

# Case Note:

## Comparative Law Aspects of the *Doe v Unocal* Choice of Law Hearing

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The classification of legal systems into families has interested academic comparative lawyers for more than a century.<sup>1</sup> But, since the outcome of litigation so seldom turns on classification, bench and bar have tended to leave this issue to the academics. The choice of law hearing in *John Doe I and others v Unocal Corporation and others*<sup>2</sup> was an exception in that both sides argued that classification was relevant to the outcome of the case. This note summarises the arguments raised as to whether Myanmar law belongs to the common law family, and then considers whether classification into legal families should play a dispositive role in cases of this kind.

In 1996, 14 Burmese villagers filed action against Unocal claiming compensation for various torts committed by the Burmese military during the construction of an oil pipeline eastwards into Thailand from the Andaman Sea. The pipeline is a joint venture between Unocal (and other oil companies) and the Myanmar Gas and Oil Exploitation Department. In the June 2003 hearing, Judge Victoria Chaney heard argument and evidence regarding two choice of law motions filed on behalf of Unocal. The first motion asked her to apply Bermudan law to the issues in the case (since Bermuda was where the joint venture documents were signed). Written declarations by two experts on Bermudan law were before the court. The second motion asked her, in the alternative, to apply Myanmar law. Three experts on Myanmar law gave written and oral evidence. In a reserved judgement, Judge Chaney denied both motions and undertook to apply Californian law to the issues. Below is a summary of the expert evidence that she heard on behalf of the defendants from Khin Maung Thein, professor emeritus of Mandalay University Law Department, and on behalf of the plaintiffs from myself.<sup>4</sup>

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<sup>1</sup> I have described developments since 1900 in the introduction to Huxley, A (ed) (2002) *Religion, Law and Tradition: Comparative Studies in Religious Law* RoutledgeCurzon.

<sup>2</sup> Superior Court of the State of California for the county of Los Angeles, Saturday 28 June 2003. Judge Victoria Chaney delivered written judgment on the choice-of-law motions on 31 July 2003. Her judgment may be accessed as a pdf file, available at: <[www://ccr-ny.org](http://www://ccr-ny.org)>. I cite this by page number alone.

<sup>3</sup> For most purposes I prefer to refer to the nation as Burma. However, it is convenient to distinguish law before and after the military coup by distinguishing 'Burmese law' (prior to 1988) from 'Myanmar law' (after 1988).

<sup>4</sup> Professor Myint Zan, University of the South Pacific Law Department, was also called as an expert witness by John Doe. I have been advised not to read his testimony, to avoid the risk of 'cross-pollination'.

In Unocal's view, Burmese law has been part of the common law family ever since the British conquest of Mandalay in 1885. In John Doe's view, this was true only until the 1970s when Burma restructured its law, lawyers and constitution. The following account of events between 1885 and 1965, at least, is uncontroversial. From 1886 to 1937, Burma was ruled from Calcutta as part of British India. The legal policies applied by the British in Burma were the policies then in vogue in Calcutta. During the 20 years following the Indian Mutiny (1858), rival visions of Anglo-Indian law were in play. The utilitarians (such as James Strachey and James Fitzjames Stephens) favoured codifying Anglo-Indian law, while the historicists (such as Mountstuart Elphinstone and Henry Maine) favoured ancient law texts and the primacy of custom. By 1885, when Calcutta instigated the Third Anglo-Burmese War, the rivals had reached a compromise: there would be no more expensive codification projects, whether of the English or the native law. Instead, matters of marriage, inheritance, religion and caste would continue to be decided by colonial judges applying pre-colonial law-texts. This was the template to which, between 1886 and 1900, Anglo-Burmese law was constructed.

It follows that the sources of law in British Burma were threefold: the Anglo-Indian Codes governed topics like Procedure, Evidence, Contract and Local Government; English case law governed Tort and Equity; and the law-texts of pre-colonial Burma governed Marriage and Inheritance. What tied the whole together so that it deserved the label 'common law' was the way the legal profession was organised and trained. Audience rights before the Anglo-Burman courts mirrored those in England: serious cases were reserved for barristers. There was a Rangoon bar and a Mandalay bar, each adopting the institutional structure of London chambers. The route to qualification as an Anglo-Burmese barrister lay through the Inns of Court in London and from 1880 onwards a steady stream of Burmese followed it. These London-educated barristers came to dominate public life in British Burma during the 1920s and 1930s. As a result, Burmese politics spoke with a distinctly legal accent until the Japanese conquest of 1942. The Allies re-conquered Burma in 1945, and Burma gained independence in 1948. Like India, it chose not to recognise the English crown. Unlike India, it decided to sever all links with the Commonwealth. Parliamentary democracy lasted until the military coup of 1962, which installed a socialist one-party state. From 1920 onwards, the law departments at the universities of Rangoon and Mandalay had evolved to cover all stages of legal education. After 1962 they acquired a monopoly: no more Burmese law students were allowed to go to London. Between 1948 and 1962, although Burma became poorer and more isolated, it remained a member of the common law family.

As to the effect of events between 1962 and 1975, the experts disagreed. During this period Maung Maung restructured Burmese law.<sup>5</sup> As judge, he gave judgment in an important 1966 case on the sources of Burmese law; as minister, he was responsible for the new constitution of 1975 and for the reforms to the legal profession and judiciary in 1972. In my opinion, the cumulative effect of these three changes was to dislodge Burma from the common law family into the socialist law family. In Khin Maung Thein's opinion, they had no such drastic effect, and Burmese law has remained a common law system right through the anti-socialist military coup of 1988 up to the present century. I said that the 1966 case directed judges to seek Burmese law not in the common law,

<sup>5</sup> Maung Maung (1925-1994) was called to the bar at Lincoln's Inn. During the 1950s he practised as a barrister in Rangoon and taught as a lecturer at Rangoon Law School. In the 1960s he held visiting fellowships in the law schools of Utrecht and Yale. He remained politically close to Ne Win throughout his life and, for a few turbulent months in 1988, held Burma's highest political office.

but in words that echoed the manifesto of the Burma Socialist Programme Party. He disagreed with my reading of this case, stating that judicial interpretation of the laws had evolved little during that period. I said that Article 202(f) of the 1975 Constitution (which states that 'Existing laws [...] are to be interpreted or implemented by the central or local organs of state power in the spirit of this Constitution') instructed the lay judiciary to interpret Burma's law in the light of the one-party state's political aims which are, to cite the Preamble, to 'faithfully follow the leadership of the Burma Socialist Programme Party, build a socialist economic system by the Burmese Way to Socialism'. He rejoined that Article 202(f) was not inconsistent with the principle of judicial decision-making as known in the common law. I said of the 1972 reforms of the judiciary that the replacement of legally trained judges by untrained laymen took Burma out of the common law family. He replied that a common law system is characterised by case law, and it is irrelevant whether or not the people who decide such cases are legally trained.

Having heard our testimonies, Judge Chaney remarked that 'it is questionable whether an intact body of law survived the socialist regime of the 1960s and 1970s, which ended the common law system in Burma' (9). Here is that rare phenomenon, a judicial finding of fact on comparative law classification. It is not clear whether this finding contributed to her dismissal of the second motion. The narrowest basis for the decision is that the defendants had failed to discharge their evidentiary burden at stage one of California's three-stage test to determine the choice of law. Since she cannot authoritatively identify what Myanmar law is, she must assume it to be identical with California law on all relevant points. Therefore, the opportunity to conduct a stage three 'comparative impairment' analysis never arose. The critical finding of fact, then, is that Myanmar law is unknowable. On this scale, does the fact that Myanmar left the common law world 30 or 40 years ago weigh heavy or light?

In my submission, it should be practically weightless. We should not need to discuss classification in choice of law cases. It can affect choice of law only if we accept the presumption that common law systems are generally the type of legal systems that California should recognise. For this to be workable, we would have to be able to identify which legal systems had belonged to the common law family, and what circumstances might suffice to take them out of the family. Common law systems can certainly still be found in North America and the British Isles, but elsewhere there is disagreement as to the effect of post-colonial changes on commonwealth countries. Does Pakistan remain a common law system now that its Constitution declares the Qur'an to be the grundnorm of Pakistani law? If Israel has inherited a common law system from the British mandate in Palestine, why is this not true of Egypt and Iraq, whose relationship with the British Empire after 1918 was broadly similar? Zimbabwe and Antigua are clearer post-imperial members of the family. It could be argued that each of them, on account of different delinquencies, has removed itself from the common law fold.

When Judge Chaney's finding on classification is seen in the context of her judgment as a whole, it seems unlikely to have tilted her scales. The focus of her judgment (and, still more, of her conduct of the hearing) was not on whether Myanmar law is common law, but on whether it actually functions. What she elicited from the experts were their answers to such questions as are law reports published? How independent are the judges? Is the government bound by rules it has announced beforehand? Can judges outside Myanmar sufficiently learn what its law is?

Judge Chaney's approach is, I submit, the right one. Choice of law issues such as arise in *Doe v Unocal* should turn on observed fact (what is Myanmar law actually like today?), not on comparative law classification. To recognise a presumption in favour of

common law systems is to unnecessarily complicate the two essential questions: Can California apply Myanmar law? Should California apply Myanmar law?<sup>6</sup>

<sup>6</sup> On 14 December 2004, lawyers for Unocal and John Doe announced that they had reached agreement, in principle, on a settlement of the litigation.