and other non-Burmese to fill a variety of economic roles, including that of moneylender to help finance the expansion of Burmese rice production. British rule displaced Burmese governmental institutions. The steel frame of British rule replaced a Burmese system in which the king possessed broad powers in theory but quite limited actual administrative strength. Village headmen, formerly invested with legitimacy based on their local political strength plus investiture by the Burmese king, became lowly paid functionaries at the bottom rung of the colonial administrative hierarchy.

British law also displaced the traditional Burmese legal system. If one considers law to set the publicly enforceable rules of the game, it was the imposition of British law that provided rules of behaviour that allowed the transformation to proceed. Colonial law favoured commerce and provided for a panoply of property rights, enforceable contracts, and

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3. Brown (2011).

4. See e.g. the thorough compilation by McPherson (2007).

5. Pollock (1961).

a judiciary that upheld these elements of the colonial rule of law. The new legal system also disadvantaged the Burmese, who largely failed to understand its strictures. As a province of British India (until 1937), Burma became subject to laws imported from India and shaped by commercial interests in Rangoon. The Burmese cultivator, unfamiliar with British legal principles and with the rules of a monetized commercial economy, migrated to Lower Burma to grow rice, and took on excessive debt. In the legal contest over terms of indebtedness and other commercial arrangements with moneylenders and commercial interests, the latter generally prevailed. For many years the Burmese, and especially Burmese cultivators, lacked the right and ability to enact legislation for colonial Burma and also lacked sufficient understanding of the British colonial judicial system to be able to enforce in court the rights they nominally might have exercised.

While Burmese law traditionally had emphasized conciliation, British law involved findings of fault. While Burmese law had anchored its legitimacy on the basis of religious precepts, custom, and equitable principles, British law rested on legislation and the imperial experience in British India with its quite different social and community patterns. Even in areas such as succession, inheritance, marriage, or religion, where the British legal system nominally sought to preserve local custom, the imposition of British judicial practice such as rules of judicial precedent, coupled with the inability of many British judges to understand the Burmese context, meant that judicial decisions made Burmese customs and principles rigid and lifeless even as courts sought to apply them. In Burmese eyes, court proceedings became a game of wits. The outcome seemed to be so divorced from Burmese conceptions of reality that litigants both suspected corruption of the judicial process and engaged in it.

Criminal law too lacked legitimacy in Burmese eyes, divorced as it was from traditional religious precepts. Within a generation, the incidence of crime increased, especially in Lower Burma, which served as the source of most Burmese rice exports, until it far exceeded the level of crime that the British had experienced in India. Then the Great Depression hit. Overextended by debt, Burmese cultivators lost their lands to foreclosure. Moneylenders in turn found themselves unable to turn foreclosed properties into liquid assets. The colonial government reacted only slowly and enacted laws that either were unsuited to the problem (the Land Alienation Act and Tenancy Act, promulgated only in 1939) or came too late to be implemented (the Land Purchase Act of 1941) before the Japanese invasion. The 1930s also were characterized by a rural rebellion and by urban anti-Indian riots in Rangoon. By the end of British rule, the legal system had failed both as a source of dispute resolution and as an instrument for integrating Burma into the imperial economic system on a sustainable basis. Imposed British law had helped to direct and amplify the effects of destructive economic and social forces rather than helping to limit their shortcomings.

This unfortunate history suggests lessons both for Burma and, by extension, for the rule of law. The more general lesson is that a legal system, if it is to be a source of strength for a society and economy, must be seen as legitimate by those upon whom it acts. A lesson from the colonial experience for Myanmar today is that, unchecked, an influx of foreign capital can encourage large-scale exploitation of resources and potentially damaging physical, social, and institutional consequences. Rather than facilitating these developments, Myanmar and international development organizations and favourably inclined foreign countries may want to focus on shaping elements of law to address them before rather than after substantial harm occurs.

## 1. BURMA AND ITS ECONOMIC ROLE IN THE BRITISH EMPIRE

The British conquered Burma in a series of wars from 1824 to 1886. They exiled the Burmese royal family, abolished the Burmese government, disestablished the Buddhist religion, and imposed a colonial administration on the country. From the British perspective, the colony required law and order so that it could fulfil its economic role in the empire. Protected by law, the commercial community in Burma, overwhelmingly non-Burmese, profoundly restructured the economy. Money was introduced (a revolution in itself) and a large rice export sector created in the formerly subsistence economy. Before the opening of the Suez Canal, Burma had less than two million acres under rice cultivation. Under the British-induced export economy this jumped to over seven million acres by 1900 and about 13 million acres by 1940. The population increased at a far slower rate.<sup>6</sup>

These statistics do not tell the entire story of the dislocation of the Burmese farmer in the new economy. Other disruptive factors were the migration of Burmese as individuals rather than in communities, the immigration of Indians to Burma, and the growing indebtedness of the Burmese farmer. The great increase in rice cultivation had to occur in Lower Burma, where climate and soil were suitable. Thus, the colonial administration encouraged Burmese migration from Upper Burma to the sparsely inhabited south.<sup>7</sup> Unfortunately, migration meant the occupation of Lower Burma by individuals who often had to struggle against neighbouring squatters to keep their land. This was quite different from the mutually co-operative village communities of pre-British Burma.<sup>8</sup>

The British administered Burma as a province of British India until 1937, and encouraged the migration of Indians to Burma. These immigrants did not merely join the Burmese as rice farmers. They also formed a new class in Burma between the British and the Burmese. They became labourers, professionals such as lawyers and minor officials, and moneylenders.<sup>9</sup> The Burmese cultivator found himself tied to his work—but not his land—by increasing indebtedness. The farmer initially needed money to improve his new holdings and needed additional money each year to maintain them.<sup>10</sup> For the first time he also could borrow money for luxuries beyond his means. This had been impossible in the non-monetized subsistence economy.<sup>11</sup> Conveniently at hand was the Indian moneylender, who asked only that the farmer pledge his land and future crop as security. If the Burmese spent his money unwisely or had a bad crop year he was suddenly faced with the loss of his land. Indeed, with the moneylender charging interest at a rate of 15–40% or more, depending on the risk of the loan,<sup>12</sup> cultivators frequently incurred debts they could never repay. The moneylender would foreclose and the Burmese became a tenant on his own land. After a year or two he would amass new debt and be evicted. He then migrated to a new locality where he would become a tenant or else again develop a piece of land only to watch it again pass into

6. Furnivall (1957), p. 244; U Tun Wai (1961), pp. 44ff.

7. Furnivall (1957), p. 49; U Tun Wai (1961), p. 55.

8. Furnivall (1957), pp. 57–8.

9. Harvey (1968), pp. 446–7; Furnivall (1956), pp. 116–23.

10. In pre-colonial Burma, women were often literate and, while not considered the full equal of men, enjoyed considerable social equality. Nonetheless, it is probably appropriate to discuss the Burmese cultivator as a man. Cady (1958), pp. 61–3.

11. U Tun Wai, *supra* note 6, p. 74.

12. Christian (1942), p. 117.

creditors' hands.<sup>13</sup> Every year in Lower Burma approximately half of the tenants would change localities.<sup>14</sup>

The Great Depression, when falling rice prices rendered most farmers insolvent, revealed the extent of the alienation of Burmese farmers from their lands. In Lower Burma by 1936, only 52% of cultivated rice land remained in agriculturists' hands and 39% of the rest belonged to non-residents. That year the Indian Chettyar caste of moneylenders owned about one quarter of the best rice lands of Lower Burma (about two and a half million acres out of a total of ten million). They also held mortgages approximately equal to the value of another two and a half million acres. These figures probably understate the situation: lenders realized that they would not benefit from further foreclosures even though loans were non-performing.<sup>15</sup> Thus, the law permitted rapid economic expansion of the commercial community in Burma and helped to project economic forces in the country and—although the Great Depression cannot be blamed on the colonial legal system—their disruptive consequences when the monetized economy collapsed. The law no longer reflected the culture of Burmese society or met its needs. Rather, law reflected foreign colonial administration and its economic aspirations. J.S. Furnivall, British civil servant and scholar in Burma, recognized this:

The rule of law is a foundation stone of western freedom ... but this is true only where the law is an expression of social will; in a tropical dependency it expresses the will of the colonial power, and is an instrument of economic development. The rule of law becomes, in effect, the rule of economic law ... [and] naturally expedites the disintegration of the customary social structure.<sup>16</sup>

The colonial legal system in Burma was an imposed hybrid that led to instability unknown to either the British or Burmese legal systems in their traditional forms.

## 2. LAW AND INSTITUTIONS IN PRE-COLONIAL BURMA

At the time of British conquest, Burma possessed its own legal system. The population was often literate<sup>17</sup> and the Burmese king possessed a library filled with books.<sup>18</sup> The legal profession had been established for hundreds of years.<sup>19</sup> While there were some similarities in legal principles, a major difference between the Anglo-American and the traditional Burmese systems of law was that in the latter secular and religious prescriptions were an inseparable unity.

This was a direct consequence of the traditional Burmese conception of the state as a mere worldly reflection of the cosmos. A good Burmese king had as his task the orientation of his earthly world as near as possible to the cosmological order. Burmese palaces were shaped in a square form with a seven-tiered tower in the centre, these numbers being of cosmological significance. Should there be disturbing signs in the secular world, such as a crop failure, the king would order removal of his capital city to a place more suited to cosmological needs,

13. Furnivall, *supra* note 6, pp. 65, 106–7.

14. Andrus (1948), p. 71.

15. *Ibid.*, pp. 68–70; Andrus (1943), p. 55.

16. Furnivall, *supra* note 9, p. 295.

17. *Ibid.*, p. 126.

18. Symes (1800), p. 383.

19. Htin Aung (1962), pp. 26–7; Myint (2000).

even if the new site had little secular value, and in spite of the costs of complete reconstruction possibly only a few miles from the former site. During the troubled 35 years from 1822 to 1857, the Burmese capital was relocated to four separate sites.<sup>20</sup> Burmese administration also reflected cosmology. There were four chief ministers, each representing a guardian of one of the four cardinal points, and four special officers, each of whom flew a special flag on one of the four sides of the palace. “The cosmological principle was carried far down through the hierarchy of officialdom, as revealed by the numbers of office bearers. Thus, there were four under-secretaries, eight assistant secretaries, four heralds, etc.”<sup>21</sup>

Burmese law must be understood in the light of these cosmological concerns unfamiliar in Western law. Burmese civil law was based on the Hindu Code of Manu, which came to Southeast Asia in the course of expanding Indian influence. However, the Manu Code came to a Burma vital enough to be influenced but not overwhelmed by the new culture:

[T]he name of Manu was impressive and inspiring, and it was frequently invoked in the treatises that were written after the Code had been received. “So has Manu decided.” But it was not Hindu law that the wise Manu expounded in the Burmese texts, it was Burmese law and custom, and Manu was the convenient and prestigious mouthpiece.<sup>22</sup>

As customs changed, new treatises (Burmese *Dhammathat*, from the Hindu *Dharma-shastra*, or “legal treatise”) were compiled and written under the more powerful Burmese kings. The first treatise was written hundreds of years ago and the last appeared shortly before the First Anglo-Burmese War of 1824.<sup>23</sup> *Dhammathats* do not confine themselves to the realm of pure law, but rather concern themselves with the manners and morals of society generally. Use of a *Dhammathat* in a Burmese judicial decision has been likened to citation of the Bible in an English court opinion.<sup>24</sup> Burmese judges frequently cited *Dhammathats* as dicta while rendering decisions quite to the contrary.

Early in their rule the British recognized the quasi-legal quasi-religious nature of the *Dhammathats*. In an 1883 decision, Sir John Jardine, a serious student of Burmese customary law and judge in British Burma, cautioned that: “In construing the *Dhammathats* the Courts ought to pause and consider whether, by established usage, or by express words, or by judicial precedent, any particular rule has acquired the force of law, or whether it merely points out a duty imposed on the conscience alone.”<sup>25</sup> Another British judge noted that: “The rules in the *Dhammathats* are not definite propositions stated in logical terms. Any attempt to construe them like English statutes would at once result in numerous flat contradictions.”<sup>26</sup> *Dhammathats* “explained and discussed more than they prescribed.”<sup>27</sup>

20. Heine-Geldern (1956), p. 4; Cady (1954), p. 2; Harvey (1925), p. 265. The concept of the cosmological orientation of the Burmese state survived the colonial period. For example, Burma proclaimed independence at 4:20 a.m. on 4 January 1948, with both the specific date and the unusual time having been determined by astrologers to be propitious. Maung Maung (1963), p. 115.

21. Heine-Geldern (1956), pp. 4–5.

22. Maung Maung, *supra* note 20, p. 5.

23. See Htin Aung *supra* note 19, pp. 10–18, for a detailed discussion of the *Dhammathats* and the Hindu Code.

24. *Ibid.*, p. 11; Furnivall, *supra* note 9, p. 133. Andrew Huxley (1988–89), p. 24, makes a similar observation: “Readers who are familiar with classical Roman and modern American law can picture the *dhammathat* as a genre halfway between Gaius’ Institutes and an American Restatement of Law.”

25. *Mi Thit v. Maung To Aung* (1883) S.J. 197, 199.

26. *Crown v. Chan Mya* (1902) 1 L.B.R. 297, 299.

27. Lingat, 1950, p. 21.

*Dhammathats* reflected the society of their day. They did not apply the “law,” but only reflected contemporaneous rules and customs of society. When clear, these customs became binding principles. Where two or more principles conflicted or when proper custom was uncertain, traditionally the most equitable principle was adopted.<sup>28</sup> Thus, traditional judges made law and their decisions were later compiled into new *Dhammathats*.<sup>29</sup> Burmese traditional justice strove for harmony and peace in society. Judges and arbitrators gave a patient ear to litigants and sought to guide them to a satisfactory compromise. The letter of an abstract law was not nearly as important as conforming the decision to accepted notions of equity and fair play.<sup>30</sup> Once judgment was passed, a dish of pickled tea was placed before the two parties. If both ate, the dispute was ended and harmony was again restored. If either party refused, this showed dissatisfaction and signified an appeal to a higher court.<sup>31</sup>

At the village level the headman was responsible for the administration of traditional justice.<sup>32</sup> He (or sometimes she)<sup>33</sup> acted more as an arbitrator than a judge and, as such, would take a fee from both sides in a case.<sup>34</sup> Although his jurisdiction was formally limited to cases of a specified maximum value, his position as one with authority and wisdom often meant he was asked also to arbitrate more serious matters. Each important town had a special judge appointed by the king. Despite travel difficulties, a famous judge would draw appeals from many towns other than his own. In the king’s city there was a final court of civil appeal from which appeal was only to the king himself.<sup>35</sup>

There were professional lawyers in traditional Burma. While edicts curbed their litigiousness, they were considered assets in presenting the cases of less articulate clients. For their services lawyers could collect one-tenth of the value of the matter or a specified amount of silver. An edict of AD 1636 set out the ethics and functions of good lawyers: “to put the client’s case to the best advantage before the court ... to advise the client if he had a weak case, and if the client persisted, to seek to minimize the damage to the client.” The edict added that lawyers who sought to undermine the ends of justice were no better than thieves and robbers.<sup>36</sup>

The Burmese attempted to keep civil justice distinct from criminal justice, although there was overlap.<sup>37</sup> Criminal justice was an administrative function designed to maintain the King’s Peace and punish those who committed murder, rape, abduction, robbery, theft, and grave scandal. At the beginning of each reign the new king would issue edicts enumerating criminal offences and their punishments. These included public humiliation, whipping,

28. *Ma Po v. Ma Swe Mi* (1897) II U.B.R. (1897–1901) 79, 90, 94.

29. Ba U (1959), p. 112.

30. Htin Aung, *supra* note 19, p. 21. See also the delightful and illustrative law tale, “The Drum of Justice,” pp. 68–70; Maung Maung, *supra* note 20, p. 15; See e.g. *Ma E Mya v. Ma Kun* (1892) II U.B.R. (1892–96) 102, 108.

31. Htin Aung, *supra* note 19, p. 22.

32. Differences in community life between Upper and Lower Burma have compounded confusion about terms. For example, the Burmese term *myo* has been variously interpreted as “village,” “township,” “town,” “circle,” and “district.” Sophisticated Western writers such as Furnivall and Cady have noted that the *myo* was not even solely a territorial unit.

33. Htin Aung, *supra* note 19, p. 21.

34. Lee (1978), p. 194. Lee suggests, p. 188, a political dimension to a headman’s decision: “the outcome might reflect the status of the parties as much as any principle of law or ethics.”

35. Htin Aung, *supra* note 19, pp. 21–2.

36. Cited in Maung Maung, *supra* note 20, pp. 16–17.

37. *Ibid.*, pp. 18–19; Htin Aung, *supra* note 19, p. 21.

confinement in irons, maiming, and banishment. Primarily, however, the criminal had to pay compensation to the victim or his family. Capital punishment was said to be rare despite the common practice of murdering political rivals.<sup>38</sup> One should recognize the informality of Burmese law, criminal as well as civil, despite the apparent formality of these institutions. The Burmese king, nearly omnipotent in theory, was severely limited in the reach of his rule by basic technological conditions of the time and the absence of a functioning administrative bureaucracy.<sup>39</sup>

### 3. ADMINISTRATION OF BRITISH LAW

A British administration of considerable strength replaced the religious and highly political Burmese government of limited territorial power. Although the new administration affected individual Burmese lives much more profoundly than had the traditional governments, British rule was not a government in the political sense; politics left Burmese life at least until the 1920s. British administration in Burma had a single purpose: to create and maintain order so that the new colony could play its role—especially its economic role—in the empire.

The administration of British justice in Burma unfolded along the pattern successful in other provinces of British India. In Lower Burma the Chief Commissioner, the top British official in Burma from 1862 to 1897, himself served as the chief court. Under him were three Commissioners who tried murder cases and second civil appeals, and twelve Deputy Commissioners who served as district judges, trying cases not requiring over seven years' imprisonment, major civil suits, and first civil appeals. Finally, there were a hundred subordinate Executive Officers, mostly Burmese, who tried minor criminal and most civil original cases. In 1872, a Judicial Commissioner was appointed with chief court powers, relieving the Chief Commissioner of his judicial functions. The first general step towards separation of judiciary and executive occurred in Lower Burma in 1905, with the creation of a separate judicial service, relieving the Commissioners of their judicial functions. Deputy Commissioners and their executive assistants continued to try criminal cases, however. In Upper Burma, Commissioners and Deputy Commissioners retained jurisdiction over most criminal and many civil cases.<sup>40</sup> In 1922, the High Court was established at Rangoon with consolidated powers and the jurisdictions of the Lower Burma Chief Court and Upper Burma Judicial Commissioner.<sup>41</sup>

On the local level, an early Chief Commissioner attempted to create in Burma the system of village administration familiar from India:

The [British in Calcutta] had spent some years developing a scheme of local government that worked in north India. This was applied to Burma as the Village Act (1887). It required the abolition of the legal identity of each actual village (which for centuries had played a crucial role in dispute settlement and taxation) and the substitution of a virtual legal personality called the *nonorganic administrative village*.<sup>42</sup>

38. Maung Maung, *supra* note 20, p. 19; but compare Harvey, *supra* note 20, pp. 354, 358.

39. Cady, *supra* note 20, pp. 3ff.

40. Harvey, *supra* note 9, pp. 442–3.

41. Maung Maung, *supra* note 20, p. 30.

42. Huxley, 2001, p. 123, emphasis in original; footnote omitted.



Many village and circle (village group) headmen had led Burmese resistance to British rule and this made it attractive to reduce the village from a social and residential unit to an administrative one. To enhance village administration, boundaries were redrawn to place headmen in charge of areas of proper size and to ensure that revenues from these areas provided neither too much nor too little remuneration for their services. The village was reshaped along lines not necessarily relevant to community life. Eventually the elements of traditional Burmese society were abolished and replaced by other artificial administrative units. The village headman was no longer a leader with popular authority. Rather, he became a village administrator responsible for police, taxes, public works, and agricultural improvements in his area.<sup>43</sup> A major consequence of replacing community government in Burma with these lifeless but efficient administrative units is seen from the Administration Report for 1931–32, noting that village headmen had performed their difficult tasks satisfactorily “in face of the apathy or opposition of the villagers.”<sup>44</sup>

Under Burmese government and early British rule, village and circle headmen had settled many local disputes. By 1891, however, British judicial administration had progressed to the point that a British Judicial Commissioner could set aside a decision by a circle headman, based on custom and affirmed by a Burmese lower judge, on grounds that it was contrary to Burmese law.<sup>45</sup> J.S. Furnivall considers this decision to mark a turning point. After that, the courts began the mechanical application of legal principles, replacing the personal and authoritative judgments of traditional Burmese law, much as the village community had been replaced by a mechanical administrative unit.<sup>46</sup>

#### 4. COLONIAL LAWS AND LEGAL DECISIONS

British laws in Burma generally functioned to advance larger economic interests. Professor Cady reviewed legislation proposed to improve conditions for the Burmese farmer, and found one reform bill after another rejected because of opposition from the commercial community in Rangoon.<sup>47</sup> Yet British judges were not merely pliable objects in the hands of commercial interests. Depending on their inclinations, British judges would decide against Englishmen and for Burmese insofar as each was seen to have violated the law.<sup>48</sup> The problem was the great gap between the law of the courts and the realities of Burmese existence.<sup>49</sup> Burmese were unfamiliar with British legal principles, and British judges understood little about Burmese law.

None of Jardine’s successors could carry out the synthesis of British and Burmese laws he had tried to begin. Although he had cautioned that *Dhammathats* compiled contemporaneous customary law and were not intended to be binding on future litigants in changed times,<sup>50</sup>

43. Cady, *supra* note 10, p. 143. Aung-Thwin and Aung-Thwin (2012), pp. 186–7 nicely describe the change in role of the village and circle headmen.

44. *Report on the Administration of Burma, 1931–32*, Rangoon, p. 77; cited in Furnivall, *supra* note 9, p. 75.

45. *Mi Pa Du v. Maung Shwe Bauk* (1891) S.J. 607; Compare *Maung Hmin Gyaung v. Maung Shwe Min* (1883) S.J. 233 (Jardine, J.).

46. Furnivall, *supra* note 9, pp. 73–7.

47. Cady, *supra* note 10, pp. 164–8.

48. Ba U, *supra* note 29, p. 130.

49. Maung Maung, *supra* note 20, p. 31; Harvey, *supra* note 9, p. 443.

50. *Ma Le v. Ma Pauk Pin* (1883) S.J. 225, 232.

few judges were as eager as he to study current Burmese customs. Judges increasingly interpreted outdated *Dhammathats* as custom because they were not familiar with relevant Burmese customs. The courts destroyed traditional Burmese law even as they sought to apply it.<sup>51</sup> By the end of the nineteenth century, moreover, the application of Burmese law was confined to a narrow area. A decision of the Full Bench of the High Court interpreting Section 13(1) of the Burma Laws Act, XIII, of 1898,<sup>52</sup> explained that:

[F]rom the time of its [Section 13's] enactment the rules of Buddhist law regarding [succession, inheritance, marriage or caste, or any religious usage or institution] were adopted by the state as the law which it would enforce as between Buddhists, but all other rules of Buddhist law were abrogated and ceased to be law in the proper judicial sense of the word, because the state, by necessary implication from the terms of the section, declared that it would not enforce them.<sup>53</sup>

For most areas of law the British imported wholesale codes designed and enacted in British India.<sup>54</sup> These included the Contract Act, Negotiable Instruments Act, Indian Evidence Act, Indian Penal Code, and the Criminal Procedure Code. By the 1920s, this process of adoption from India was fairly complete. Burma received from India, and other parts of the empire to a lesser extent, judicial interpretations and precedents as well.<sup>55</sup> After importing law alien to Burmese needs and culture, judges applied it mechanically rather than with concern for Burmese custom and understanding of law. The atmosphere of the courts became unreal, and the “gap between the law and the life of the people” became increasingly wide.<sup>56</sup>

The law of mortgaging land shows the kind of hardships the new law created. Traditionally in Burma a sale of land was conditional; the seller retained the right to redeem the land when he had the money. The buyer could not sell the land to a third party without first obtaining the consent of the original owner.<sup>57</sup> At first, British courts recognized this principle, one judge, for example, requiring the party claiming title by sale to prove that the sale was not conditional.<sup>58</sup> Soon, however, other courts found a conflict between the Burmese custom and the rule of evidence that the party not in possession had the burden of proving that the possessor's title was defective.<sup>59</sup> Fortunately, other judges aware of the custom were ready to find an inference that the Burmese had intended to sell his land conditionally and not absolutely.<sup>60</sup> Soon Indian Chettiars and other moneylenders originated loans in the form of a bill of absolute sale, to become effective if the loan was not repaid by a specified date. One judge, in a typically mechanical application of the law, simply noted that

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51. For the observations of a judge disturbed by this problem, see *In re Maung Thein Maung v. Ma Kywe* (1935) 13 Ran. 412, 419ff. (F.B.) (Page, C.J.); the concern of Page for Burmese law and customs is emphasized by a fellow judge on this case, Ba U, *supra*, note 29, pp. 101, 112, 116–17. On the general proposition, see Furnivall, *supra*, note 9, p. 134; and compare the cases cited in *supra* note 45.

52. Government of India, Legislative Department, *The Burma Code*, Third Edition, 1899, Calcutta.

53. *U Pyinnya v. Maung Law* (1929) 7 Ran. 677, 683. (F.B.).

54. The term “caste” in the 1898 law applied to Indians living in Burma.

55. Maung Maung, *supra* note 20, p. 29.

56. *Ibid.*, p. 31.

57. Shway (1910), p. 533.

58. *Nga Shwe Ku v. Nga Kway Ywe* (1877) S.J. 78.

59. e.g. *Ma Hla Gywe v. Ma Thaik* (1896) II U.B.R. (1892–96) 377.

60. *Ma Lon v. Maung Myo* (1893) II U.B.R. (1892–96) 350; *Maung Tun U v. Maung Nyun* (1892) S.J. 642; *Ma In Lun v. Ma Me Hla Bye* (1894) P.J. 85.

relevant British equity doctrine which could have benefited the Burmese litigant was inapplicable in Burma and found against him.<sup>61</sup> Another court noted the relevant Burmese custom, observed that it had been ignored by British courts in Burma, and found against the Burmese seeking redemption of his land.<sup>62</sup> Thus, the Burmese, who took out a mortgage without understanding that it meant an absolute sale in case of default, was surprised by the rigid application of British law. But the Chettiers and other moneylenders knew the law, wrote mortgage contracts accordingly, and benefited.

In many other areas the law of British courts conflicted with custom. Thus, according to Burmese custom, the interest on a debt could never exceed the value of the principal, regardless of the annual rate and duration of the loan. British courts never accepted this principle, again to the detriment of the Burmese, who did not understand.<sup>63</sup> Moreover, traditionally, contracts had been enforceable if they were just, not merely because they were written to be legally binding.<sup>64</sup> A traditional creditor-debtor settlement would be a compromise between the parties—who would then eat tea together—rather than the legal limit to which a creditor could force his debtor under colonial law. British legal administration even increased the Burmese divorce rate. Burmese divorce was by mutual consent, but traditionally had required concurrence of the village headman, who imposed delays and levied fees. Under British rule this ceased to be the headman's duty, and by 1850 an observer attributed the increase in the number of divorces to the removal of the traditional checks.<sup>65</sup>

The British system of justice was also deficient in that it was cumbersome and slow.<sup>66</sup> The village headman who knew the parties, or even the traditional Burmese appeals judge who knew the culture and people, were able to reach a decision in a fraction of the time it took a British court to render a decision of questionable justice. G.E. Harvey, himself a British judge in Burma, summed up British legal administration: "The atmosphere of the courts is unreal. Here are two instances [examples omitted]. And these were original trials. The appellate atmosphere was even more unreal ..."<sup>67</sup> In Professor Cady's words: "The final decision frequently had little relevance to objective fact and hence none to justice itself."<sup>68</sup> In the felicitous phrase of Michael Aung-Thwin, the British had imposed "order without meaning" on Burma and the Burmese.<sup>69</sup>

## 5. CONSEQUENCES OF THE NEW LEGAL SYSTEM

The consequences of Burmese disaffection with British justice soon made themselves felt. With the removal of religious sanctions from the proceedings, the Burmese treated court

61. *Maung Naung v. Ma Bok Son* (1902) 1 L.B.R. 192.

62. *Maung Shwe Maung v. Shwe Yit* (1891) S.J. 549.

63. Furnivall, *supra* note 9, p. 134.

64. A. Gledhill, "Burmese Law in the 19<sup>th</sup> Century," a paper made available to Maung Maung and cited in Maung Maung, *supra* note 20, p. 29.

65. Harvey, *supra* note 9, p. 440.

66. *Ibid.*, p. 443.

67. Harvey (1946), pp. 35–6.

68. Cady, *supra* note 10, p. 147.

69. Aung-Thwin (1985).

testimony as a game and began to perjure themselves.<sup>70</sup> In traditional Burma, prospective witnesses had had to take a serious oath before giving testimony. The oath enumerated terrible and fearsome curses for not telling the truth, such as leprosy, madness, vomiting blood, being eaten by tigers and crocodiles, being swallowed up by the earth, and sudden and violent death. The oath was taken only after full explanation by the judge of its meaning, and in a sacred place: “at the top of the stairs of the court building, or at the bottom of the stairs, or under a large tree nearby, or at a Buddhist temple, according to whether the value of the suit was small, moderate, large or very large.”<sup>71</sup>

In British courts, on the other hand, the Burmese would tell untruths, “partly because the court was too remote, too formal, too abstract for them to trust. The type of oath administered to witnesses by a British court carried no religious or moral sanction to the Burmese Buddhist and could hardly be administered with dignity by a non-Christian judge ... For witnesses as for lawyers trials became a game testing the wits rather than the veracity of participants.”<sup>72</sup> As court proceedings became incomprehensible and decisions less related to the justice the Burmese expected, the corruption of judges and witnesses became endemic. Furnivall reported:

Judges no longer have to justify their decisions to public opinion, and parties cannot tell whether an adverse decision is due to corruption or to the vagaries of western law. It is much easier, therefore, for judges to take bribes. Moreover, aggrieved litigants will usually attribute an adverse decision to corruption, and this view is encouraged by the fact that the decision usually goes in favour of the longer purse, which can better afford to fight the case and engage the more skillful advocate. As the general belief in corruption grows, the people are more ready to offer bribes, and judges are less fortified to resist them.<sup>73</sup>

Harvey estimated that, of the 650 judges in Burma before World War II, only the 50 Burmese and British on the higher courts were incorruptible: “The rest of the 650 were usually corrupt; even sympathetic observers did not think more than one in three could be honest.”<sup>74</sup>

Because they did not understand or even speak the language of the new courts, the Burmese had to resort to lawyers. At first only the mercantile community needed lawyers who could speak English and practise in the courts. But Burmese farmers increasingly had to retain attorneys as Indian moneylenders resorted to court to enforce their claims. The Burmese initially had to use Indian lawyers, but eventually Burma developed an excess of native lawyers. The imposition of the British legal system and the corresponding decline of traditional dispute resolution by local authority figures led to considerable litigation. As lawyers increased to an excessive number, they themselves began to promote lawsuits, and litigation became excessive, clogging the courts.<sup>75</sup>

These were the results within the legal system of the alienation of the people from the law. The consequences in the country as a whole of the economic forces projected by British law

70. For a nice example of the difficulties British courts had with false witnesses, see *Ma Po v. Ma Swe Mi* (1897) II U.B.R. (1897–1901) 79, 85.

71. Htin Aung, *supra* note 19, pp. 28–9; see Shway Yoe, *supra* note 57, pp. 517–19, for a similar oath in more elaborate form.

72. Cady, *supra* note 10, p. 146.

73. Furnivall, *supra* note 9, p. 176.

74. Harvey, *supra* note 67, p. 37; see also Cady, *supra* note 10, p. 146.

75. Furnivall, *supra* note 9, p. 136; Harvey, *supra* note 9, p. 443.

were even more severe. In spite of improved police administration, the Burmese turned increasingly to crime: "Under normal conditions of stable government, neighborly relations, and resident land ownership on a permanent family basis and in the absence of commercialized agriculture and speculation in land, epidemic crime had never been a serious social problem in Burma."<sup>76</sup> In Lower Burma, the incidence of crime became serious after about 1890. Grievances, previously settled by an authoritative arbitrator, amplified into emotional conflicts frequently resolved with the *dah* (long knife). Increasingly, police found it difficult to find dependable evidence of crime, especially with the growing unreliability of witnesses.

The British passed ever-more severe penal laws and meted out harsh punishments. The more vigilant the police were, the more crimes they uncovered. In 1912, violent crime was twice the level of 1904, with most of the increase in districts with substantial commercial agriculture. The prevalence of crime in Burma is especially striking if contrasted with conditions elsewhere. By 1913 there were, in proportion to population, three or four times as many people sentenced to long imprisonment as there were in any other province of British India.<sup>77</sup> Explanations of Burmese lawlessness include Furnivall's classic exposition of the devastating effects of the economic forces unleashed by the British against the previously peaceful Burmese.<sup>78</sup> Others have attributed Burmese crime to the frustrations felt by those Burmese who lacked the traditional legitimate outlets for the exercise of power and who could gain quick personal prestige, otherwise unachievable, through acts of daring and violence.<sup>79</sup> Besides increased individual and gang crime, incidents began to occur which challenged British authority more directly. Rangoon was shaken by bloody anti-Indian riots in the 1930s, in which Burmese labourers apparently spontaneously banded together to make physical war on their alien economic competitors.<sup>80</sup>

The Saya San Rebellion broke out in December 1930. It differed from riots and crime in that it was deliberately planned and organized with a newly crowned king and a trained, if unequipped, army. The insurgents relied on traditional cosmological principles, including tattooing, to give soldiers immunity from British bullets. The revolt "apparently was what anthropologists call a 'nativistic response' to the shattering impact of an alien civilization which was dissolving traditional society to its economic foundations on the one hand and denying its world-conception on the other."<sup>81</sup> It was April, 1932, before the British, with some 13,000 troops reinforced from India, broke up the larger resistance groups.<sup>82</sup> The Rebellion had involved only a small part of the Burmese population, significantly mostly in Lower Burma where agriculture was most commercialized, but was important in that it expressed farmer sentiment rather than activities of the Burmese intelligentsia in Rangoon. The latter remained largely content, until the coming of the Japanese, to promote political change in a non-violent way.

76. Cady, *supra* note 10, p. 174.

77. *Ibid.*, p. 175; Furnivall, *supra* note 9, pp. 138–9.

78. Furnivall, *supra* note 9, p. 141; see also Harvey, *supra* note 67, p. 40.

79. Cady, *supra* note 10, pp. 176–8.

80. See Collis (1938), pp. 143–83, for an eye-witness account of one of these riots.

81. Sarkisyanz (1968), p. 35.

82. See Cady, *supra* note 10, pp. 309–21, for a discussion of the Rebellion in some detail; also interesting are the comments of one of the three judges on the tribunal before which Saya San was tried. See Ba U, *supra* note 29, pp. 105–10.

By the outbreak of World War II, Burma was in serious economic trouble, only in part due to the Depression, and politically restless. The British had brought their law to Burma, but were unable to use it as a means of achieving their goal of social order. To again summarize with an observation by Harvey: “Indeed, at the risk of being misunderstood, I say not only did crime increase under British rule, it is even arguable that it was caused by British rule.”<sup>83</sup>

## 6. CONCLUSION

Traditional Burmese legal doctrines had much in common with those of the British, for example the rules of evidence or the law of torts, which included the concepts of contributory negligence, presumptions, vicarious responsibility, and absolute liability.<sup>84</sup> Traditional Burma had judges and lawyers and standards of ethics all of which are quite familiar to us today. Where Burmese law significantly differed, beyond substantive law in matters such as those of contract, was its goal of reconciling parties rather than merely imposing on them an abstract notion of justice as prescribed by law. This customary law might not have been able to survive without changing to meet the needs of a depersonalized society outside the village in which each person knew the others and depended on them economically and socially.<sup>85</sup> But systems of law which have grown more slowly within evolving institutions have been able to adapt better to the changes of industrialization and economic development. That was the experience in neighbouring Thailand, for example, which retained sovereignty while undergoing an economic development similar to, but less disruptive than, Burma’s.<sup>86</sup>

The problem in Burma was more profound than a simple failure of a viable legal system to adapt to new economic forces. What brought the severe disruption in Burma was that the traditional legal system had no opportunity to evolve. Rather, it was destroyed along with the traditional government and institutions. Law in Burma changed from its position as an expression of popular needs and familiar custom to instead serve as an instrument of an imposed central administration with customs and goals alien to the subject population. British rule in Burma stands in sharp contrast to a sustainable legal system that evolves to meet new economic circumstances. It is an example, rather, of the difficulty, if not impossibility, of rapidly and radically altering a legal order from a position of power above and outside a population which has not been instructed in the workings of the new law or persuaded that the new system will better serve popular needs than did the old.

The rule-of-law literature is now being enhanced by looking at this issue across multiple countries. Daniels, Trebilcock, and Carson have taken the first important step by looking at rule-of-law outcomes in eight formerly British-controlled territories, including Burma.<sup>87</sup> They conclude their survey with the observation that: “As the body of experience reviewed ... reveals, the most egregious failures of British imperial authorities to instill a long-standing commitment to legality in its former colonies can be traced to a failure to take local knowledge and experience seriously.”<sup>88</sup> That was most certainly true of colonial Burma.

83. Harvey, *supra* note 67, p. 38.

84. Htin Aung, *supra* note 19, pp. 27–38.

85. A. Gledhill, as cited in Maung Maung, *supra* note 20, pp. 28–9.

86. See e.g. Cady (1964), pp. 494–6.

87. Daniels *et al.* (2011), pp. 111–78.

88. *Ibid.*, p. 176.

The powerful colonial administration was able to bring about the disintegration of the traditional legal process; it was unable to create a viable, or even stable, substitute. It would be valuable for further cross-country research to try to identify primary factors such as the anthropology and sociology applicable to elites and populations, economic roles, and the strength of institutions mediating between the imperial power and popular conceptions of law, and the extent that they play important parts in determining whether an external legal system comes to be perceived as legitimate or not.<sup>89</sup>

Myanmar today needs to be aware of the possibility that the multinational legal systems to which major investors are accustomed, and major contractual arrangements with influential members of today's Burmese elite, may channel and amplify strong economic forces, rather than integrating them with the country and its culture. If that happens, then the legal system again may be part of a process that weakens Myanmar's institutions rather than helping to encourage their stability, strength, and evolution.

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### *List of abbreviations*

S.J.	Selected Judgments and Rulings, Lower Burma (1 Vol., 1872–92)
P.J.	Printed Judgments, Lower Burma (1 Vol., 1893–1900)
L.B.R.	Lower Burma Rulings (11 Vols., 1900–22)

89. Another significant variable, definitely relevant for Burma, may relate to the degree that a colonial population welcomes, acquiesces in, or largely rejects, the encroaching imperial power. See Robinson (1972).

II U.B.R. (1892–96), etc.	Upper Burma Rulings (Civil) (5 Vols., 1892–1909)
Ran.	Indian Law Reports, Rangoon Series (14 vols., 1923–37)
(F.B.)	The High Court was sitting in Full Bench

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