

# *Promiscuity, Polygyny, and the Power of Revenge: The Past and Future of Burmese Buddhist Law in Myanmar*

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## **Abstract**

Myanmar is the only Buddhism-majority country in the world that has developed and maintained a system of family law for Buddhists enforced by the courts. This article considers the construction of Burmese Buddhist law by lawyers, judges, and legislators, and the changes made through legislative intervention in 2015. It begins by addressing the creation and contestation of Burmese Buddhist law to demonstrate that it has largely been defined by men and by its perceived opposites, Hinduism and Islam. Three aspects of Burmese Buddhist law that affect women are then examined more closely. First, Burmese Buddhist law carries no penalties for men who commit adultery, although women may risk divorce and the loss of her property. Second, a man can take more than one wife under Burmese Buddhist law; a woman cannot. Third, restrictions on Buddhist women who marry non-Buddhist men operate to ensure the primacy of Burmese Buddhist law over the potential application of Islamic law. This article deconstructs the popular claim that women are better off under Burmese Buddhist law than under Hindu law or Islamic law by showing how Burmese Buddhist law has been preoccupied with regulating the position of women. The 2015 laws build on this history of Burmese Buddhist law, creating new problems, but also potentially operating as a new source of revenge.

**Keywords:** Burma, Myanmar, Buddhist law, courts, Islam, women, marriage, polygyny, divorce, personal law

“We wanted to catch the rabbit, but instead we caught a cat” (Ma-Ba-Tha, 2015).

## 1. INTRODUCTION

Myanmar is the only Buddhist-majority country in the world that has developed and maintained an official body of family law for Buddhists. Burmese Buddhist law is a construction of principles that apply to lay Buddhists and regulate matters of marriage,

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inheritance, and divorce. Burmese Buddhist law is a selective body of law that is not based on Buddhist religious texts and it is not “customary” in the sense of being a collection of customs passed down over time.<sup>1</sup> The law does not apply to the monastic order, nor is it related to the *vinaya*<sup>2</sup> (the monastic code of conduct). In this article, I use the term “Burmese Buddhist law” to indicate that it is an area of law specific both historically and in its application to lay Buddhists in Myanmar. While the correct term for this body of law has been hotly debated in Myanmar, today it is generally referred to as “Myanmar customary law” (*Myanma dale tone dan ubade*).<sup>3</sup> It is an area of law that is not codified, although it has been modified by legislation in relation to adoption, inter-religious marriage, women’s inheritance, and divorce.<sup>4</sup> In particular, two new laws—the Monogamy Law and the Buddhist Women’s Special Marriage Law—alter Burmese Buddhist law, although this has gone largely unnoticed in contemporary debates.

This article considers the construction of Burmese Buddhist law by legal practitioners and courts.<sup>5</sup> It focuses on recent legislative reforms, reflecting on both the influence of monks on the law-making process and the tension between the authority of the legislature and the courts. Unlike neighbouring Thailand, where the legal enforcement of monogamy in the 1930s was said to be the result of foreign condemnation and the forces of modernization,<sup>6</sup> the enactment of a Monogamy Law in 2015 was at the initiative of monks based on the implicit presumption that it is Muslims (not Buddhists) who practise polygyny and that this practice needs to be eradicated. The enactment of this law has led to reports of criminal changes.

Several days after the Monogamy Law was introduced in Myanmar, the first criminal charges were laid.<sup>7</sup> A Muslim man co-habiting with a Buddhist woman was arrested and charged after being reported to police by Ma-Ba-Tha. Ma-Ba-Tha, also known by its official English name, the Patriotic Association of Myanmar, was formed in 2013 as a group of radical Buddhist monks that portrays itself as promoting a nationalist Buddhist cause yet has a predominately anti-Muslim agenda.<sup>8</sup> In this reported case, both the man and the woman were said to be married to other partners, yet only the man was charged. Although the Monogamy Law does not consider religion to be relevant to the crime, the news report noted that the woman denied knowing that the man was Muslim. Ma-Ba-Tha claimed the case as a victory in their anti-Muslim campaign.

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1. Huxley (1988–89), p. 24.

2. See Huxley (2001b).

3. The reference to “Myanmar” rather than “Burma” here reflects the fact that the military changed the name of the country from Burma to Myanmar in 1989. The people of Myanmar are still known as “Burmese.” The debate on what is the most appropriate term for this area of law is not the focus of this article. For a recent contribution to the argument that religion under colonialism was a construct and technique of power, see Turner (2014). For the way in which law has been used to construct religion, see Crouch (2015).

4. This includes the Kittima Act and the Buddhist Special Women’s Marriage and Inheritance Act 1954, and four laws passed in 2015: the Population Control Law No. 28/2015, the Conversion Law No. 48/2015, the Buddhist Women’s Special Marriage Law No. 50/2015, and the Monogamy Law No. 54/2015 (in Burmese). This article focuses specifically on the latter two laws. The Monogamy Law applies to all regardless of religion, although in this article I focus only on its impact on Buddhists.

5. This article is unable to review the literature on women in Myanmar more generally: see e.g. Ikeya (2011); Ikeya (2013); Harriden (2012); Than (2011); Than (2013). Instead, the focus is more narrowly on women in relation to Burmese Buddhist law.

6. Loos (2006).

7. Aung Kyaw Min (2015).

8. For more on Ma-Ba-Tha, see Nyi Nyi Kyaw (2016), pp. 183–210.

Notwithstanding this early case, a very different pattern emerged in terms of cases that have been reported to date. Up until the end of 2015, over 25 reports were made by Burmese Buddhist women against their *Buddhist* husbands on allegations of adultery and polygyny, and at least one report of polyandry. One example is a Buddhist woman, Daw Aye Thet Maw, who reported her promiscuous Buddhist husband to the police in Hlaing Tharyar Township.<sup>9</sup> The couple were married for almost 20 years and have two children, yet the wife claimed to know of her husband's affair for several years. The police were said to be pursuing charges of adultery against him under section 13 of the Monogamy Law, which attracts a seven-year jail sentence. As a result of cases like this, Ma-Ba-Tha admitted it had got things wrong: they wanted to catch the rabbit (Muslims), but instead had caught the cat (Buddhists). In this way, Ma-Ba-Tha's law reform project was a failure: the law was not supposed to give Buddhist women the power of revenge over their unfaithful Buddhist husbands.

What are we to make of these incidents and of the Monogamy Law in Buddhist-majority Myanmar? What does it have to do with ideas about the family, women, and Burmese Buddhist law at this time of political transition? Which institution—the legislature, the courts, or monastic authorities—have the power to define the scope, function, and limits of Burmese Buddhist law?

In seeking to answer these questions, the article begins by addressing the contested history of the compilation of Burmese Buddhist law to demonstrate that it is a body of law that has largely been defined by men and in relation to its perceived opposites: Hinduism and Islam. The focus of this article is primarily on the contemporary era, although it is necessary to demonstrate briefly how the history of the construction of Burmese Buddhist law is relevant to the present. The article then takes a thematic approach to consider the representations of Burmese Buddhist law through key secondary legal sources, parliamentary records, and court decisions, including compilations of legal principles by eminent legal practitioners, and the court decisions of the Supreme Court.

This article addresses the claim often made by jurists that under Burmese Buddhist law women are better off than under Hindu law or Islamic law. Instead, I suggest that scholars should first look to the position of Buddhist women as compared to Buddhist men, and the position of first wives as opposed to second wives under Burmese Buddhist law. When they do, the precarious position of women under Burmese Buddhist law becomes more apparent. This article contributes to scholarship that challenges the thesis of the "high status" of Buddhist women<sup>10</sup> by examining three aspects of Burmese Buddhist law. First, I consider the acceptance under Burmese Buddhist law of promiscuity by Buddhist men, and the greater difficulties a Buddhist wife, as opposed to her husband, faces to obtain a divorce. Second, I look at the permissibility of men taking more than one wife under Burmese Buddhist law (polygyny), and the status and rights of "parallel" wives. Third, I demonstrate how restrictions on Buddhist women marrying non-Buddhist men (who are presumed to be Muslim) have been used to enshrine the ascendancy of Burmese Buddhist law over Muslims and displace the application of Islamic law. I consider both Burmese Buddhist law

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9. Toe Wai Aung (2015).

10. The most recent publication is Than, *supra* note 5; see also Harriden, *supra* note 5; Ikeya (2006); and Ikeya, *supra* note 5.

and the 2015 laws in the present tense, as both are in operation: Burmese Buddhist law appears to apply to marriages pre 2015, while the Monogamy Law applies post enactment.<sup>11</sup>

Through this exploration of promiscuity, polygyny, and the power of revenge, I demonstrate the preoccupation Burmese Buddhist law has with regulating women and the way legislative reform has in part reinforced, but also altered, this area of law. This contest of authority between the courts, law-makers, lawyers, and monks over what constitutes Burmese Buddhist law reflects past historical debates, but also creates new problems and potentially a new source of revenge.

## 2. CREATING AND CONTESTING BURMESE BUDDHIST LAW

How did Myanmar come to be the only Buddhist-majority country in the world that boasts a special system of family law for Buddhists? Who or what sources provide the foundation for defining what Burmese Buddhist law is? The origins of Burmese Buddhist law purport to be derived from the pre-modern Pali and Burmese legal genre called the *dhammathat*—sets of written laws that were used to adjudicate cases in the time of kings. Although a diverse collection of texts, British colonists attempted to identify or compile a “definitive” set of the *dhammathat*, which could then be applied as customary law by the colonial courts. I demonstrate that the Burmese ultimately rejected the idea that any one compilation of the *dhammathat* was definitive, and this view has increased the importance of legal texts and books on Burmese Buddhist law as a guide for lawyers and the courts.

Prior to full British colonial rule in the 1880s, the area that we know today as Myanmar was ruled by a series of kingdoms. The first kingdom to be established by Burmans was known as the Kingdom of Pagan and there is clear evidence that a distinct legal culture developed over time.<sup>12</sup> The primary sources of this pre-colonial legal system date to the twelfth century. These sources indicate that a body of written law known in Burmese as the *dhammathat* were used in the adjudication of cases.<sup>13</sup> The *dhammathat* do not easily equate to a common-law understanding of law reports, codifications of law, or religious texts.<sup>14</sup> They are generally structured around 18 major titles of law that comprise criminal, personal, and economic matters; it also contains extensive rules on legal procedure, kingship, and monastic law.<sup>15</sup>

Up until the colonial era, monks, kings, and royal administrators regarded the *dhammathat* as authoritative Buddhist literature on a par with the Buddhist canon.<sup>16</sup> While this legal tradition developed and changed over time, it was disrupted by the Anglo-Burmese Wars (1824–26, 1852–53, and 1885). The ultimate demise of the Konbaung dynasty (1752–1885)

11. The question of the potential retrospective application of the Monogamy Law is a live one, and has not yet been considered by a court to my knowledge.

12. Huxley (2008), p. 184; Crouch (2014).

13. For an analysis of the significance of the *dhammathat* to Burmese legal culture, see Huxley (1997). For a more extensive explanation of its Pali etymology, see Lammerts (2010).

14. Huxley (1988–89), p. 24.

15. See generally Lammerts, *supra* note 13.

16. Lammerts (2013), pp. 118–44.

and its system of law in Burma occurred alongside the Third Anglo-Burmese War in 1885 in which the last monarch, King Thibaw, and his family were captured by the British and shipped off to India. With this final stage in the annexation of Burma, local legal traditions were subsumed under the British common law.

Some of the sources of law from the time of the kings were used to shape the construction of family law for Buddhists. This included efforts to identify, compile, and offer commentary on the *dhammathat* in the early colonial period. This is typified in the work of colonial authorities such as John Jardine (1844–1919) and his *Notes on Burmese Law*. Jardine’s work arose from his position as Judicial Commissioner of British Burma and the cases he decided raised issues foundational to Burmese Buddhist law. In addition, Em Forchhammer (1851–90), a Government Archaeologist of British Burma, wrote a formative essay towards the end of his term.<sup>17</sup> He argued that the *dhammathat* literature of the 1880s was derived from a single Mon work, although this interpretation has subsequently been called into question.<sup>18</sup> The work of Jardine and Forchhammer contributed to broader debates concerning which compilations of the *dhammathat* are considered to be authoritative. Partly because the Manu-gye was the first to be translated into English in 1847,<sup>19</sup> British authorities decided that the Manu-gye text was to be the pre-eminent source of Burmese Buddhist law. This decision followed from the presumption that it was the practice of each new ruler to introduce a new body of law to replace the old one.<sup>20</sup> When the translation of a Digest of 36 *dhammathat* was published by U Gaung,<sup>21</sup> one of the former ministers of the last Burmese king who later served under the colonial regime, this cast doubts on the definitive nature of the Manu-gye. After independence, the courts (now filled with Burmese judges) rejected the idea that the Manu-gye took pre-eminence. The consequence is that today courts may choose to refer to any of the multiple volumes of the *dhammathat* available. These sources have also been the primary scholarly focus on Burmese Buddhist law to date.<sup>22</sup>

While courts may still refer directly to the *dhammathat*, they rely on commentaries of case-law as a guide for most settled areas of law. Today, the most popular and authoritative law book on Burmese Buddhist law is U Mya Sein’s 12th edition of his book entitled *Myanmar Customary Law* (in Burmese). His book was first published in 1955 and the most recent edition was published in 2014, outlasting the writings of all other legal practitioners in this area. U Mya Sein is a well-known lawyer based in Mandalay who is recognized for his expertise in Burmese Buddhist law. He is the author of numerous law books, compilations, and summaries of court decisions. Drawing on his insider access to unreported court decisions from Yangon and Mandalay in the 1970s to 1990s, his text updates many older sources.

While U Mya Sein’s text is the most current in terms of recent case-law, it inevitably draws heavily on a wide range of older sources. Classic sources from the early 1900s to the 1960s

17. Forchhammer (1885).

18. Huxley (1996b).

19. The Laws of Manu are considered to be authoritative books of the Hindu code. In Myanmar, references to Manu have been called “The Buddhist Manu,” see Lammerts, *supra* note 13.

20. E Maung (1970), p. 4, referring to the work of Forchhammer who was a proponent of this view.

21. Gaung (1908–09).

22. Professor Andrew Huxley was the leading scholar in this area; see Huxley, *supra* note 14, (1995), (1996a), (1996b), *supra* note 13, (1998), (2001a), (2001b), (2004), *supra* note 12, (2014). Other scholars include Okudaira (2003), (2000), (1986); and Myint Zan (1999).

include popular legal commentaries on Burmese Buddhist law that continue to be cited by the courts, lawyers, and legal academics. All are written by men,<sup>23</sup> although not all are Burmans, but some are Indians who worked as lawyers in Burma. These writings generally focus on the substance, origins, and principles of Burmese Buddhist law as developed by case-law. These texts evince a shift in understandings of Burmese Buddhist law. The most prominent example is the question of its origins. The original thesis was that Burmese Buddhist law was derived from Hindu law. A shift took place as Burmese authors insisted that Burmese Buddhist law does not have its origins in Hindu law.<sup>24</sup> The contrast with Hindu law is often made in the context of the position of women. The differences in the inferior status of women under Hindu law are stressed compared with the rights of women under Burmese Buddhist law.<sup>25</sup> It has often been noted that the practice of purdah is not recognized in Myanmar.<sup>26</sup> Other authors such as Mi Mi Khaing have noted that “The Burmese do not hold the Hindu view of women as the irrational sex.”<sup>27</sup> This aversive approach defines Burmese Buddhist law by what it is not. The accepted approach today is to reject the thesis of the Hindu origins of Burmese Buddhist law and to recognize that it is influenced by the practice and customs of Buddhism in Burma.<sup>28</sup> In the same way as Burmese Buddhist law has been characterized in contrast to Hinduism, so too has its relation been with Islam. As I discuss in a later section, Burmese Buddhist law is often said to be more favourable to women than Islamic law.

Another key source is Lahiri’s *Principles of Modern Burmese Buddhist Law*, which has been published in seven editions over a period of 30 years, and is still in wide circulation today.<sup>29</sup> Sisir Chandra Lahiri was an advocate of the High Court of Rangoon as early as the 1920s. He was part of the bar at Henzada, although, by 1957, he is listed as a resident in Calcutta. The book was recommended by the Governor in Council for study and preparation for the Advocateship, Pleadership, and Indian civil service examinations in the 1930s and 1940s, which is an indication of the recognition the book received in official government circles. This was no doubt in part because it was a concise English summary of case-law up to this time.

At the Department of Law at the University of Yangon today, Lahiri’s book is prescribed for law students alongside other key references such as U Mya Sein’s book and Dr E Maung’s *Burmese Buddhist Law*.<sup>30</sup> Dr E Maung (1889–1972) was a lawyer and academic at the University of Rangoon (1926–32), and later a judge of the High Court and Supreme Court.<sup>31</sup> He also served in several ministerial positions in the independence

23. Lahiri (1957), p. 182. While Daw Mya Sein (the daughter of U May Oung and a well-known historian in her own right) has written on Burmese Buddhist law (see Mya Sein (1962)), I do not cite this because I did not come across any evidence that the courts, lawyers, or law professors refer to this text. Her work does not appear to have had a significant influence on how Burmese Buddhist law is understood and practised today.

24. See e.g. E Maung (1951), p. 6; Hla Aung (1958); Maung Maung (1963), pp. 5–6.

25. E Maung, *supra* note 20, p. 3.

26. See e.g. Mya Sein (1958); Maung Maung, *supra* note 24, p. 49. It is unclear whether the popular reference to purdah is referring to the practice among Hindu or Muslim communities.

27. Mi Mi Khaing (1984), p. 17.

28. One dissent is by foreign scholar Lammerts, who, based on his study of hundreds of palm-leaf *dhammathat* manuscripts, argues that this debate has been “entirely misguided and based upon inaccurate presuppositions that stipulate strict sectarian divisions in the legal culture”: Lammerts, *supra* note 13, p. 487.

29. The seven editions stretch from 1925 when it was first published up until 1957.

30. He is also the author of *The Expansion of Burmese Law*, which is an analysis of the *dhammathat*.

31. Huxley, *supra* note 22.

government. His book builds on and updates the work of U May Oung,<sup>32</sup> a judge of the High Court of Judicature at Rangoon. E Maung's book combines discussion of the *dhammathat* and case-law with his own recollection of cases he heard as judge (as documents were lost during the occupation of Burma by Japanese during World War II).<sup>33</sup> Like many books of this kind, case-law was expounded not to help lawyers or judges *locate* relevant case-law (as citations are often incomplete, compounding the difficulty of locating these decisions), but rather to offer a *definitive restatement* of the law. These law textbooks therefore became a source of law in themselves.

Finally, the study and practice of law in Myanmar never stray far from the influence of the infamous Dr Maung Maung (1924–94). His book, *Law and Customs in Burma and the Burmese Family*, is considered to be a staple text. He worked in the Office of the Attorney General in the 1950s, before being appointed a judge and the Chief Justice under the socialist regime.<sup>34</sup> He went on in the 1970s to serve as a member of Ne Win's Revolutionary Council, and as a member of the committee that drafted the socialist 1974 Constitution. His work demands scholarly attention because of his immense influence on the legal system.

The work of Burmese authors such as Lahiri, E Maung, Maung Maung, and U Mya Sein are key references cited in unpublished PhD theses on Burmese Buddhist law.<sup>35</sup> These books are also important because, in the absence of legislation and easy access to the *dhammathat*, the writings of lawyers and commentaries on the decisions of the courts have become the key sources of Burmese Buddhist law. The way in which these references represent Burmese Buddhist law has had a significant influence on how Buddhist women are judged.

### 3. JUDGING THE BUDDHIST WOMAN

Burmese Buddhist law exists within a legal framework in Myanmar that recognizes religious-based laws for family-law matters, except where it is modified by statute. Burmese Buddhist law exists alongside Anglo-Muhammadan law and Anglo-Hindu law.<sup>36</sup> In this way, the idea that the world religions<sup>37</sup> of Buddhism, Islam, and Hinduism have their own separate family-law regimes is embedded in the Myanmar context. This was introduced by the Burma Laws Act 1898, which is still in effect today. The law only recognizes customary law to the extent that it deals with matters of “succession, inheritance, marriage or caste, or any religious usage or institution.” This area of law largely consists of case-law by judges, although there is some legislation specifically for Hindus and Christians, based on similar legislation passed in British India. While other countries have codified their systems of personal law in more recent decades, attempts to codify Burmese Buddhist law have failed.<sup>38</sup>

32. See U May Oung & E Maung (1926), and U May Oung (1919). E Maung also notes that he learned from U Tha Gywe, the author of several books (1910–11), (1919–20).

33. E Maung, *supra* note 21, p. 41.

34. See Huxley, *supra* note 18.

35. See e.g. Yee Yee Cho (2007); Khin Phone Myint Kyi (2006); and Nilar Soe (2007).

36. Burma Laws Act 1898, s. 13(1). For a recent analysis of Islamic personal law, see Crouch (2016).

37. On the idea of the concept of world religions as a creation perpetuated by Europe, see Masuzawa (2005).

38. Maung Maung, *supra* note 24, p. 68.

Courts are required to apply Burmese Buddhist law in cases in which both parties are Buddhist unless the issue has been addressed by legislation. This caveat is a nod to residual common-law ideas of the sovereignty of the legislature because it allows parliament today to have the final say on family law. In the colonial period, the Registration of Kittama Adoptions Act 1939 modified case law<sup>39</sup> in order to regulate the inheritance rights of an adopted son or daughter according to Burmese Buddhist law. In the same year, the Buddhist Women's Marriage and Inheritance Law was passed, and later updated in 1954. This law requires the registration of a marriage between a Buddhist women and a non-Buddhist man, and stipulates that any matters of inheritance, property rights, divorce, and guardianship are to be determined according to Burmese Buddhist law (regardless of the religion of the husband). Aside from this, parliament showed little interest in regulating family law. From 1974 to 1988, the unicameral socialist parliament did not legislate family law, and neither did the ensuing military regime (1988–2010). However, since 2015, several laws have modified Burmese Buddhist case-law. I focus on two here: the Monogamy Law and the Buddhist Women's Marriage Law. As the initiative of a group of radical monks, these laws were said to be for the protection of the country and of Buddhism, and intended to restrict Muslims in particular. Yet this law-making campaign by Ma-Ba-Tha has obscured how these laws, in fact, affect Burmese Buddhist law.

### 3.1 *Promiscuous Buddhist Men and the Crime of Adultery*

How does the Monogamy Law change Burmese Buddhist law in relation to adultery? I identify two key practices that the law alters: first, adultery on the part of a husband is now a ground for a wife to obtain a divorce; and second, if adultery is proven, the wife can claim all the property from the marriage. Both of these principles run contrary to established Burmese Buddhist law, yet both now provide added benefits to a wife seeking revenge on her unfaithful husband or a husband dealing with an unfaithful wife.

As mentioned, Burmese Buddhist law is not derived from or justified by Buddhist texts alone. Yet there are some connections between orthodox Buddhist precepts and Burmese Buddhist law. For example, one of the five precepts of Buddhism is not to engage in sexual misconduct.<sup>40</sup> Burmese Buddhist law is intimately concerned with matters of marriage and divorce, as well as the issue of faithfulness. Marriages in Myanmar are not registered with the government and there is no required ceremony according to Buddhism. Instead, proof of a valid marriage rests with Burmese Buddhist law, which requires that the man and wife eat and sleep together, and that others recognize that they are married.<sup>41</sup> While Burmese Buddhist law allows divorce, in its application, judges have been inconsistent on the issue of adultery in terms of its impact on a woman as opposed to a man. Divorce is allowed on the grounds of serious cruelty, if the husband takes a second wife without consent, or if the wife commits adultery.<sup>42</sup> This means that, even if the husband commits adultery, a wife has no grounds to bring a claim for divorce.<sup>43</sup> Further, a husband can file for divorce on desertion if

39. Registration of Kittama Adoption Act 1939 (Burma Code, Vol. XI).

40. Spiro (1982), p. 45.

41. See Lahiri, *supra* note 23; Mya Sein (2014).

42. E Maung, *supra* note 20, p. 81.

43. *Ibid.*, pp. 81–5.

one year has passed, although a wife must wait three years before she can obtain a divorce from her husband who has deserted her.<sup>44</sup> Divorce at times may take on a public dimension if there is no consent. For example, it has been noted that a husband may put an advertisement in a newspaper announcing his intention to divorce, but a wife may counter this with a public advertisement stating they are still husband and wife.<sup>45</sup>

Burmese Buddhist law offers greater freedoms to men than women on matters such as adultery. This is captured in Burmese proverbs such as “three steps down and he is a bachelor,” suggesting that, once outside the home, a man is free to take other partners, the three steps here referring to the steps from a man’s house as a married man.<sup>46</sup> Mi Mi Khaing mentions this proverb in the context of the deference and respect a wife shows to her husband. Further, Tharaphi Than’s examination of the writings of female Burmese authors in the post-independence period demonstrate the common theme of husbands committing adultery and the “trapped lives” of women in such marriages.<sup>47</sup> In the 1960s, Spiro found that adultery was more frequent among men than women, and in cities rather than villages.<sup>48</sup> In the 1990s and 2000s, there are records of judges being reprimanded or penalized by the regime for promiscuity.<sup>49</sup> The primary purpose of this article is not to offer new empirical evidence of these issues (although recent court cases discussed below can be taken in this way), but rather to identify that these issues have been raised in past anthropological studies, and could be used as a point of reference for future empirical research.

Some adulterous relationships may in effect amount to the keeping of a mistress. Yet this poses several threats to the wife—the extra expenses, the time the husband is away from the home (if the second wife does not share the same house), the loss of face experienced by the first wife, and the potential for the mistress to become a “parallel” (previously known as an “inferior”) wife.<sup>50</sup> In this way, the line between adultery and polygyny in Myanmar are blurred.

What is clear is that the grounds for divorce under Burmese Buddhist law are more difficult for women to prove as opposed to men. For example, while adultery is a ground for a man to divorce his wife, the courts have debated whether adultery is sufficient grounds for a woman to obtain a divorce from her husband.<sup>51</sup> This is just one matter in which women are subject to higher degrees of scrutiny in the courts than men. In 1948, the High Court decided an important case that set a precedent on this issue. In this case, the husband had contracted a venereal disease and passed it on to his wife as a result of frequenting prostitutes, without her knowledge.<sup>52</sup> The court held that, if his act of transmitting a venereal disease in the first few

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44. Some Burmese scholars, such as Daw Mya Sein, present this situation as a *benefit* for women, and suggest that it is perfectly reasonable for a wife to wait for three years after her husband abandons her (with no reference to how a woman is supposed to find the means to live for three years if the husband was the sole income earner). See Mya Sein, *supra* note 26.

45. Mi Mi Khaing, *supra* note 27, p. 39.

46. This proverb was noted in Mi Mi Khaing, *ibid.*, p. 16.

47. Than, *supra* note 10, pp. 40–2.

48. Spiro (1977), p. 248. There has been no anthropological field research on this topic since Spiro’s research.

49. This is pointed out by Cheesman (2015), p. 170, based on a reading of court documentation.

50. Spiro, *supra* note 48, p. 249.

51. According to Myint Zan, this principle established in a 1929 case has not been overturned: Myint Zan, *supra* note 22.

52. *Mrs Joubert Bwa v. Joubert Bwa* (1948) BLR (HC) 132.

months of marriage was an isolated instance, then it did not count as cruelty. But, given that there was evidence that the husband again committed adultery after transmitting the disease to his wife without her knowledge, this was held to be evidence of cruelty. Yet the court reiterated that adultery on the part of the husband, without further evidence of cruelty, is not considered a sufficient ground for a wife to divorce her husband.

In addition to the higher barrier to divorce, women are less likely to seek a divorce due to the rules concerning property.<sup>53</sup> The risk of the wife losing her right to property under Burmese Buddhist law deters a wife from seeking a divorce.<sup>54</sup> In effect, the rules around property may operate as an incentive for the husband to keep a mistress or parallel wife, as the first wife is better off not to threaten divorce in this situation. Polygyny is also permissible according to Burmese Buddhist law if the first wife is infertile, leading to what Tharaphi Than has called the “insecurity” of infertile wives.<sup>55</sup> If a wife commits adultery, Burmese Buddhist law allows the husband to divorce his wife and obtain all rights to the marital property.<sup>56</sup> A woman faces significant social stigma if she chooses to divorce and later wants to remarry, although men do not face such social consequences.

This issue of divorce, property rights, adultery, and the blurred line with polygyny are illustrated in a 2012 Supreme Court case. In *Daw Mie Mie Tun v. U Maung Maung Lwin*,<sup>57</sup> the husband was accused of several offences including adultery, serious cruelty against his wife, and taking a second wife in secret without the permission of the first wife (often known as bigamy). At first instance, the wife was successful in obtaining a divorce because her husband’s actions were found to amount to serious cruelty. As a result, she was awarded all rights to the marital property. On appeal, the husband won in his claim that the property should be divided equally because his actions were only considered to be minor cruelty. The wife then made a special appeal to the Supreme Court, which upheld the original decision. The court distinguished between “minor” cruelty and serious cruelty. Minor cruelty included a wife being hit once by her husband or when a husband takes another wife without consent. The effect of a finding of minor cruelty by the court is to allow the first wife a right of divorce and to claim her share of the property. In contrast, the court defined serious cruelty as a situation where the wife suffers repeatedly (mentally or physically) and the consequence of this finding is that she not only has a right to divorce, but a right to all the property. The court found that this case constituted serious cruelty, and ruled in favour of the wife.

The Monogamy Law alters Burmese Buddhist law on the issue of adultery and on property rights in cases of divorce. The husband can now be convicted for the criminal offence of adultery and, if he is, the wife can seek divorce and rights to all property from the marriage.<sup>58</sup> This I call the “revenge clause” because it operates as an incentive to report one’s wayward partner. As the 2012 court case demonstrates, questions of adultery may also be mixed in with the issue of polygyny, as discussed next.

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53. The rules concerning property are complex under Burmese Buddhist law, with at least six different types of property and different inheritance rules in relation to each type: see U Mya Sein, *supra* note 41; Lahiri, *supra* note 23.

54. Spiro, *supra* note 48, pp. 289–92.

55. Than, *supra* note 10, p. 45.

56. The same motivation has been noted in the context of Thailand. See Loos, *supra* note 6, p. 145.

57. (2012) MLR 48.

58. Burmese Buddhist law distinguishes between numerous kinds of property (see U Mya Sein, *supra* note 53); however, the law does not mention whether some or all kinds of property are included.

### 3.2 *Polygamous Buddhist Men and the New Crime of Polygamy*

The second change that the Monogamy Law makes to Burmese Buddhist law is to introduce the crime of polygamy. This is in contrast to the position under Burmese Buddhist law, which has long recognized polygyny (when a husband takes more than one wife), although it does not allow polyandry (when a wife takes more than one husband).<sup>59</sup> This position was affirmed by the Privy Council in 1907, its decision recognizing that it was legal for Buddhist men to take more than one wife in Myanmar.<sup>60</sup> While it is not socially acceptable and it is not common practice today, scholars and practitioners admit that polygyny is permitted if the man is wealthy.<sup>61</sup> In this section, I draw on the little anthropological and historical data we have that indicate the practice of polygyny and the social issues that arise from it. I then demonstrate how the courts have dealt with this issue, and the connection between polygyny and inheritance.

The affirmation of polygyny under Burmese Buddhist law was partly in response to social reality. In the 1960s, Spiro speculated that as many as 5% of men living in cities were polygynous.<sup>62</sup> Polygyny has been observed not just among ethnic Burmans, but also among other ethnic groups such as the Shan.<sup>63</sup> Acknowledgements of polygyny are seen in both literature and in court records. In a review of Burmese literature post independence, Tharaphi Than identifies that a common story in this literature is of women or men having multiple partners. She notes in passing the practice of polygamy and mistresses, although describes these as “extra-marital affairs.”<sup>64</sup> In addition, records bearing testament to the issue of polygyny also appear in the autobiography of U Nu, the former President of Burma (1948–56, 1957–58, 1960–62). The autobiography includes accounts of his visits to brothels as a university student. In one instance, he recalls how he came across a woman who had been forced into prostitution. She had been driven to work at the brothel that he frequented because her husband took a “lesser” (second) wife who treated her so badly that she had to flee the house. U Nu notes that, without an income or a place to stay, this “superior wife” was driven to working in a brothel in Yangon.<sup>65</sup>

According to Burmese Buddhist law, there is no restriction on the number of wives a husband can take. Social tolerance may nevertheless limit this practice. One public instance of this was the former Vice Chancellor of Rangoon University, who reportedly had six wives, although he was said to have been removed from his position after he had taken the sixth wife.<sup>66</sup> This does resonate with observations of other Burmese authors who have noted the practice of government officials being forced to abandon their position if they take more than one wife.<sup>67</sup>

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59. All texts on Burmese Buddhist law recognize that polygyny is permissible. See e.g. Mootham (1939), pp. 16–17; E Maung, *supra* note 20, pp. 47–54; Lahiri, *supra* note 23, pp. 30–2; Mi Mi Khaing, *supra* note 27, p. 37.

60. *Ma Wun Di v Ma Lin* (1907) 4 LBR 175.

61. While polygyny is also recognized in Hindu Law and Islamic personal law in Myanmar, the practice of polygamy is rare among Muslim communities.

62. Spiro, *supra* note 48, p. 253.

63. Leach (1965), p. 213.

64. Than, *supra* note 10, p. 135.

65. U Nu (1975), p. 34.

66. *Ibid.*, p. 253.

67. Mi Mi Khaing, *supra* note 27, p. 38.

The practice of polygyny is also evident in the Burmese language, which has several terms to distinguish between the different status of wives. The first or big wife is known as *maya-gyi*, while the lesser or inferior wife is known as *maya-nge*. But not all second wives are necessarily “inferior,” as some may be co-wives with equal rights (*maya paying*).<sup>68</sup> The second wife is often said to be younger and from a lower social class. Some Burmese scholars such as Daw Mya Sein have suggested that polygamy is more common among those from low socioeconomic backgrounds, noting in the late 1950s that her cook’s husband had three wives and another servant was the second wife of her husband.<sup>69</sup> In her work on modernity and women in Myanmar, Tharaphi Than identifies how one Burmese writer discusses the term “lesser wife” as a way to promote the acceptability of the practice of having a mistress, to the detriment of the first wife.<sup>70</sup> In the face of negative social implications, women have often found their own way to get revenge, especially if the husband dares to take a second wife without permission of the first wife. There are cases in which the first wife has been known to murder her husband upon finding out the news that her husband has a second wife, while the father may face estrangement from his children.<sup>71</sup> The courts have responded to concerns over the negative social consequences for women in a polygamous marriage by determining that second wives should be referred to as “parallel” (rather than “inferior”) wives and therefore equal in status.<sup>72</sup>

This historical evidence for the practice of polygyny is perhaps the main justification that explains why Burmese Buddhist law legalizes polygyny. Unlike in Thailand, there do not appear to have been serious attempts to justify polygamy according to the teachings or principles of Buddhism.<sup>73</sup> Perhaps one reason for the lack of efforts to justify polygyny is that Myanmar does not appear to have been subject to the same levels of condemnation for the practice of polygyny as its Thai counterparts.<sup>74</sup> While Loos notes that the practice in Thailand came under overt and sustained criticism in the 1880s and early 1900s, such explicit condemnation by foreigners is less apparent in Myanmar.

The issue of polygyny has led the courts to a preoccupation with defining who is a wife or what the different categories of wives are under Burmese Buddhist law. The cases on polygyny are often preoccupied with the rights of the first wife in relation to second or subsequent wives. In 1971, a decisive court case declared that the first and subsequent wives should be considered equal in status—that is, as parallel wives.<sup>75</sup> The original applicant in this case was a Burmese Buddhist woman who was the second wife of her deceased Burmese Christian husband. Her husband married his first wife according to the Christian Marriages Act, which does not allow polygyny. On this basis, the first wife sought to deny the second wife any rights to the inheritance. At first instance, the court held that the second wife and her

68. Spiro, *supra* note 48, p. 250.

69. Mya Sein, *supra* note 26. Unlike Spiro’s efforts at extensive research, her comments are largely anecdotal.

70. Than, *supra* note 10, pp. 42–3.

71. Spiro, *supra* note 48, p. 254.

72. E Maung, *supra* note 20, pp. 47–54.

73. For reference to efforts to justify polygyny according to Buddhism in the context of Thailand, see Loos, *supra* note 6, pp. 10, 121; see also Reynolds (2006), pp. 185–213.

74. On condemnation of the practice of polygyny in Thailand in the late 1800s and early 1900s, see Loos, *supra* note 6, pp. 108, 118.

75. *Daw Gyi Gyi v. Mrs Merry Wun* (1971) BLR (CC) 52 (in Burmese). For a more detailed discussion of this case, see Myint Zan, *supra* note 22, pp. 155–76.

husband had lived together as husband and wife and should therefore be governed under the Special Buddhist Women's Marriage and Inheritance Law 1954. The will made by the deceased husband was declared to be invalid because Burmese Buddhist law does not allow the making of a will, and so the second wife was entitled to her share of the inheritance. However, on appeal, the Chief Court reduced the inheritance share of the second wife on the basis that she was only a "lesser wife." Both women appealed, and so the issue of lesser wives and superior wives was heard by a full bench of the Chief Court, with Dr Maung Maung (mentioned above) sitting as Chief Justice. In this decision, the court stressed that the 1954 law did not create lesser wives, but rather sought to ensure protection for all Buddhist wives regardless of whether they were a first or subsequent wife. The court held that the terms lesser and superior wives in Burmese were unclear and had led to misunderstandings when translated into English. The 1954 law does not mention polygamy, but simply that a Buddhist woman married to a non-Buddhist man has certain rights and protections. The court took a broad view and held this law also applies in cases of polygyny. The second wife was successful in her claim and, according to Burmese Buddhist law, she received half the property acquired during the years she lived with her husband, and one-third of the property acquired by her husband and the first wife before she lived with him.

Courts continue to deal with the issue of polygyny today, often in the context of complex inheritance disputes. For example, in 2004, the Supreme Court heard a case for special appeal by a first wife against the second wife.<sup>76</sup> In this case, a man had married the first and second wife at the same time and lived with both of them. He had later taken a third and fourth wife. Upon his death, the first wife claimed that her son as *auratha*<sup>77</sup> should receive the inheritance. According to Burmese Buddhist law, the first-born child has special rights to inheritance, and can claim one-quarter of the estate on the death of one parent.<sup>78</sup> However, the eldest son of the first wife in this case was disabled and so deemed ineligible by the Supreme Court to be the *auratha* son. The Supreme Court held that the first and second wives should inherit equal shares in the estate, and the fourth wife to lesser shares (given she had married the man at a later point in time; the third wife was already deceased). This case is an example of how, upon the death of the husband, polygynous marriages can lead to disputes between the wives and the children regarding rights to inheritance.

In another case in 2005, the Supreme Court had to decide on the inheritance rights of the sons of a first wife under Burmese Buddhist law.<sup>79</sup> In this case, the deceased husband had three wives. He had fathered four sons with his first wife (who was also deceased), no children with the second wife, and two sons and a daughter with the third wife. The property was initially divided so that the sons of the first wife only received the share due to their mother, but not that of their father. A court case was brought by the four sons against the third and only remaining wife of their late father on the grounds that they were the rightful inheritors of all property acquired by their father up to the date that he married his third wife. The Supreme Court upheld the sons' claim to their father's property up until the date he

76. *Daw Kyin Swan and Daw Than Nyunt & six others v. Daw Ama (aka) Daw Than Ye and U Win Myin & six others* (2004) MLR 57.

77. The Burmese word *auratha* or *orasa* comes from the Sanskrit *aurasa* (a legitimate son, lit. "from the breast").

78. For explanation of the law on *auratha* according to Burmese Buddhist law, see Lahiri, *supra* note 53, pp. 217–42; U Mya Sein, *supra* note 53.

79. *U Myat Soe & 3 others v. Daw Tin Kyi* (2005) MLR 42.

married his third wife. The case is an example not only of the practice of polygyny, but also of the rights of children born of polygynous relationships.

Yet all these cases were before the passage of the Monogamy Law in 2015, which appears to abolish Burmese Buddhist law principles in relation to polygyny and the related issue of the inheritance rights of wives. The Monogamy Law borrows from existing offences in the Penal Code of taking a second wife and taking a second wife in secret (bigamy) (ss. 494–495), and copies the maximum penalties of 7 and 10 years in jail, respectively.<sup>80</sup> As mentioned above in relation to adultery, the same risk of losing your property applies in the case of a husband (or wife) who commits polygamy. The effect of this provision is even more pronounced because it runs contrary to the Burmese Buddhist law principle of “mandatory intestacy” (or what Burmese refer to as “intestate succession”). Buddhists in Myanmar are prohibited from making a will. The power to make a will is not mentioned in the *dhammathat*, and this led the Chief Commissioner of Burma to declare that no will by a Burmese Buddhist is valid.<sup>81</sup> While the exact reasons are unclear, one possible contributing factor why Buddhists cannot make wills is that the state in the past had been concerned to prevent citizens from transferring their property to monks (whom they may be related to) in order to avoid paying tax.<sup>82</sup>

Legal texts do note ways around this implicit prohibition on wills, such as the practice of a sick person calling their family to their bedside and writing out their wishes before their death. These are informal agreements yet could be used as evidence if the dispute proceeded to court. There are also common practices used to circumvent the rule, such as gifts that are in effect “anticipatory inheritance.”<sup>83</sup> Today this is known as a conditional will (*thedanza*) often when parents are sick or elderly and make a request orally or in writing.<sup>84</sup> Another option is to make a family arrangement (*mithasu asi-asin*) or family management plan (*Mithasu simankhankwe-hmu*). Yet the inability to make a will gives rise to disputes over inheritance claims to land and money. This is evident in family-law cases heard on appeal before the Supreme Court, most of which are about inheritance involving valuable land or other assets, as the examples above illustrate.

The effect of the Monogamy Law—to outlaw polygyny—means that second wives are at risk of losing their inheritance rights under Burmese Buddhist law. It may also encourage men who wish to take a second wife to do so in secret, driving the practice further underground.

### 3.3 *Inter-Religious Marriage, Restricting Women, and the Relative Freedom of Buddhist Men*

Aside from the Monogamy Law, the other law passed in 2015 that affects Burmese Buddhist law is the Buddhist Women’s Special Marriage Law 2015. This law adds to the existing

80. This aspect of the Penal Code did not affect Burmese Buddhist law in the past.

81. Khin Phone Myin Kyi (2007), p. 4.

82. The *dhammathat* do not prohibit monks from owning property: Lahiri, *supra* note 53, pp. 338–9. Ironically, some Burmese scholars have suggested that, *because* no will is allowed, the rights of women are upheld, which seems to fail to recognize that a lack of a will can also make women’s rights more vulnerable. See Mya Sein, *supra* note 26.

83. Spiro, *supra* note 48, p. 77.

84. *Maung Me v. Sit Kin Nya* (1887) SJP 429. For an example of *thedanza* on the death-bed, see Mi Mi Khaing, *supra* note 27, p. 45.

Buddhist Women's Special Marriage and Inheritance Act 1954, which was first passed in 1939. As mentioned earlier, the Buddhist Women's law required a Buddhist woman and a non-Buddhist man to register if they wished to marry. The registration process was said to be for the protection of the woman to ensure she consented and that there were no objections, and registration then enabled any future disputes to be determined according to Burmese Buddhist law (regardless of the religion of the husband). The 2015 law places further restrictions around a Buddhist woman's ability to marry a non-Buddhist man. What is most striking about the public debate over this law in 2015 was not the concerns that it would restrict women, but the absence of knowledge that the 1954 law was still applicable and applied by the courts (with the exception of critiques by some lawyers familiar with this law). Contemporary discussions have reflected past legislative debates on this issue and demonstrate how this law has been used to ensure Burmese Buddhist law trumps Islamic law in cases of inter-religious marriage, securing the pre-eminence of Burmese Buddhist law over Islamic law.

In Myanmar, inter-religious marriage has long been perceived as a "problem" in the context of a marriage between a Buddhist woman and a Muslim man. The debate on legal protections under Burmese Buddhist law for Buddhist women who marry non-Buddhist men<sup>85</sup> was reinvigorated by the 1938 riots against Muslims and Indians in colonial Burma. These serious riots led to over 200 deaths and 1,000 people injured, most of them Muslims, in addition to the destruction of homes and mosques in particular.<sup>86</sup> After the incident, a committee was established by the colonial authorities to investigate the riots. In its report, the committee included the notes of a meeting convened on 26 July 1938 by the General Council of the Thathana Mamaka Young Sanghas Association at the Shwedagon Pagoda.<sup>87</sup> These meeting notes contained several resolutions, including that "The Government be urged to immediately enforce the Buddhist Women's Special Marriage and Succession Bill." This report therefore linked anti-Muslim sentiment and conflict with perceived concerns that Buddhist women who married Muslim men were being forced to convert and that their right to inheritance was reduced under Islamic law. The period of colonial rule had seen significant numbers of Indians migrate to Burma and marry local Buddhist women, which at this time of heightened nationalism was perceived as a betrayal of the nation.<sup>88</sup>

The 1939 Legislative Debates demonstrate some of the tensions surrounding this draft law.<sup>89</sup> Senator U Kyaw Din epitomized nationalist Buddhist sentiment by noting that "Burma is essentially a land of Burmese" (meaning here ethnic Burmans). He contrasts the Burman Buddhist recognition of marriage with that of Hindus, Christians, and Muslims—an indication of the way in which this area of law is seen as customary law, not "religious" law. He claimed to speak for women, noting that Burmese Buddhist law is "looked upon by Burmese women as a good idea." Unlike Anglo-Muhammadan law that forbids a woman from marrying a non-Muslim, he argued that Burmese Buddhist law was permissive because

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85. While the Special Marriage Act did fulfil this function of covering marriages between a Buddhist woman and non-Buddhist man, the law was not considered to be part of Burmese Buddhist law in the way that the Special Buddhist Women's Marriage and Inheritance Law is.

86. Final Report 1939, Appendix X.

87. Final Report 1939.

88. Than, *supra* note 10, p. 116.

89. *Burma Legislature, Proceedings of the First Senate* (1939).

it allowed women to marry non-Buddhist men, provided that they obtain government permission. In short, Burmese Buddhist law was still supposedly more favourable for women than Islamic law. Further, the law, it was argued, should have a retrospective effect.

Senator Mirza Muhammad Rafi, an Indian Muslim, rose to object and noted that he had raised his objections previously but they had been dismissed. Rafi began by highlighting the absurdity of U Kyaw Min's claim to have studied the laws of all the races of the "civilised world," and notes "it was news to me to learn this morning that Burma was a land of Buddhists and that the Buddhist religion prevails."<sup>90</sup> He proceeded to make a constitutional argument: the Bill, he suggests, is unconstitutional with reference to the Government of Burma Act 1935, as this concession to religion would affect the right to property. U Kyaw Din's response was simply to say of the Government of Burma Act 1935 "we are above these [provisions]. We are legislators"—a convenient way to dismiss the quasi-Constitution of the time. Advocate General U Thein Maung also noted that Rafi's objection was too late in the process: when a Bill is submitted to the Select Committee, the House is said to be committed to the principles of the Bill, implying that no changes to the Bill could be made.<sup>91</sup> He also went on to argue that, in any case, the objection was unsubstantiated because the Bill was simply removing discrimination from Burmese Buddhist women. Support for his view in parliament was overwhelming, indicated in the transcript by "loud applause."<sup>92</sup> Dr Daw Saw Sa, the only female senator to speak in this debate,<sup>93</sup> attempted to intervene but was cut off by the male speaker; whether her intervention was in favour or against is lost to history.<sup>94</sup> By 15 September 1939, the Buddhist Women's Special Marriage and Succession Act No. 14/1939 was approved by parliament.

After independence, the law was revised in 1954<sup>95</sup> and has now been added to in 2015. Today, a marriage between a Buddhist women and non-Buddhist man can only take place if they are both over 18 and consent to the marriage. If the woman is not yet 20, she must obtain the consent of her parents (this is not necessary for men not yet 20).<sup>96</sup> The registration of such marriages is under the purview of the General Administration Department, the most important governance unit at the local level under the Ministry of Home Affairs (the Minister for Home Affairs is appointed by the military).<sup>97</sup> A written application must be submitted with supporting evidence, and public notice of the intention to marry must be made. The marriage can be approved after 14 days if there are no objections.

A couple married and registered according to this law are required to be governed by Burmese Buddhist law in terms of property, guardianship, and divorce. That is, if a Muslim

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90. *Ibid.*, pp. 48–9.

91. *Ibid.*, p. 50.

92. *Ibid.*, p. 54.

93. The first female representative to the Legislative Assembly was appointed just three years earlier in 1936. See Mi Mi Khaing, *supra* note 27, p. 157.

94. *Ibid.*, p. 55.

95. This was in part because the 1939 law was never said to have been implemented, due to World War II. Buddhist Women's Special Marriage and Inheritance Act 1954 (Burma Code Vol. XI) (in Burmese).

96. This provision simply codifies what has come to be the recognized age for marriage according to Burmese Buddhist law.

97. It is not surprising that the General Administration Department has been given this function. Its scope is wide-ranging, and it has even appropriated some aspects of judicial power, such as s. 144 orders used in situations of emergency under the Criminal Procedure Code: see Crouch forthcoming.

man marries a Buddhist woman and they have a dispute over inheritance or divorce, he is not able to bring a case to court under Islamic law. The law places renewed restrictions on the behaviour of non-Buddhist men: they must not hinder their wife in her observance of Buddhism; the wife must be able to keep statues of the Buddha at home, visit the monastery, and practise meditation; he must not coerce her to change her religion; he must not degrade or insult Buddhism. Breach of any of these conditions amounts to a ground for divorce for the wife and requires the man to give up his portion of the property jointly owned, as well as pay compensation to his wife. In addition, the husband may face a maximum of one to two years in jail and a large fine (depending on the offence). The wife has the right to guardianship of their children, and the husband is obliged to pay maintenance. In short, rather significant disincentives now exist to dissuade a non-Buddhist man and a Buddhist woman from marrying.

In 2015, women's advocacy groups and human rights activists were quick to point out that this new law will restrict Buddhist women's rights. Lawyers also pointed out the inconsistencies in the law.<sup>98</sup> The rhetoric around the passage of the law in 1939 is strikingly similar to 2015. The law was used to prioritize and protect Burmese Buddhist law in cases in which the man was of another religion (often presumed to be Muslim), therefore ensuring that Burmese Buddhist law would trump the potential application of Islamic law.

#### 4. THE FUTURE OF BURMESE BUDDHIST LAW

Burmese Buddhist law forms the basis for the way in which courts decide matters of family law for Buddhists in Myanmar today. While putatively derived from the *dhammathat*, Burmese Buddhist law was a construction of lawyers and judges in the colonial era. The writings of legal practitioners operate as a definitive restatement and source of the law, rather than as a book to help lawyers or judge *locate* the law.

This article has shown that Burmese Buddhist law, as embodied in court decisions and legal commentaries past and present, give a more precarious position to women than is generally admitted by legal practitioners, politicians, or monks in Myanmar. The position of Buddhist women may now depend on whether they were married before or after the Monogamy Law was enacted.<sup>99</sup> If they were married before, then the rules of Burmese Buddhist law presumably still apply. While discussions on Burmese Buddhist law have focused on how it offers women more rights compared to Hindu or Islamic law, this obscures a comparison of the position of women in relation to men. Under Burmese Buddhist law, a man has the right to take more than one wife, but a wife cannot legally take more than one husband. A husband can commit adultery and face no risk of divorce or loss of property. A wife who commits adultery risks divorce and loses all her property from the marriage.

Women married after the Monogamy Law was enacted appear to be governed by new rules. The Monogamy Law has had the effect of narrowing the legal definition of marriage according to Burmese Buddhist law. Buddhist women now have the ability to bring a divorce

98. S. 39 states that the 1954 law still applies as long as it is not inconsistent with the 2015 law, but this is contradicted by s. 41 that notes the 1954 law has been abolished by this law.

99. An alternative interpretation may be whether the alleged act—such as adultery—was committed before or after the enactment of the Monogamy Law. This may be the grounds on which cases mentioned in the introduction have been reported.

and property claim against their adulterous husbands. Buddhist men no longer have the right to polygyny, yet neither are second wives protected by law. The idea for a Monogamy Law in Buddhist-majority countries is not new, as Thailand and Cambodia demonstrate, and yet the reasons it has been introduced in Myanmar are unique. The motive for this law had little to do with “modernization,” efforts to eliminate the unequal treatment of Buddhist women, or the condemnation of polygyny by foreigners, as in the case of Thailand.<sup>100</sup> Instead, this was part of a campaign in which Ma-Ba-Tha intended to catch Muslims (“rabbits”) out in their alleged efforts to marry (and therefore convert) Buddhist women. Support for this law from the military-backed Union Solidarity and Development Party was part of broader efforts to gain votes in the lead-up to the 2015 elections, where a threat of a landslide victory by the National League for Democracy was imminent. However, just as in India, where polygyny is more common among Hindus than Muslims,<sup>101</sup> so too in Myanmar polygyny is more common among Buddhists than Muslims. The reported allegations in 2015 demonstrate a new form of power that Buddhist women have against their Buddhist husbands, particularly given the potential property windfall involved under the “revenge clause.”

What of the future of Burmese Buddhist law in Myanmar? Most marital disputes over issues of adultery and polygyny may of course never go to court. But, for disputes that do, the fate of Burmese Buddhist law will rest on the interpretive power of the courts and the legislative power of parliament to further codify the law. As the National League for Democracy takes office in 2016, monastic groups such as Ma-Ba-Tha are unlikely to enjoy the same level of influence on law-makers, although they may continue targeted campaigns to report individuals accused of breaching the law. While Ma-Ba-Tha has admitted that it was wrong on the Monogamy Law and apologized for making it easier for Buddhist women to seek revenge on their Buddhist husbands, what the new law has done is to open up a host of new legal questions. The 2015 legislative reforms will potentially lead to a new generation of litigation redefining women, wives, and the private lives of Buddhists in Myanmar.

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100. Loos, *supra* note 6.

101. This is well known in India. In 1955, polygamy was outlawed according to Hindu Law in India, but not in Myanmar. For a recent report on the problem, see Law Commission of India (2009); for the longer history of reform to Hindu family law, see Newbiggin (2013).

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