



MARRIAGE, DIVORCE, AND INHERITANCE: A REVIEW OF THE PERSONAL AND FAMILY LAWS AFFECTING WOMEN’S LAND RIGHTS IN BURMA

TENURE AND GLOBAL CLIMATE CHANGE (TGCC) PROGRAM



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Cover Photo: Village committee member from Hae Lop village, Kalay Township, Sagaing Region, participates in community resource documentation activities.

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ACRONYMS AND ABBREVIATIONS

LUC	Land Use Certificates
NLUP	National Land Use Policy
SEZ	Special Economic Zone
VFV	Vacant, Fallow and Virgin Lands Management Law

EXECUTIVE SUMMARY

In Burma, as in many other countries, women's legal rights to land and other forms of property are linked to their relationships to their families, specifically their spouse. While sole ownership of land and property has become more common for women, marriage, divorce, and inheritance remain important events that influence many women's long-term tenure security and livelihood prospects. Many of the historical laws on marriage, divorce, and inheritance remain on the books, even if practices continue to evolve. This paper, produced under the auspices of USAID's Tenure and Global Climate Change program, therefore examines the personal and family laws affecting women's land rights in Burma with recommendations on areas for future research. Most strikingly, family law does not apply to most women in Burma, because for Buddhist and Muslim marriages (representing over 90% of the population), laws on marriage, divorce, and inheritance are governed by religious customs, which are not explored in this paper. Nevertheless, this analysis is particularly important in a time when economic development and cross-cultural exchanges are resulting in mixed religion marriage, and a number of these laws are particularly relevant to small, but important, ethnic minority groups.

At a macro level, Burma's Constitution prohibits discrimination on the basis of sex and guarantees equality to all citizens, yet, while women are explicitly granted equal rights in employment, there are no equality provisions related to property or land. Gender neutrality is observed in most other recent laws, though the National Land Use Policy represents a good step in future efforts to strengthen women's land rights.

With respect to personal and family laws, the paper finds that the Burma Laws Act of 1898 outlines rights related to marriage, divorce, inheritance, and succession, by largely placing these under the religious customs to which a person adheres (specifically Buddhist, Hindu, and Muslim). Thus, women's rights are generally governed by which religious group they are born into, and whether and whom they marry. Rights for Buddhists are not codified by statute in Burma but instead refer to the Dhammathats, which are Buddhist pre-colonial legal and ethical compilations. While Muslims and Hindus are also subject to the Burma Laws Act, their minority status means that formal courts are less likely to be familiar with these religious customs. There are a number of laws that apply to mixed marriages, as well as specific religions like Christian, Parsi, and Sikh, though the legislation is generally from the late 1800s or early 1900s, and in some cases reflect historical situations better than current best practice, for example permitting girls as young as 14 years old to marry. Laws related to mixed religion marriage appear to favor the Buddhist individual; for example if a Buddhist woman marries a non-Buddhist man and divorce occurs, property stays with the woman. Even in mixed marriages, however, many issues related to property ownerships are treated under Buddhist customary law. The Succession Act of 1925 include a series of provisions that place decision-making authority in the male representative of the family (for Christian, Parsi, and Jewish families).

While gendered issues play a large role in marriage, divorce, and inheritance, including structural disadvantages for women, the laws need to be considered based on the time and place they were written. Those written in the late 1800s/early 1900s represent colonial Victorian Anglo-Saxon, Protestant perspectives. More recently, a number of laws reflect relationships between ethnic and regional groups. The end result, principally for minority groups, is that the statutes are outdated, complicated, and scattered across different laws. Future analysis should focus on the role of Buddhist customary practices in promoting women's land and property rights, as well as pathways to clarify and harmonize gender equality under the law.

1.0 INTRODUCTION

Across the world, women are less likely than men to own land. Women own less land than men do and have land of lesser quality relative to men. Generally speaking, women also have fewer rights to land and property relative to men. For example, women often have only use and access rights, but not the right to transfer land (Giovarelli, Wamalwa, & Hannay, 2013). Women and men access, use, and own land differently: women are more likely to inherit land than to purchase or lease it; they are less likely to have their names included on documentation; and, their rights are more likely than those of their male counterparts to be derivative of a relative's rights, often those of a husband, father, or brother (Doss, 2016).

These dynamics are deeply ingrained in powerful social norms that presume men's status as heads of households, leaving women with diminished decision-making power within their households and communities, and relatively fewer rights to property and land (Doss, 2016). These differences limit women's ability to access market arenas that require formal rights, to participate in decision-making regarding land, and to manage or equally share in the benefits gained from productive use of land. This hampers women's social and economic empowerment as individuals, but also harms their families and communities. When women have rights to land, household incomes improve, and more money is allocated to nutrition and education for children, leading to better outcomes for women, families, and communities (Landesa, 2014).

The ways in which women and men hold, access, and use land differently may come from or be reflected in a variety of sources: community or family traditions; religious norms; customary laws and norms; formal laws, rules, and regulations at various levels; and, application of these laws in courts and common law precedent. This issue paper seeks to examine but one of these sources: formal, national-level laws and policies.

Formal laws can contribute to, reinforce, or fail to address gender-based discrimination that stems from social norms. This discrimination may be explicit: laws in 35 countries provide lesser inheritance rights to marital property, including land, to female surviving spouses (World Bank, 2016). Discrimination occurs through omission as well. Laws with gender-neutral provisions regarding ownership and management of land and property on an individual basis, through inheritance or purchase, or within a marital community or upon its dissolution, can perpetuate the presumption that men are rightful primary rights holders and limit women's access and recourse within formal institutions. Laws with explicit provisions guaranteeing gender equality and women's rights often fail to be implemented or enforced, and gaps in legislative coverage or administrative mechanisms mean that attempts to realize women's rights often fall short. These gendered realities call for identifying interactions between formal legal structures governing land administration and property rights (including policy, law, regulation, and administrative agencies), family law, and inheritance in a given setting. An analysis of formal law reveals how these laws may limit or at the very least fail to promote and protect women's rights to land on an equal basis with men.

In Burma, land is essential to livelihoods of both women and men. Agriculture, forestry, and aquaculture comprise the largest employment sector in the country, employing almost half (47.4%) of employed women with many more women working as self-employed farmers (GOM, 2016a). Many in Burma consider men and women to have equal rights to land. In practice, rural women and men often work the land together, and many couples make decisions about the land together. However, men are primarily regarded as heads of households and, more often than not, hold the primary land rights for the household (Namati, 2016). For example, under the 2012 Farmland Law, land classified as agricultural

land is eligible for registration and an accompanying Land Use Certificate (LUs), also known as Form 7, issued to the head of the household, usually a man (Namati, 2016; Eshbach & Louis, 2016).

Where women are heads of households, they are at a disadvantage in accessing and productively using land. Male-headed households are more likely to have access to agricultural land than are female-headed households, and where households have access to agricultural land, the average size of the landholdings is larger for male-headed households (ADB, UNDP, UNFPA, & UN Women, 2016). Male-headed households also have higher yields and higher average profit per acre (World Bank & LIFT, 2016).

According to some field research, men are also more likely to make decisions regarding land use, sale of produce, and the use of household income without agreement from his spouse than a woman would be able to do without the consent of her spouse (Louis & Eshbach, 2016). Women are also much less likely than men to attend and actively participate in informational meetings regarding relocation or other changes in the use or ownership of land, disadvantaging women in terms of access to information (TNI, 2015). Women are underrepresented in the local governance institutions that make decisions about land at the community level (Namati, 2016; Minoletti, 2014).

Some has already been written about the implications of several land governance laws on women's land rights in Burma (Faxon, 2015; Faxon, 2017; GEN, 2012; Namati, 2016; Namati & Landesa, 2015; TNI, 2015). However, thus far, an examination of how various personal and family laws of Burma may affect the interpretation and application of the land administration laws, particularly on matters of transferring land and property rights through inheritance and changing land rights upon marriage and separation, has been absent. Very often, it is the application of such laws that perpetuates a gendered difference in rights to land and property.

Throughout the world, inheritance is the most common way that people acquire rights to land, and the rules for how land rights are inherited are governed by a collection of personal and family laws, whether they are enshrined in formal law, customary practice, common law precedent, or other sources of law. Provisions under the personal and family laws determine who is a member of a family (i.e., through marriage, adoption, or legitimacy of birth) and the rules for succession of property. Such laws often include gender-specific language and provisions that affect how such laws apply to men and women differently. Such laws may explicitly differentiate between women and men's rights or may indicate that a woman's right to inherit is dependent on marital status or relationships to other males (Giovarelli & Scalise, 2016b).

As the Government of Burma plans its potential reforms to the legal framework on land, it is important to have a clear view of the gender implications of the entire framework around land and property, including potential gender issues that arise when the marriage, divorce, and inheritance laws are applied to land rights. This issue paper explores the potential gender implications of the interaction between formal laws governing land and those governing family law – marriage, divorce, and inheritance – in Burma, providing an overview of key policies and legislation, identifying potential challenges for women in claiming and realizing rights to land under the formal legal system and gaps in rights guaranteed to women with regard to land, and examines the ways these separate legal regimes might interact to hinder or prevent women's equality in land ownership, use, and access.

1.1 A NOTE ON SCOPE

This paper attempts to address two somewhat limited objectives given the breadth of the topic: (1) to introduce a needed conversation about the relationship between formal laws governing land and property and the personal and family laws and practices in Burma and the implications and effects of these two legal regimes on women's rights to land; and, (2) to identify areas for further inquiry and research to inform this conversation. This issue paper is not meant to be an exhaustive review of the

effects and application of the personal and family laws of Burma on women's rights to property. Rather, it is a limited exploration of the text of some of the major formal personal and family legislation that may affect women's land rights. The paper does not address implementation of these laws nor does it examine practices on the ground. It does not address common law precedent or customary law, which are also prevalent in Burma, particularly in the areas of family and personal law.

Also note that the laws of Burma often make a distinction between citizens and non-citizens with regard to property rights. For the purposes of this paper, the authors focus only on the laws as they apply to citizens of Burma.

I.2 AN OVERVIEW OF LAND AND PROPERTY IN BURMA

It is important to note that under the Constitution of Burma, all land is property of the state (§ 37(a)). Individuals, households, and communities do not own land; rather, they hold long-term use rights to a particular plot. The definitions of such use rights depend on the type of land involved, and are defined under various laws, some of which are described below. Many such rights, including rights to agricultural land registered under the Farmland Law, are transferrable by various methods, including inheritance. Personal and family laws generally lay out rules for how property rights are distributed. Although land in Burma is not private property and does not, strictly speaking, fall directly under the purview of the formal personal and family laws describing property, these laws are still relevant to a discussion on land rights for two reasons: (1) the long-term transferable rights to land are a type of private property, although the land itself may not be; and, (2) because the land rights are transferable by inheritance, the same sorts of rules that are generally applied to inheritance of other forms of property, should be applied to such inheritable land rights.

2.0 THE GENDERED PROVISIONS OF KEY LAWS AND POLICIES RELATED TO RURAL LAND MANAGEMENT IN BURMA

This section provides a brief overview to set context for the discussion on the personal and family laws below, rather than an exhaustive review of the gendered provisions of these policies and legislation.

Under the *Constitution of Burma* (2008), the supreme law of the land, the state is the ultimate owner of all lands within the country, but the state can grant or rescind land use rights (§ 37). The Constitution generally prohibits discrimination on the basis of sex, and guarantees equality to all citizens (§§ 21(a), 348). In addition, women are explicitly granted equal rights in employment, and equality “as prescribed by law” is guaranteed for mothers and pregnant women (§§ 350-51). There are no provisions in the Constitution referencing women’s equal rights to property or land. The right to private property and inheritance is guaranteed, but it is gender neutral (§ 37(c)). In the official English translation, there are also numerous provisions that specifically reference personhood in the context of provisions that reference the duties and rights of government officials with male pronouns (e.g., “a person himself”), reinforcing discriminatory social norms that men will be occupying seats in government, or holding positions of legal agency more generally (ADB et al., 2016; UNDP-Myanmar, 2015).

Generally speaking, the laws governing land make no explicit distinction between women and men and employ mostly gender-neutral language.

There are no gendered references in the *Farmland Law* (2012). In the English translation, words including “person,” “farmer,” and “agriculturist” are used to describe those subject to the law.¹ While these terms do not exclude women outright and are progressive in the sense that they do not explicitly disadvantage women, the law also does not contain any affirmations of gender equality, any measures to ensure that women’s land rights are on a par with those of men, or any provisions that explicitly address the limitations imposed on women’s land right by social norms.

Provisions for registration under the Farmland Law are similarly gender neutral. An LUC will be issued by the Township Farmland Management Body to an agricultural household or member of the household (§ 6). The law does not provide for joint registration of the land rights. In evidence from recent paralegal work conducted by Namati, respondents frequently believed that the head of household is required to fill out the forms to apply for an LUC; however, the form itself merely says “name of applicant” (Namati, 2016).

¹ Note that in Burma language, the word for “farmer” may have gendered connotation in that women are considered “casual labor” rather than “farmers” (Oxfam, 2014).

The **Vacant, Fallow, and Virgin Lands Management Law** (2012) (VFV Law) is similarly gender neutral in language. The VFV Law introduced a mechanism that allows public and private sector investors to claim land that is considered unused (§§ 4-5). While the accompanying rules do allow for “rural farmers and families who wish to carry out manageable agricultural projects” to apply for land allocation under the law (§ 3(f)), the law fails to adequately safeguard small farmers and the vast majority of such allocations made since 2012 have gone to larger investors (Oberndorf, 2012; Scurrah, Hirsch, & Woods, 2015). Such transfer of land puts many farmers, especially those belonging to members of ethnic nationalities who have no documented rights to the land that they rely on for customary practices such as shifting or rotational cultivation or agroforestry, in a vulnerable position (TNI, 2016). While the government classifies fallowed land as unused, ethnic nationalities attest that vacant land “does not exist in ethnic territories” (Franco, 2016; TNI, 2016).

The VFV Law does not affirmatively state that women have an equal right to apply for and receive grants of land use rights under this law.

The **Land Acquisition Act** (1894) allows the government to compulsorily acquire land when that land is required for a “public purpose” (§ 4). The law lays out the procedures for acquiring, compensating for, and taking possession of that land. The language of this law is generally gender neutral.

For investments within designated Special Economic Zones, the **Special Economic Zone Law** (SEZ Law) (2014) applies. This law transfers the responsibility of relocating persons and providing compensation to the developer or investor (rather than being that of the government) (§ 80). This law is similarly gender neutral in its provisions about relocation and compensation.

It is important to note that land takings, whether under the VFV Law, the Land Acquisition Act, or the SEZ Law, also have the potential to disproportionately affect women: where women access and use certain lands for certain purposes that contribute to their livelihoods (e.g., for collecting firewood for the family), it is likely that they have no secure and documented right to that land. If the land is classified as VFV land, they stand to lose access to it, should an investor want it. They would not receive any compensation for the land, and oftentimes the livelihood activity that the women used that land for must still be done, only it becomes more difficult (i.e., the women have to walk much further to collect firewood for their families).² Also, where there is consultation with affected persons about the particulars of a land taking or relocation or provision of compensation, women are less likely to be able to meaningfully participate in such consultations and decisions than men.

Forest land is governed under the **Forest Law** (1992), the **Forest Policy** (1995), and related rules and instructions, including the **Community Forestry Instruction** (2016). Each of these is also drafted with gender-neutral language.

The **National Land Use Policy** (NLUP), adopted in January 2016, provides guidance on the vision forward with changes to the current legal framework and the application of the laws. The policy assures equitable land access for smallholders and landless people, with consideration of customary tenure and gender equality (§§ 6-8). Employing gendered language, the NLUP explicitly calls for equal land tenure and management rights for women and men, invoking gender equality provisions of the Constitution and the Convention on the Elimination of All Forms of Discrimination Against Women, an international agreement to which Burma is a party (§ 75). The NLUP specifically lists a suite of land rights that men and women hold equally: rights to own property; to individually or jointly hold land; to land allocation and management; to inherit land rights; to participate and represent the community in collecting information about and making decisions about land; and, to participate in the formalization of the land

² For an example of the gender effect of a land investment upon members of a particular community, see Eshbach & Louis, 2016.

rights of ethnic nationality organizations (§ 75). The policy also requires women to be included as members of Land Use Committees, and encourages customary authorities, civil society, and others to promote gender equality with regard to land rights (§§ 10, 76).

However, the NLUP is not a document that wholly protects women's equal rights to land. First, the NLUP lacks sufficient links between its own provisions and those of the existing land laws. For example, the Farmland Law ensures both a broader and more specific bundle of rights to LUC holders that the NLUP does not call out as equal for women and men, including the rights to sell, exchange, and use land as collateral (TNI, 2015). And while the NLUP specifically calls out the equal right of women and men to hold land jointly, the Farmland Law does not provide for joint registration. The NLUP may have been able to move further in establishing the steps needed to improve gender equality as the land legal framework is revised moving forward.

Secondly, the NLUP does not include provisions that acknowledge and address barriers to women's land right nor that aim for an affirmative increase in gender equality with regard to land ownership, management, and governance (Faxon, 2017). Although references to women are numerous, a more nuanced concept of gender and the need for measures to analyze and address gender inequality as a whole are largely missing from the document. The NLUP also lacks recognition or differentiation of gender or other heterogeneity within marginalized populations. For example, the policy includes a chapter on ethnic nationalities within Burma, and calls for ethnic women's participation in decision-making on land, it does not make reference to ethnic women in any other section (§ 67). Additionally, while the NLUP creation process included a public consultation, women were much less involved in the drafting and public consultation process than were men (Faxon, 2017), reflecting the challenges in putting principles into practice. Nevertheless, while not without faults, the NLUP represents a solid first step toward more gender equal land rights that sets a foundation for future legal and development efforts to strengthen women's land rights (Faxon, 2017).

3.0 THE GENDERED PROVISIONS OF THE PERSONAL AND FAMILY LAWS AFFECTING PROPERTY RIGHTS IN BURMA

A vestige of British colonial rule, the formal laws governing marriage, divorce, and inheritance in Burma are religion-specific and set out to apply the specific religious customs of each group (Crouch, 2015). This system is enshrined in formal law in the Burma Laws Act (1898), under which the laws of the religion to which the person in question adheres (Buddhist, Hindu, and Muslim, specifically) govern all matters of succession, inheritance, and marriage, and a suite of other statutes lay out the rules of marriage divorce and succession for other religious groups (Aye Kyaw, 1991). This system affects the ways women access and own land. Their rights are complicated by which religious group they are born into, whether they marry, and whom they marry.

A large majority (89.8%) of Burma's population is Buddhist; minority religions include Christianity (6.3%), Islam (2.3%), Animist (0.8%), Hindu (0.5%), other (0.2%), and none (0.1%).³ For Buddhists, Hindus, and Muslims (over 90% of the population), custom and religious teachings and rules have the force of law in matters of marriage, divorce, and inheritance (Burma Laws Act, 1898, § 13). The Buddhist majority in Burma use Buddhist law and custom to determine the validity of a marriage, the rules for divorce, and the division of property within a marriage and upon divorce and the rules of inheritance and succession. The Dhammathats (pre-colonial legal and ethical compilations), prevailing custom, and judicial precedents are the main sources for how questions on these matters are decided for Buddhist couples (Yee Yee Cho, 2012). These rules are not codified by statute in Burma.

Similarly, Islamic family law is not codified by statute in Burma. Questions regarding family law for Muslim couples are decided based on Islamic laws and teaching, custom, and judicial precedent (Marlar Than Aung, 2015). Muslims constitute only a small minority of Burma's population, so the formal court system is less likely to be familiar with these customs in deciding a case than they would be in cases of Buddhist marriages.

For Hindus, most matters would be decided based on Hindu laws and customs, but there are a few laws that codify or formally modify Hindu customary practices.

³ Note that the census was criticized for not fully enumerating the persons of Burma, and so some of these figures may be lower than reality, particularly for some religious minorities (UNFPA, 2016).

In the cases of other minority religious populations (including Christians) and marriages between persons of different religions, there are several statutes that govern the conditions of a valid marriage and the division of property upon marriage and divorce.

Several of these statutes are summarized and discussed in the following sections.

3.1 LEGISLATION ON MARRIAGE AND DIVORCE

Burma Laws Act (1898): For matters of succession, inheritance, and marriage courts must decide based on the relevant religious laws where the parties are Buddhist, Muslim, or Hindu (§ 13(1)). Certain provisions of such religious laws may be altered or abolished by statute, in which case the court should follow the statute (§ 13(1)). Where the parties are not of these religions, the courts should decide such cases “according to justice, equity, and good conscience” (§§ 13(3)).

Married Women’s Property Act (1874): The wages, earnings, and property that a married woman acquires through her own work, occupation, or exercise of her specific skill are considered her separate property (§ 4). Further, a married woman is entitled to purchase an insurance policy on her own behalf, independently of her husband, maintain a suit for the recovery of her separate property and have the same remedies and liabilities, both civil and criminal, as if she was unmarried (§§ 5, 7-8). No similar provision applies to the husband, or describes either spouse’s entitlement to marital assets apart from life insurance (§§ 5-6). This law does not apply to women who are Buddhist, Muslim, Hindu, Sikh, or Jain at the time of marriage (or to women who are married to men that have professed to any of these religions at the time of marriage) (§ 2).

Christian Marriage Act (1872): There are several requirements for a valid legal marriage where one or both of the parties are Christian. Christian men or women can have a valid marriage only if the marriage is performed by a minister licensed to perform marriages under the particular sect of Christianity. There are specific requirements for different Christian clergy, and some general restrictions; for example, at least two credible witnesses present, parental consent if either party is a minor, public notice of impending marriage, and payment of certain fees.

Special Marriage Act (1872): Marriages between those who do not adhere to Christian, Jewish, Hindu, Muslim, Parsi, Buddhist, Sikh, or Jain religions and between those who are mixed in their religions also must adhere to several requirements to have a valid legal marriage under this law. Requirements include no other living spouse, the man must be at least 18 and the woman 14 years old, consent of father or guardian if either is under 21 years old, and no relations of consanguinity that would render their marriage illegal (a shared great-great-grandparent or closer and one as the lineal ancestor of the other or the sibling of a lineal ancestor). Three witnesses and a registrar must be present at the ceremony, following registration, payment of fees, and declaration of intent to marry.

Burma Divorce Act (1869): This law lays out requirements for dissolution of marriage, annulment, and judicial separation for marriages under which at least one party is Christian and marriages under the Special Marriage Act (§ 2; Special Marriage Act, 1872, § 17). Under this law, either spouse can petition the court to dissolve or annul a marriage or grant judicial separation on various grounds, but the law has several key gendered provisions that would lead to a gendered difference in: (1) the ability to seek a divorce, annulment, or separation; (2) the judgement of who is at fault for the divorce, annulment, or separation; and, (3) the division of property in these circumstances. Some of the key provisions of this Act include the following:

- *Grounds for divorce:* While the Act allows either spouse to petition for dissolution of marriage, the grounds required for the petition of dissolution depend on the petitioner’s gender. The Act allows a man to petition the court to dissolve a marriage on the basis of his wife’s adultery (§ 10). It allows women to petition the court for dissolution in the case of adultery, but only if it is

paired with the exchange of Christianity for another religion and an aggravating circumstance (such as a form of marriage with another woman, incest, bigamy, rape, sodomy, bestiality, desertion exceeding two years, or particular cruelty) (§ 10). The grounds for an annulment (impotence, being within prohibited degrees of consanguinity, mental incapacity at the time of marriage, having a previous marriage in force at the time of marriage, or if marriage was obtained by force or fraud) or judicial separation (adultery, cruelty, or desertion without reasonable excuse for at least two years) are the same for both genders (§§ 8-9, 22).

- *Adding an adulterer to the suit:* Under the Burma Divorce Act, adulterers must be added to suits regarding female infidelity, while the same is not the case for male infidelity (§ 11).
- *Protection of women's property:* The Burma Divorce Act has several provisions that lay out what may happen to the wife's property throughout the separation process. When judicial separation is granted, the wife should be treated as an unmarried woman or widow with regard to her property (§ 24). She is also treated as an unmarried woman for purpose of contracting while separated (§ 25). Women who have been deserted have the right to petition the court for a protection order on any property she acquired after desertion and to protect her assets against her husband's creditors (§§ 25, 27-31). If, following such an order, one seizes or continues to hold any of her property, he will be liable to return or deliver her specific property and pay her a sum equal to double its value (§ 30). If she again cohabits with her husband, subject to any agreements signed by the parties whilst separated, her property from the separation period shall be held to her separate use (§ 24).
- *Fault and property division:* If a wife is found to be adulterous, the court, at its discretion, decides whether she is entitled to any of her own property and has power to settle her property for the benefit of the husband or children (§ 39). The law contains no such provision if the husband is adulterous.

Parsi Marriage and Divorce Act (1936): This law applies only to Parsis, at the time the law was passed, a small community of ethnic Indians of Zoroastrian faith living in Burma (§ 1). As with the Christian Marriage Act and the Burma Divorce Act, the Parsi Marriage and Divorce Act lays out particular requirements for a valid marriage and divorce. Valid marriage under the Act requires parental consent if either party is under 21 years old, officiation by a Parsi priest, the presence of two witnesses, and no other existing valid marriages (§ 3). The Act allows either party to sue for judicial separation or divorce for a number of reasons, including adultery, unsound mind, religious conversion, desertion, and willful refusal to consummate marriage (§§ 30-32, 34). Each of these offenses carries a statute of limitation and requirement of ignorance of the petitioner at the time of marriage. This law requires attachment of an adulterer to the suit for reasons of paying part or the whole of the cost of proceedings, but it doesn't have a gender restriction like the Burma Divorce Act does (§ 33).

Under this law, the court can order the husband to pay the wife monthly or weekly during the suit as the court finds reasonable to cover her necessary costs (§ 40). It can also order him to pay her a gross sum or periodical payment for her maintenance and support while she remains unmarried (§ 41). The court may also specifically make provisions in the final decree as it deems just and proper with respect to property presented at or about the time of marriage that may belong jointly to both husband and wife (§ 42). Where the divorce or judicial separation is due to the wife's adultery, the court may settle up to one half of the property to which the wife would otherwise be entitled to the benefit of the children (§ 50). This Act also creates a Parsi Matrimonial Court to adjudicate cases under this law (§ 18).

Burma Buddhist Women's Special Marriage Law (2015): Under this law, Buddhist women can marry non-Buddhist men if the marriage is made with free and voluntary consent, sound minds, no other valid marriages for either party, and the consent of parent or guardian if the woman is less than 20 years old

(§ 9). The law also places various restrictions on the non-Buddhist man during the marriage. He must allow his wife and their children to freely profess and practice the Buddhist religion, not attempt to convert her religion, and not to insult Buddhism through damage to places of worship, sacred objects, words, writing, or visible representation or gesture (§ 24). The Buddhist wife can divorce her husband on any of these grounds. In such a divorce, the man must waive his rights to any jointly owned property and guardianship of their children, pay compensation to the woman and maintenance for all minor children (§ 25).

Either spouse can petition for a divorce based on a woman's conversion to Buddhism. If the non-Buddhist man petitions for divorce he is required to pay monthly maintenance sufficient to maintain the wife's standard of living until she remarries, he waives all claim to property that the woman owned individually before her conversion while he retains all rights to property that he owned solely before his wife's conversion, he waives guardianship to their children, and he is required to pay maintenance for minor children (§ 34). Likewise if the man's religion deems the marriage invalid, he can divorce the woman on these grounds but is subject to these same restrictions (§ 32).

For many other situations, this law states that the couple will be treated as if both are Buddhist, and such matters are governed under Buddhist customary law. For example, cohabiting couples are deemed to be married from the beginning of cohabitation (§ 26). All issues related to property ownership, inheritance, divorce, partition, guardianship of children are decided according to Burma customary law as if all are Buddhist (§§ 30-31). For a man who is Hindu, Sikh, or Jain, upon his marriage to a Buddhist woman, he has effectively severed ties to his family, and all inheritance rights to his property devolve to his wife and children (§ 29).

This law was controversial leading up to and upon its passage in 2015 (Nobel Zaw, 2015; White, 2015; Win Naung Toe, 2015). Some criticized the law as discriminatory against women and targeting ethnic minorities, particularly Muslim men. Others consider the law a needed measure to protect Buddhist women who marry outside their faith.

Monogamy Law (2015): This law formally bans polygamy, and renders any subsequent marriages invalid unless all previous marriages are annulled, legally dissolved through divorce, or ended by death. The Monogamy Law stipulates that if a man or woman enters another marriage while a first legal marriage exists, they are guilty of a matrimonial crime, and as a result forfeits "his" property rights—the language here does not refer to either spouse (§§ 13-14). A translator's note after the provision in the English version states: "It is unclear from the Burma text whether the provision refers to property acquired prior to marriage or during marriage, whether individually or jointly."

Notably, if a husband who is already married to another enters into a second (or subsequent) marriage (after the effective date of this law), the second wife is not entitled to inheritance if the husband dies because that marriage is legally invalid. Similarly the husband is not entitled to inheritance if the second wife dies. As with the Buddhist Women's Special Marriage Law, the Monogamy Law was criticized by as targeting Muslim men (Hnin Yadana Zaw, 2015; White, 2015). The early application of the law has included charges brought against persons of various faiths, including Buddhist (Sithu Aung Myint, 2015; Thin Lei Win, 2015a; Thin Lei Win, 2015b).

3.2 LEGISLATION ON SUCCESSION

Burma Laws Act (1898): As with matters of marriage, matters of succession and inheritance are decided based on the relevant religious laws, unless altered by statute, when the parties are Buddhist, Muslim, or Hindu (§ 13(1)). Where the parties are not of these religions, the courts should decide such cases "according to justice, equity, and good conscience" (§ 13(3)).

Succession Act (1925): This act is the main statute laying out the rules for the creation of wills and the division of property upon death in the absence of a will in Burma. Several of its provisions exclude particular ethnic groups, meaning that upon those particular points other laws, generally customary practice and religious based traditions, would govern.

This law contains many gendered provisions. Some of the key provisions of the law include the following:

- If one or both of the parties is of the Hindu, Muslim, Buddhist, Sikh, or Jain faith, the relevant (religious) customary division of property upon marriage applies. For all others, marriage does not create any interest in property of the other spouse (§ 20). In other words, for those who are not of the Hindu, Muslim, Sikh, or Jain faith, all property acquired before marriage remains separate property.
- All adult persons of sound mind can dispose of property by will (§ 59).⁴ This standard extends to married women; a married woman can dispose of any property she could legally alienate during her lifetime (§ 59).
- A will made before marriage becomes void upon the testator's marriage (§ 69).
- The law also lays out a set of rules for intestate succession when the deceased is not Hindu, Muslim, Buddhist, Sikh, or Jain (§ 29). It lays out one set of particular rules for Parsi intestates, and another set for all others. The division of property upon death of those of Hindu, Muslim, Buddhist, Sikh, or Jain faiths would be decided by relevant religious or customary law.
- Under the standard set of rules (which would apply to those of Christian and Jewish faiths, among others), the intestate share of the surviving spouse depends on whether the deceased has any surviving lineal descendants (i.e., children or grandchildren) or surviving members of the deceased spouse's natal family. If the deceased has lineal descendants, one-third of the property passes to the surviving spouse and two-thirds pass to the lineal descendants (§ 33(a)). If the deceased has no lineal descendants, one-half passes to the surviving spouse, and the other half passes to the deceased's natal family (§ 33(b)).⁵ If the deceased has neither lineal descendants nor natal family surviving, the surviving spouse inherits the whole of the deceased's property (§ 33(c)). The same division of property applies whether the surviving spouse is a man or a woman (§ 35).
- Among lineal descendants, girls and boys seem to have equal right to inherit (§§ 37-38). However, among the deceased's natal family, there is a gendered division of property: if the deceased's father is living, all property goes to him (§ 42). The intestate's mother inherits only if the intestate's father is deceased, and she must split the portion of the estate with the intestate's siblings and the intestate's deceased siblings' children (§ 43). This system again reveals a bias for men to hold and manage property.
- Parsi succession is also governed under the Succession Act, and gendered inequalities are more explicit than for other religious groups under these provisions. When a Parsi man dies and his wife is living, the share of each son's inheritance will be double that of the widow, and the widow's share is double of each daughter (§ 50). If the wife is not living, each son gets four times

⁴ Note that for the wills of Muslims (and for pre-1927 wills of Buddhists, Hindus, Sikhs, and Jains) the provisions of this Act that lay out the testamentary requirements for a valid will do not apply. See §§ 57-58. Presumably, in these cases, relevant religious law would apply.

⁵ There is an exception to this rule: for small estates under 5000 rupees and where the deceased has no lineal descendants, a widow or widower would inherit the entire estate rather than dividing with the deceased's natal family. See § 33A.

the share of each daughter (§ 52). If a Parsi woman dies, her widower's share will be double that of each of the children (§ 51). If the husband is not living, each child inherits equally, with no difference between shares of male and female children (§ 53).

- For purposes of succession, there is no distinction between those related to a person deceased through his father or mother, between those related to a person deceased by full blood and half blood, or between those born in the lifetime of the person deceased and those who have since been born (§ 27). However, the table laying out how closely particular family members are related for matters of succession uses only male terms (§ 28 & Schedule I).
- Succession to immovable property (including land) located in Burma is subject to the laws of Burma regardless of the domicile of the deceased at the time of his death (§ 5(1)). A woman acquires the domicile of her husband upon marriage, following his domicile throughout their marriage unless they are separated by the sentence of a competent court or he is undergoing a sentence of transportation (§§ 15-16). Children born outside of marriage follow the domicile of their mother, while children born into a marriage follow the domicile of their father (§ 5(1)).

There are additional statutes that address inheritance for those of Hindu faith:

- **Hindu Widow's Remarriage Act (1856):** While most matters of marriage, inheritance, and succession for Hindu parties are decided under Hindu law and custom, this Act supersedes a custom under which widowed women who were Hindu were not allowed to remarry. The Hindu Widow's Remarriage Act allows a Hindu woman to remarry following the death of her spouse (§ 1). Such remarriage, however, limits the woman's rights to her deceased husband's property, including, presumably, any rights to land. The widow would retain only a limited, nontransferable interest in any of her deceased husband's property that came to her by way of maintenance, inheritance to her husband or his successors, or through her husband's will (unless that will grants express permission for her to remarry). Her rights to this property would cease upon her remarriage and pass to the next heirs of her deceased husband (§ 2). Upon remarriage, the woman may also lose custody of any children she had with her deceased husband. The family of her deceased husband can petition the court for guardianship of the children (§ 3). The woman retains rights in all other property and rights to inherit property from her subsequent husband (§ 5). There are no similar laws limiting property rights should a Hindu man whose wife has died remarry.
- **Hindu Law of Inheritance Amendment Act (1929):** This law applies when a Hindu man dies intestate, and it only applies to property not held jointly (§ 1). The order of succession was modified to reflect the following (with additional heirs before and after): father's father, son's daughter, daughter's daughter, sister, sister's son (provided he was not adopted after the sister's death), and father's brother (§ 2). The law additionally limits the size of the estate to be inherited by a female to that which could be inherited according to customary law (§ 3).

Child Law (1993): This law was enacted to implement the provisions of the Convention on the Rights of the Child and provides that every child has the right to citizenship; every child has the right of inheritance and every child has the right of possessing and holding property (§ 25).

4.0 IMPLICATIONS OF THE FORMAL PERSONAL AND FAMILY LAWS ON WOMEN'S LAND RIGHTS IN BURMA

A full understanding of the security of women's land rights cannot be based on land laws alone. A full understanding requires deep knowledge of the legal framework as a whole and the application (or lack thereof) of that framework through examination of the practice of how women access and use land, how they obtain and hold rights to that land, and their potential vulnerabilities that may lead to their losing that land. In particular, understanding the gendered dimensions of inheritance, the most common way rural land rights are obtained throughout the world, is critical as inheritance regimes have the potential to entrench and perpetuate unequal social structures from generation to generation.

An understanding of the personal and family laws of a country is but one essential piece of this puzzle. A full understanding requires knowledge of the manner in which the land laws and the family laws of the jurisdiction interact. Questions critical to this inquiry include the following:

- What is a valid marriage?
- What is the division of land rights within a marriage?
- What is the division of land rights within a non-valid marriage?
- What is the division of land rights upon a separation or divorce?
- What inheritance rights does a surviving wife have upon the death of her husband?
- What inheritance rights does a daughter have upon the death of her parents?⁶

In the case of Burma, the formal legal framework couples a suite of land laws that employ generally gender-neutral language with a complex structure of family laws. Read together, they leave many unanswered questions about the state of women's land rights. However, this review of the formal family land laws in Burma reveals some important information that gets us closer to answers to the questions above.

For one, the applicable law (and thus, the answers to these questions) depends on the religion of the parties involved in a particular situation. Any inquiry into matters of land rights in marriage, divorce, or

⁶ Finding an answer to each of these questions often requires answered several sub-questions. For a more complete analytical framework, see Giovarelli & Scalise, 2016a and Giovarelli & Scalise 2016b.

inheritance must begin with a threshold question: What is the religion of each of the persons involved? The answer to this question leads to which law should apply.

Relatedly, the formal family laws are not applicable for the majority of people in Burma. For Buddhists, Muslims, and Hindus (totaling over 92% of the population), religious law or custom has the force of law in matters of marriage, divorce, and inheritance. While some formal legislation applies in the case of Hindus (legislation that supersedes religious custom in certain cases) and for Buddhists, Muslims and Hindus that marry outside of their religion, most questions for these groups are answered through other sources of law.

For the minority of persons in Burma to which the formal family laws apply, the statutes are outdated, complicated, and scattered across a number of different laws. With respect to the age of the statutes, many were written well over a century ago and the initial intention and impetus should be judged through the lens of the time, though the practical realities of these laws need to be considered in the present. Importantly, several of these laws apply to Christians, who are only about 6% of the population in Burma, but make up a significant proportion of particular ethnic minorities, including Karen, Chin, and Kachin.

These statutes also have some highly gendered provisions that indicate a presumption that men are the primary managers of property. For example, the provisions addressing marital property and its division are scattered across laws governing marriage for different religions, often apply only to one spouse, or to both spouses but in different ways, or are linked to punitive measures for adultery. The Burma Divorce Act makes a woman's infidelity grounds for divorce, but a man's infidelity must be coupled with another aggravating circumstance for a woman to petition for divorce (Burma Divorce Act, § 10). If a wife is found to be adulterous, she risks losing rights to her personal property at the discretion of the court (§ 39). The statutory laws provide little guidance for division of property in the case of divorce. There is no default marital property regime (World Bank, 2015). Religious-specific statutory laws are unclear regarding whether property brought to a marriage is held communally within marriage, and whether property accrued within marriage is considered community property.

In the statutes pertaining to inheritance, there is limited equality for women, and some provisions are explicitly discriminatory. While the Succession Act's rules for intestate succession apply to both women and men equally, certain provisions indicate a bias toward men as decision-makers for the family and holders and managers of property (Succession Act, § 35). For instance, fathers can name guardians for their minor children by will, while mothers cannot, and a mother can inherit property from her child only if the child's father is deceased (§§ 42-43, 60). A system that is biased toward men as decision-makers and property managers often means that women are less likely than men to receive assets via inheritance from their parents or other relatives, and that they are less likely than men to be able to direct assets gained during their lifetimes to their children (especially to their daughters) or other relatives.

When these laws that determine the rights to marital property and inheritance are coupled with the mostly gender-neutral land laws, the principles of gender equality enshrined in the Constitution and the National Land Use Policy fall short. In a system where the social norm assumes that men are heads of households and primary decision-makers over land, gender-neutral laws are likely to be interpreted and implemented in ways that severely disadvantage women, or that formal laws will be subverted in favor of more traditional approaches. Women who have acquired land or property via inheritance when they marry are likely to follow social norms regarding its management, meaning it will likely be the husband who manages and controls property and interacts with government officials. While laws are gender neutral, the lack of clear and affirmative provisions governing women's property rights regardless of marital status indicates that women may frequently be unable to claim and defend their rights to land. This is evident from recent experience with registration of land use rights under the Farmland Law,

where despite seemingly gender-neutral language, the vast majority of LUCs have been issued in the names of men only and efforts for joint registration have been largely unsuccessful.⁷

⁷ See Namati, *supra* note **Error! Bookmark not defined.**, at 5-6.

5.0 RECOMMENDATIONS FOR FURTHER ANALYSIS

To get a better sense of the full picture of women’s land rights in Burma, several additional pieces of research should be completed, including the following:

- An analysis of suggested revisions to existing marriage, divorce, and inheritance laws;
- A gender study of Buddhist family law and its application as it applies to marriage, divorce, and inheritance;
- A gender study of Islamic family law and its application as it applies to marriage, divorce, and inheritance;
- A mapping of the institutional structures tasked with enforcing family and property laws;
- A study of the implementation and enforcement of the formal family laws and any relevant principles established through common law precedent that may affect the gender dimensions of property rights and land tenure security;
- Studies of the gender dimensions of customary law and its enforcement as it relates to property rights and land tenure security, including through marriage, divorce, and inheritance, in each of the states and regions;
- A study of gender dimensions of land takings and related consultation, compensation, and relocation in Burma; and,
- A survey of any efforts to incorporate women’s land tenure security into efforts in Burma to implement the National Strategic Plan for the Advancement of Women (2013-2022) and the Convention on the Elimination of All Forms of Discrimination Against Women.

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