

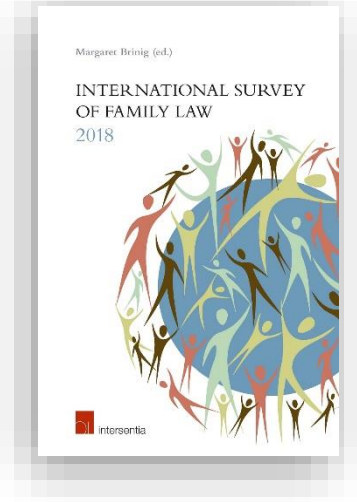


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MYANMAR
MARRIAGE UNDER MYANMAR
CUSTOMARY LAW*

Khin Khin Oo

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Résumé

Le droit coutumier de Myanmar tire ses origines des coutumes ancestrales du peuple birman et il s'applique à tous les bouddhistes du Myanmar en tant que loi personnelle des citoyens du pays. Ce droit concerne essentiellement les affaires familiales, comme le mariage, le divorce, le droit successoral et les droits matrimoniaux. En vertu du droit coutumier, le mariage est une institution civile et n'a aucun lien avec la religion. Ce chapitre propose un aperçu du droit du mariage en droit coutumier myanmarais.

* This is the modified version of the author's previous work, 'Some Incidents of Marriage under Myanmar Customary Law' (2012) X (11) *Journal of the Myanmar Academy of Arts and Science* 135-153.

1. INTRODUCTION

Every citizen of a country has the right to freely follow one's customs, culture and traditions and profess the religion of their choice subject to certain limitations. These fundamental rights are expressly declared by the respective constitutions. The Myanmar Constitution of 2008 clearly recognises the citizens' right to freely develop the literature, culture, arts, customs and traditions they cherish. The Myanmar Laws Act 1898 vests force and validity in customary law if it is necessary to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution – the Buddhist Law in cases where the parties are Buddhists, the Muhammadan Law in cases where the parties are Muhammadan,¹ the Hindu Law² in cases where the parties are Hindus.³ However, this law naturally states nothing about the law applicable to Christians, as most family law matters for Christians are regulated by enacted laws, such as the Christian Marriage Act, Succession Act and Divorce Act. Family laws in Myanmar, therefore, can be grouped as four major different family laws, namely, Myanmar customary law (for Myanmar Buddhists), principles of Hindu law (for Hindus)⁴, Mohammedan law (for Muslims), and various family statutes applicable to Christians (for Christians). This chapter will discuss marriage under Myanmar Customary law.

2. NATURE AND SOURCES OF MYANMAR CUSTOMARY LAW

Before beginning the main discussion of the marriage systems of Myanmar's people, it is essential to discuss the nature of Myanmar customary law and its sources. Myanmar customary law has applied to all Buddhists in Myanmar as their personal law since the ancient times of Myanmar kings;⁵ and it may

¹ Mohammedan Law includes Islamic personal laws and the family law principles applied by Muslims residing in Myanmar.

² Hindu Law means Hindu personal law and the principles of Hindu law applied to Hindus residing in Myanmar. Manipuris living in Myanmar are not subject to the Myanmar customary law, but to Hindu family law. Questions of inheritance are to be decided by the principles of Hindu Law. *Ma Saw Tin v. Sayar Sin*, 1956 BLR 89; *U Kan Hla v. Daw Yin and one other*, 1983 Civil Appeal Case No. 9 (Supreme Court of Mandalay).

³ Myanmar Laws Act 1898, s. 13(1).

⁴ Manipuris living in Myanmar, are not subject to the Myanmar customary law. They are subject to the Hindu customary law.

⁵ *Daw Thike v. Cyoung Ah Lin*, 1951 BLR (SC) 133; *Chan Eu Ghee v. Mrs. Iris Maung Sein*, 1953, BLR (HC) 294.

primarily be gathered from the Dhammathats,⁶ thus standing on its own legal system.⁷

Myanmar, formerly known as Burma, was formed as one of the provinces of British India after the three Anglo-Myanmar Wars in 1825, 1852 and 1885. After the annexation of Myanmar by the British Government, many principles of British common law were initiated and introduced to establish a uniform system of laws throughout the country. The impact of British law, however, has not much affected the ancient Myanmar customary law.⁸

Where in any suit or proceeding in Myanmar, it is necessary for any court to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution,

- (a) the Buddhist Law in cases where the parties are Buddhists,
- (b) ...
- (c) ...

shall form the rule of decision except in so far as such law has, by legislative enactment, been altered or abolished or is opposed to any custom having the force of Law.⁹

The ‘Buddhist Law’ mentioned in section 13(1) of the Myanmar Laws Act, as it was mistakenly called by English writers, is unconnected with Buddhism.¹⁰ It has nothing to do with religion at all. Actually the Buddhist Law specified in section 13(1) had meant the customary law of Myanmar’s people who profess the Buddhist faith. The term ‘Myanmar customary law’, which was introduced by the Myanmar eminent jurist U Mya Sein in his famous work on Myanmar customary law, was first used in the *Ma Tin Hla v. Daw Gauk and two others* case decided by the full bench of the Supreme Court in 1969.¹¹ After that case, the correct title of Myanmar customary law, instead of Burmese Buddhist Law, has been uniformly acknowledged and accepted by Myanmar courts and legal scholars too.

The Dhammathats, ‘legal rules and legal principles relating to marriage, divorce, partition, succession, inheritance and adoption etc.’¹² are a primary

⁶ The Dhammathats are composed of legal rules and legal principles relating to marriage, divorce, partition, succession, inheritance and adoption, etc.

⁷ TIN AUNG AYE, ‘Myanmar Customary Law and Culture’, in *Interpretation of Statute Law and Treaty*, Yangon, Cho Tay Than Publishing House, 2004, 1st ed., at p. 42: ‘But they are not codes of law in the strict sense and there is wide variance among them in content and quality.’ MAUNG MAUNG, *Law and Custom in Burma and the Burmese Family*, The Hague, Martinus Nijhoff, 1963, at p. 9.

⁸ KYAW SEIN, ‘A Brief Legal History of Myanmar’ (1999) 1(2) *Law Journal* 164.

⁹ Myanmar Laws Act 1898, s.13(1).

¹⁰ *Nartar Ce v. Aaphoo Ce*, 1969 BLR 106; see also MYA THEIN, ‘Hindu Influence on Burmese Customary Law’ (1980) 1(1) *University Law Journal* 154.

¹¹ *Ma Tin Hla v. Daw Gauk and 2*, 1969 BLR 107.

¹² MAUNG MAUNG, above n. 7, at p. 9.

source of Myanmar customary law. However, there are three other sources of law which are more important than Dhammathats in some respects, as some of the Dhammathats have fallen behind the changing situations of the present Myanmar social environment as time moves on. There are altogether four sources of present-day Myanmar customary law. These are the Dhammathats, case law, the doctrine of binding precedents and legislation.

In the case of *Limchimneo (alias) Daw Kyin Nyun v. Limgeoksoo (alias) Mutu*,¹³ it was laid down that Myanmar customary law can be gathered from the Dhammathats which are compatible with the current social environment of Myanmar society, from the decided cases and the prevailing customs and practices of Myanmar.

Judicial precedents constitute the third, and today, the most important source of Myanmar customary law. The judicial recognition of current customary law beyond the Dhammathats and the need to incorporate them in judicial decisions were expressed by the then Chief Court in both *Daw Kyi Kyi v. Mrs. Mary Wain* and *Daw Khin Mya Mar (alias) Mar Mar v. U Nyunt Hlaing* cases.¹⁴

Some of the cases must solve mixed question of law and facts. If there were no provisions upon those questions or there were gaps in them, they were filled by legislation. For example, the Registration of Kittima Adoptions Act of 1939, Myanmar Buddhist Women Special Marriage Law of 2015 and the Monogamy Law of 2015 are the major statutes concerned with Myanmar family law matters. The legislation strengthens the customary law principles which are either inadequate or obsolete for the needs of current Myanmar society. If there were a conflict between the legislation and the customary law, the former prevails over the latter.¹⁵

The British conception of ‘justice, equity and good conscience’, which was embodied in section 13(3) of the Myanmar Laws Act has been continued as a basis of the Myanmar legal system, especially in the field of Myanmar customary law ‘where there is no any other enactment or where there is any case not provided by section 13(1)’.¹⁶

3. SUBJECTS OF MYANMAR CUSTOMARY LAW

A Buddhist in Myanmar, irrespective of what his/her nationality is, and irrespective of where he/she came from, is prima facie governed by the

¹³ *Limchimneo (alias) Daw Kyin Nyun v. Limgeoksoo (alias) Mutu*, 1956 BLR (HC) 248.

¹⁴ *Daw Kyi Kyi v. Mrs. Mary Wain*, 1971 BLR (CC) 52; and *Daw Khin Mya Mar (alias) Mar Mar v. U Nyunt Hlaing*, 1972 First Civil Appeal No. 38.

¹⁵ *Ma Kway v. Ma Mi Lay*, 6 Ran 682; *Ma Tin Hla v. Daw Gauk and 2*, above n. 11; *Ma Woung Shwe Linn v. Union of Myanmar*, 1970 BLR 22.

¹⁶ The Myanmar Laws Act 1898. The Myanmar Code (1955), Vol. 1 at p. 9.

customary law of Myanmar.¹⁷ Therefore, in order to decide if a person is to be a subject of Myanmar customary law, the sole criterion is whether he or she is a Buddhist in Myanmar. In this respect, the term Buddhist is a wider term covering not only Bamar, a majority of whom are Buddhists,¹⁸ but also other nationalities, such as Rakhine, Kayin, Kayah, Kachin, Chin and Shan nationals, who may or may not be Buddhists. Therefore, in deciding disputes relating to marriage, divorce, inheritance, partition and family matters of the national races of Myanmar, Myanmar customary law is applicable with the one condition that due consideration and understanding of the prevailing local customs of their own should be given.¹⁹ When and where necessary, respective local customary laws and traditions, as the dominant laws to which the parties are subject, should be more carefully weighed and considered in the context of their own local traditions and customs.²⁰

In principle, Buddhists who are living and staying in Myanmar are permanently governed by Myanmar customary law. If they do not want to be governed by Myanmar customary law, it must be proved:

1. that they have special custom having the force of law in Myanmar;
2. that their custom is opposed to Myanmar customary laws; and
3. that their custom is just and fair.²¹

If they cannot prove the above-mentioned facts, all Buddhists domiciled (having permanent residence) in Myanmar, irrespective of their race or nationality, shall be governed by Myanmar customary law.²²

4. NATURE OF MARRIAGE UNDER MYANMAR CUSTOMARY LAW

Marriage under Myanmar customary law is 'a civil institution into which the Buddhist religious element enters not at all'.²³ The Myanmar word for marriage is *ein-daung-pyu*, meaning setting up a house. In 1965, the full bench of

¹⁷ *Daw Thaik v. C. Young Lin*, 1951 BLR (SC)133.

¹⁸ Buddhism is practiced by 87.9%, Christianity by 6.2%, Islam by 4.3% and Hinduism by 0.5% respectively. Some profess animism and worship nats (spiritual deities) according to their traditional beliefs. The 2014 Myanmar Population and Housing Census, <www.dop.gov.mm>.

¹⁹ *Ma Shwe Yin v. Mg Ba Tin*, 1 Ran. 343. *U San Thein v. Mg Khine*, 1965 BLR (CC) 554.

²⁰ *Nar Citi v. Ah Phyu Si*, 1969 BLR 155.

²¹ *Ma Shwe Yin v. Mg Ba Tin*, above n. 19; *Ma Yin Mya v. Tan Yaik Pu*: 5 Ran. 406; *Lin Kar Gim v. Mrs. Iris Mg Sein*: 1955 BLR (SC) 15; *Tan Swee Kyu v. Chan Chain Kyan*: 1947 Ran.107; *Daw Thaik v. C. Yong Lin*, above n. 17; *Tan Ma Shwe Zin v. Khu Khu Ching*: 1939 Ran. 548.

²² *Daw Thike v. Cyoung Ah Lin*, above n. 5; *Lim Kar Gim vs. Mrs Iris Maung Sein*, above n. 21.

²³ MAUNG MAUNG, above n. 7, p. 54.

Myanmar Supreme Court observed marriages under Myanmar customary law as 'delicate and important social matters'. Although the most important element of Myanmar Buddhist marriage is consensual contract, it is not in the nature of a commercial contract, referring to the Contract Act, but in the nature of a social and civil contract according to Myanmar customary law as well as the Contract Act. This means the result would be just to parties in the case, and would be acceptable to the society to which they belong.²⁴

Both men and women enjoy equal rights in all aspects of legal, social and cultural matters.²⁵ This is the most peculiar nature of Myanmar marriage. Myanmar marriage creates the status of husband and wife as tenants in common²⁶ by acquiring the right to share the family property, determine the questions of legitimacy, succession and inheritance, and imposes a liability on the husband to maintain his wife and children and to remain faithful to his wife.

5. ESSENTIALS OF VALID MARRIAGE

Although the Dhammathats, the primary source of Myanmar customary law, do not specify the essential conditions of the contract of marriage, certain requirements are prescribed by customs to constitute a valid marriage. They are as follows:

1. The man should attain puberty.
2. The woman should be single and at least 20 years of age, a widow, a divorcee, or a single person under 20 years of age who has obtained her parents' or guardians' consent.
3. The parties must give their mutual and free consent to become husband and wife presently.
4. The parties must be mentally competent to contract as tested by section 12 of the Contract Act.
5. Neither party to the marriage may have an existing valid marriage as prescribed by the Monogamous Law of 2015.
6. The parties must live together as husband and wife publicly. In the absence of direct proof, marriage may be inferred from conduct of the parties or established by reputation.

At one time, there needed to be consummation to constitute a valid marriage. By referring to old Dhammathats, it was decided that if there were no cohabitation

²⁴ *Maung Ko Gyi v. Daw Ohn Khin*, 1965 BLR 913.

²⁵ *Ma Hla Aung v. Ma Aye*, SJ 219.

²⁶ *U Pe v. U Maung Maung Kha*, 10 Ran 261, PC; *Ma Htwe v. Ma Tin Oo*, 1953 BLR (HC) 29; *Ma Ohn Kyi v. Daw Hnin New*, 1953 BLR (HC) 332.

or consummation after the marriage, the marriage tie will not exist between these parties.²⁷ In 1972, however, the Chief Court held in the case of *Daw Khin Mya Mar (alias) Mar Mar v. U Nyunt Hlaing* that Myanmar customary law is changing and old Dhammathats which are not in line with the present situation should not be followed. Under Myanmar customary law, to constitute a valid marriage all that is essential is mutual consent, and not consummation. When both parties, with their mutual consent and, where needed, the consent of the parents from both sides, have gone through the marriage ceremony, there is a valid marriage under Myanmar customary law.²⁸

6. MARRIAGEABLE AGE

The Dhammathats suggest that parents should give their sons or daughters in marriage when they reach the age of 15 or 16, so the customary age for marriage was 15 or 16. They do not fix an age limit below which a young man cannot marry a girl of his choice without his parents' consent. In the past, there were various judicial decisions regarding that matter. In 1928, it was decided in the case of *Mg Thein Mg v. Ma Saw* that a Myanmar Buddhist boy of any age can enter into a valid marriage without the consent of his parents or guardians once he attains puberty, i.e. is physically competent to marry.²⁹

With respect to the marriageable age of a girl, Dhammathats enjoin upon parents and guardians the necessity to marry minors before the completion of their sixteenth year so as to prevent their falling into sin. Manugye Dhamma permits an unmarried woman above the age of 20 years to marry a man of her choice. There were different and rather arbitrary decisions in different cases. This point was set at rest by a full bench decision of the Rangoon High Court in *Ma Aye Sein v. Maung Hla Min*, which declared that, except in the case of widows or divorcees, a girl under 20 years of age cannot contract a valid marriage without the consent, either express or implied, of her parents or guardians.³⁰ This case is still in force and there is no other current leading case on this point.

Marriageable age is set when a girl may marry without parental consent, and a lower age is set when she may marry subject to parental consent. By referring to section 4 of the Myanmar Buddhist Women's Special Marriage Law, it could be said that the minimum statutory marriageable age for the girl is 18 years of age with parental consent.

Section 375 of the Penal Code provides that a man is said to commit rape if he has sexual intercourse with a woman who is under 16 years of age with

²⁷ *Ma Hla Me v. Maung Hla Baw*, 8 Ran 425.

²⁸ *Daw Khin Mya Mar (alias) Mar Mar v. U Nyunt Hlaing*, 1972 First Civil Appeal Case No. 38.

²⁹ *Mg Thein Mg v. Ma Saw*, 6 Ran 340.

³⁰ *Ma Aye Sein v. Maung Hla Mi*, 3 Ran 455.

or without her consent. Section 361 of the Penal Code further provides that whoever takes or entices any female under 18 years of age out of the keeping of the lawful guardian of such minor is said to kidnap such minor from lawful guardianship.

Therefore, the marriage of a minor girl who is under 16 with or without parental consent is totally prohibited by the Penal Code and Myanmar customary law. If a girl, who is older than 16 but not yet 18, marries a man without her parents' consent, that man may still be charged criminally for kidnapping such a minor under the Penal Code. But in the case of a woman who has attained the age of 18 but is not yet 20 and who enters into a contract of marriage without the consent of her parents or guardians, such a woman cannot enjoy the matrimonial proprietary rights conferred by the customary law until she reaches the age of 20.

7. CONSENT AND CAPACITY OF THE PARTIES

The most important element of the Myanmar Buddhist marriage, which is commonly described as a consensual contract, is consent.³¹ Marriage depends upon the fact that the parties must give their mutual and free consent to become husband and wife presently.³² Consent must be free and voluntarily. Consent is said to be free when it is not caused by coercion or undue influence, fraud, misrepresentation or mistake under section 14 of the Contract Act.

In the early days, parents' consent and agreement played the principal role in the marriage. Today, the vital consent on which a marriage must be founded is that of the parties themselves. The *Maung Sein Nyunt v. Ma Aye Kyi* case clearly pointed out that no longer can a father or mother give away an unwilling minor daughter into marriage. If the consent given by the man and the woman is not free, the marriage will not be valid and binding on them.³³ However, the consent of the parents or guardian is still essential to the validity of marriage of a minor girl. The minor's incapacity to enter into a contract of marriage must be supplemented by the consent of her parents or guardian.

8. PROOF OF MARRIAGE

Proof of marriage is one of the difficult problems in Myanmar customary law because no ceremony is legally necessary in order to constitute a valid marriage

³¹ MAUNG MAUNG, above n. 7, at p. 54.

³² *Maung Tun Aung v. Ma E Kyi* 14 Ran 215 (FB) 227; *Ma Pwa Kywe v. Maung Hmat Gyi* 1938 Ran 667 (672); and *Ma Aye Thwe v. U Tha Yin*, AIR 1941 Ran 179.

³³ *Maung Sein Nyunt v. Ma Aye Kyi*, 1962 BLR 404.

between two Myanmar Buddhists. The *Ma Aye Mi v. Ma Kyi Kyi* case decided that no ceremony was required in order to constitute a valid marriage, all that is necessary being the consent of both parties.³⁴ The *Ma Kyin Mya v. Maung Sit Han* case also held that if any ceremony takes place, it is evidence of the intent and no more than evidence whereby the fact of mutual agreement can be proved. The ceremony itself is not a means of creating the marriage tie. In the present state of society almost no marriage is contracted without some sort of show, entertainment or ceremony, or without the knowledge of the people of the locality where the parties reside.³⁵

It is popular among the young people of Myanmar to go to a judge or magistrate and sign affidavits in the presence of a few friends and elders stating their competence and intention to marry. *Maung Kyi v. Ma Ohn Myint*³⁶ held that even though there are no prescribed rules or procedures to make such an affidavit of marriage, it is a valid marriage if the couples have attained the requisite age and have taken an oath before the court to be married with mutual consent. Affidavits for marriage show the competency and mutual consent of parties and become documentary evidence having legal sanctity. Hence, the Supreme Court directed that in making affidavits for marriage, it is necessary for the judge to determine whether or not each party has attained the marriageable age, whether or not either party has an existing valid marriage and whether or not both parties have freely consented to the marriage. In making affidavits for a marriage contract, all essentials of a valid marriage shall be considered by Myanmar customary law itself. This is the trend of marriage today.

In the absence of direct proof, such as holding a marriage ceremony or making affidavits of marriage, mutual consent may be inferred from the conduct of the parties or established by reputation.

The opinion of *S. Anamalay Pillay v. Po Lan* states that when a man and a woman have openly lived together as husband and wife for many years in the same house and they have been regarded as such by their friends and relations who have seen them do so, a presumption arises that the couple intended a valid union.³⁷ *U Tun Yin v. Maung Ba Han* decided that where there is a dispute and where marital status must be determined from repute and the conduct of the parties themselves, the conduct of the neighbours and friends, who treated them as though they were husband and wife, can be admissible as evidence from which the status is to be inferred. A bare statement by a witness that certain couples are husband and wife is not evidence of repute.³⁸

³⁴ *Ma Aye Mi v. Ma Kyi Kyi*, 1948 BLR 625.

³⁵ *Ma Kyin Mya v. Maung Sit Han*, 1937 Ran 103.

³⁶ *Maung Kyi v. Ma Ohn Myint*, 1968 First Civil Appeal Case No. 61.

³⁷ *S. Anamalay Pillay v. Po Lan*, 3 LBR 228.

³⁸ *U Tun Yin v. Maung Ba Han*, 1949 BLR 443 (HC).

Where a man has a wife and visits another woman with whom he never goes out in public or associates with his relatives and friends, such a woman cannot claim to be a wife.³⁹ In the case of *Maung Maung v. Ma Sein Kyi*, it was held that cohabitation means living in a conjugal relationship, not a clandestine arrangement. There must be an open avowal of the married status: going together to the pagoda and the monastery and eating together in public are conduct of such nature. Conduct must lead friends, neighbours and relatives to accept the parties as husband and wife.⁴⁰

In the case of *U Pu Lay v. Daw Chit*,⁴¹ U Pu Lay applied for the dissolution of marriage on the ground that they lived together as husband and wife in the same house for over 20 years at Tuntay Township. But the respondent Daw Chit argued that their relationship was not that of husband and wife; she treated U Pu Lay with respect because he was much older than she was, though she admitted their living in the same house. The Central Court held that the mere fact of living together for 20 years in the same house did not constitute a valid marriage. There were no other sufficient circumstances indicating that they were related as husband and wife. In order to constitute a valid marriage under Myanmar customary law, the parties must publicly live together as husband and wife. Therefore, in the absence of a valid marriage there could be no divorce.

In the case of *Daw Chit Chit v. Daw Sann Yin*,⁴² Daw Chit Chit claimed a share in the estate of the deceased U Thet Htun on the ground that she was his widow also. The burden of proving marriage lay on her. There needed to be clear and unequivocal recognition of her status as such. Whether U Thet Htun and Daw Chit Chit lived together and admitted their status, whether they behaved towards each other as husband and wife, whether they visited relatives and friends in each other's company, whether they went together to places of worship, whether they acted jointly in making or taking conveyances of property, whether she had good character and a decent life position, whether on the death of U Thet Htun, she behaved like a widow at the funeral, and their other similar conduct indicated were taken into consideration and indicated that they were not related as husband and wife under Myanmar customary law. Accordingly, the Court decided that the status of husband and wife had not been established between deceased U Thet Htun and Daw Chit Chit under Myanmar customary law.

³⁹ *Ma Kyin Mya v. Maung Sit Han*, above n. 35.

⁴⁰ *Maung Maung v. Ma Sein Kyi*, 1940 Ran 562.

⁴¹ *U Pu Lay v. Daw Chit*, 1976 BLR 41.

⁴² *Daw Chit Chit v. Daw Sann Yin*, 1990 First Civil Appeal Case No. 32 (Supreme Court of Mandalay).

9. SHIFT FROM POLYGAMOUS TO MONOGAMOUS MARRIAGE

The practice of polygamy was recognised by the Dhammathats and was legal in Myanmar until 2015 and enactment of the Monogamy Law. The position and status of Myanmar married women before and after the enactment of the said law will briefly be examined here.

Customarily, a Myanmar Buddhist husband can have more than one wife at any given time if he can maintain both in a good condition of life. Designating wives who hold equal status as first wife and second wife was more precise and correct than old usages of *ma ya-kyi* (superior wife) and *ma ya-nge* (inferior wife). Judicial decisions also recognised the status of first wife and second wife if a man married more than one wife, especially in the case of a Myanmar Buddhist woman who married a non-Buddhist man. With the Chief Court's decision in the case of *Daw Kyi Kyi v. Mrs. Mary Wain* in 1971, as a consequence of the legal reorganisation of polygamy, the second wife had the same status as the first wife and the two women occupied identical positions, both in respect of personal rights and in respect of ownership of property in the family. They are *ma ya paying* (parallel wives) known as the first wife and second wife, sharing their husband's estate equally.⁴³

Apart from the lawful wife or wives under the polygamous marriage of Myanmar customary law, a husband might also enter into and maintain conjugal relations with a woman whose position falls short of that of a lawful wife. If a Myanmar Buddhist married husband secretly lived together with another woman, letting her know of his existing legal marriage, that other woman could not be said to be the second wife holding an equal status with the first wife under Myanmar customary law.⁴⁴ The same concept was applied in the case of *Daw Chit Chit v. Daw Sann Yin* in 1990, which has already been elaborated and discussed in section 8.

Thus polygamy was permitted by the customary law.⁴⁵ However, polygamy was not a popular institution as there was the changing trend of Myanmar social customs and marriage systems. Indeed, today taking a second wife during the lifetime of first wife without her consent ordinarily constitutes a serious matrimonial fault, and the courts have recognised in many different cases that 'if a Myanmar Buddhist husband takes a second wife without his first wife's consent, she has a right to divorce him.'⁴⁶ It was apparent that the idea of polygamy in the

⁴³ *Daw Kyi Kyi v. Mrs. Mary Wain*, above n. 14.

⁴⁴ *Maung Tha Dun v. Ma Thein Yin*, 1 Ran 1, *Ma Thein Nwe v. Maung Kha*, 7 Ran 451.

⁴⁵ *Ma Wun Di v. Ma Khin*, 4 LBR 175; *Ma Thein Yin v. Maung Tha Dun*, 2 Ran 62.

⁴⁶ *U Ba Kyiv v. Daw Mya Yee*, 1982 Second Civil Appeal Case No. 66 (Supreme Court of Mandalay).

Dhammathats was obsolete and no longer consonant with present-day Myanmar social custom.

Several proposals were submitted to the Parliament to abolish the polygamy system and to adopt a monogamy system. Only in 2015 did the new system of marriage shift from polygamous marriage to monogamous marriage through enactment of the new Monogamy Law.⁴⁷ This Monogamy Law aims to help facilitate pleasant wedded life between husband and wife with each being loyal; by preventing women from becoming unlawful wives; by preventing possible matrimonial faults as a result of practising polygamy; and by raising the morale and morality of man and woman.⁴⁸

10. SPECIAL MARRIAGE LAWS

Although Myanmar Laws Act section 13 vests force and validity in respective enumerated personal laws in Myanmar, there is no provision for mixed marriages between the parties who are subject to different personal laws. Still, Myanmar customary law itself contains no prohibition forbidding mixed marriage between a Myanmar Buddhist and a person of another race or religion. Therefore, in the case of mixed marriages between Buddhists and non-Buddhists, conflicts have occurred in the choice of law between Myanmar customary law and the non-Buddhist spouse's family law. The courts have frequently been called upon to decide the validity of mixed marriages, especially when questions arising from divorce or succession are involved.

For a mixed marriage of a Muslim man to a Buddhist woman, no marriage is legally possible between them without the woman's conversion to Islam. In such a case, Myanmar wives lose all matrimonial rights conferred on them by Myanmar customary law, including such rights as divorce, adoption, succession and inheritance; and they are to be governed by Islamic law only. The same situation also happens in respect of a marriage between a Hindu man and a Buddhist woman. According to the Christian Marriage Act, a legal marriage between a Myanmar woman and a Christian could be contracted either by means of a Christian religious ceremony or by civil contract before a Registrar. Under this Act, conversion is not necessary but her marriage is governed by the Christian Marriage Act for marriage matters and the Succession Act for succession matters, not by Myanmar customary law. In mixed marriages between Myanmar Buddhist women and non-Buddhist husbands, therefore, Myanmar women are in a worse position.

⁴⁷ Monogamy Law, Pyidaungsu Hluttaw Law No. 54 of 2015.

⁴⁸ Monogamy Law, s. 4.

The Christian Marriage Act, Special Marriage Act 1872, the Buddhist Women's Special Marriage and Succession Act of 1954 (repealed law) and the new Myanmar Buddhist Women's Special Marriage Law of 2015 are important statutes providing a legal form of marriage between Buddhist and non-Buddhist. The first two enactments provided possible forms and procedures by which valid marriages could be contracted between persons who professed the Buddhist faith and those who did not. The repealed law of Buddhist Women's Special Marriage and Succession Act of 1954 and the new Myanmar Buddhist Women's Special Marriage Law of 2015 confer the legal status of wife, legitimacy of their children and any other matrimonial rights under Myanmar customary law upon Myanmar Buddhist women whose spouses are non-Buddhists.

The brief discussion on marriage under these four marriage laws will be highlighted.

A Christian can contract a valid marriage with a non-Christian according to the Christian Marriage Act. If a Myanmar Buddhist man marries a non-Buddhist woman, the governing law to legalise their marriage is not Myanmar customary law but either the Christian Marriage Act or the Special Marriage Act. In the case of *U Aye Hlaing v. Daw Nartarlyar (alias) Daw Buthee*,⁴⁹ it was held that the Christian Marriage Act lays down a series of rules and procedures to constitute a valid marriage. The parties intending to marry under the said Act shall be solemnised in accordance with its respective provisions. The marriage may be performed either in a religious ceremony or at the Registrar's Office. Cohabitation between a Myanmar Buddhist husband and Christian wife without having formal solemnisation shall not constitute a valid marriage.

The Special Marriage Act of 1872 was amended in 1923 to provide a form of marriage for non-Buddhists and Buddhists, and to legalise certain marriages the validity of which is doubtful. When a Buddhist man or woman married a non-Buddhist under the said two Acts, their marriage is a special marriage and falls outside Myanmar customary law, to be governed in questions of divorce by the Divorce Act and in questions of succession by the Succession Act. He or she loses the right to adopt a child. Therefore, although these two Acts make it possible for Buddhists and non-Buddhists to marry, such marriages take the families outside the pale of Myanmar customary law.

The Buddhist Women's Special Marriage and Succession Act was passed by Parliament in 1954 to protect the interests of Buddhist women who married non-Buddhists. Principles of Myanmar customary law relating to succession, divorce and adoption are applicable to this couple under the 1954 Act. The Act sought to make Myanmar customary law territorial and not personal.

⁴⁹ *U Aye Hlaing v. Daw Nartarlyar (alias) Daw Buthee*, 1977 First Civil Appeal Case No. 28, Supreme Court of Mandalay.

In *Daw Saw v. E.M. S Mac Tung's Estates*,⁵⁰ a Myanmar Buddhist wife applied for a succession certificate regarding a property of a deceased Muslim. The father of the deceased filed a rival application for a succession certificate. The deceased and the Myanmar Buddhist wife had lived as husband and wife since 1926. The father of the deceased contended that Islamic Law would apply to the partition of property. The Chief Court did not accept the contention and pointed out that the Buddhist Women's Special Marriage and Succession Act 1954 was passed for protection of the rights of Myanmar woman. The wife of the deceased had the full right to inherit the property of deceased. Therefore a succession certificate must be issued to the wife.

The equitable nature of Myanmar customary law can be found in *Daw Ah Mar v. Daw Hla Tint & seven others case*.⁵¹ Under the Buddhist Women's Special Marriage and Succession Act, a Myanmar Buddhist wife, Daw Ma Ma Lay, could inherit the estate of a deceased Muslim husband, U Ba Thien. If Daw Ma Ma Lay passed away, their children would inherit. Under Myanmar customary law, there are no provisions prohibiting the right of inheritance of a deceased Buddhist's estate to his or her non-Buddhist children. Therefore, the non-Buddhist son could inherit the estate of deceased Myanmar Buddhist mother Daw Ma Ma Lay.

Though the Act gives protection to all Buddhist women who enter into union with non-Buddhist residents in the country, the Supreme Court and the Attorney General Office's strictly directed and prohibited their subordinate offices not to sign affidavits for marriage between a Myanmar Buddhist woman and an alien from any foreign country.

The 1954 Act was replaced by the new enactment of the Myanmar Buddhist Women Special Marriage Law of 2015 in order to provide better protection for Myanmar Buddhist women married to non-Buddhists. The new Myanmar Buddhist Women's Special Marriage Law and the Monogamy Law will be discussed here as both laws are connected with and have made improvements to marriage principles under Myanmar customary law.

The Myanmar Buddhist Women's Special Marriage Law guarantees equal enjoyment of and effective protection of matrimonial rights with respect to marriage, divorce, partition and guardianship of children that arise from the marriage between Myanmar Buddhist woman and a non-Buddhist man.⁵² This law is applicable to every Buddhist woman and her non-Buddhist husband whatever his personal law. Disputes concerning marriage, divorce, partition, succession and guardianship of children of Myanmar Buddhist women and non-Buddhist men shall be decided in accordance with this law.⁵³

⁵⁰ *Daw Saw v. E.M. S Mac Tung's Estates*, 1966 BLR, 81.

⁵¹ *Daw Ah Mar v. Daw Hla Tint & seven others*, 2003 MLR 161.

⁵² Preamble to the Myanmar Buddhist Women's Special Marriage Law.

⁵³ *Ibid*, s. 2(a).

Under this law, marriageable age for both sexes is higher than the previously repealed law, for now both parties to marriage must have reached the age of 18.⁵⁴ Under the repealed law, the non-Buddhist man needed to attain puberty and the Buddhist woman must have reached the age of 14 in order to enter into a valid marriage contract. Another important change is the provision that '[n]either party has an existing valid marriage'.⁵⁵ The other essential elements in connection with competence to marry and with obtaining parents' or guardian's consent are the same as under Myanmar customary law.⁵⁶

No existing valid marriage on the part of husband is a new requirement due to the recent institution of Myanmar's monogamous marriage system under the Monogamy Law of 2015. Section 5(c) of the Buddhist Women's Special Marriage and Succession Act, 1954 (repealed law) required the fact that only the woman must not have an existing valid marriage, since principles of Myanmar customary law then allowed only polygamy, not polyandry. The Monogamy Law makes a careful shift from polygamous marriage to monogamous marriage with the insertion of sections 5 to 10 by connecting the Monogamy Law, the Myanmar Buddhist Women's Special Marriage Law and Myanmar customary law. Subject to the provisions of this law, man and woman may legally enter into a marriage in accordance with either any existing law, or any religion or any custom to which they are subjects.⁵⁷ However, after the enactment of this Monogamy Law, every marriage between a man and a woman shall be monogamous, without affecting the validity of polygamous marriage made before the enactment of this law.⁵⁸ In addition, intermarriage between Buddhists or mixed marriage between a non-Buddhist man and a Buddhist woman shall be legitimate if intermarriage is consistent with Myanmar customary law as well as with the Myanmar Buddhist Women's Special Marriage Law.⁵⁹ In other words, all marriages contracted within the Union of Myanmar are governed by the Monogamy Law whether or not the parties to the marriage are Buddhists.

Chapter 3 of the Myanmar Buddhist Women's Special Marriage Law details the formalities to constitute a valid marriage. The marriage certificate, which is conclusive proof of such marriage, will be issued by the Registrar after fulfilling the conditions laid down by the said chapter. Sections 21 and 23 deal with legal presumptions. Section 21 provides that where a non-Buddhist man makes a promise to marry a Buddhist woman, such promise shall be deemed to be a promise to marry made under this law. Section 22 further states that where a non-Buddhist man and a Buddhist woman live together in such a manner as if

⁵⁴ Ibid, s. 4.

⁵⁵ Myanmar Buddhist Women's Special Marriage Law, 2015, s. 4(d) and (e).

⁵⁶ Ibid, s. 4(a)–(c).

⁵⁷ Monogamy Law, s. 5.

⁵⁸ Ibid, ss. 6 and 10.

⁵⁹ Myanmar Buddhist Women's Special Marriage Law, ss. 7 and 8.

they are husband and wife in accordance with Myanmar customary law, they shall be deemed to be lawfully married under this law from the time they started to live together as such. Incidents and issues arising from marriages performed under this law or presumed by it, such as issues arising from marriage or ownership of matrimonial property, shall be governed by the Myanmar customary law.⁶⁰ The new Special Marriage Law has penal provisions for those who violate any provisions made under section 19 to 20 of chapter 4 under the title of ‘Terms and conditions for the non-Buddhist man’. There were no such penal provisions under the repealed Special Marriage Act of 1945.

11. CONCLUSION

This chapter has briefly discussed the marriage system under Myanmar customary law. Myanmar customary law has been greatly improved by judicial decisions and new enactments which may be the most important source of present-day Myanmar customary law. Most recently, in 2015, the Pyidaungsu Hluttaw enacted two important laws for marriage, namely, the Myanmar Buddhist Women’s Special Marriage Law of 2015 and the Monogamy Law of 2015.⁶¹ However, since Myanmar customary law is neither written nor codified law in a strict sense, there is a need to develop more and refine further the legal doctrines of Myanmar customary law. It has been proposed by Myanmar legal scholars to establish a statutory marriage system based on the fine and well-established customary marriage system in order to remove uncertainty, to facilitate the proving of the validity of marriage, and to settle the issues arising from entitlement to marital property. In this regard, it is worth mentioning the *obiter dictum* of the late Chief Judge Dr. Maung Maung of the then Chief Court in *Daw Kyi Kyi v. Mrs. Mary Wain*, 1971 B.L.R. (C.C)52:

As matters concerning marriage are social matters, it is necessary for the legislative authorities to seriously consider whether or not legislative enactments need to be made in order to make uniform marriage laws applying to all persons resident in the country regardless of the personal religion and personal laws of such persons. The mixtures of religion and marriage, the use of personal religion and personal law in deciding matters concerning marriage is no longer in accord with the times.

⁶⁰ Ibid, ss. 24–31.

⁶¹ There are actually four new statutes in 2015 relating to marriage either directly or indirectly. These laws are: (1) the Myanmar Buddhist Women’s Special Marriage Law; (2) the Monogamy Law; (3) the Religious Conversion Law, and (4) the Control of Population Law. These are collectively and popularly known as the Race and Religion Protection Laws. For present purposes, however, the Myanmar Buddhist Women’s Special Marriage Law and the Monogamy Law are the only ones to have been discussed in this chapter.