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Lord Kyaw Thu's Precedent: a Sixteenth-Century Burmese Law Report

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The naked rule or maxim doth not the effect. It must be made useful by good differences, ampliatiions, and limitations...; by discourse and deducement in a just tractate.

Francis Bacon

The present chapter examines a law report on a disputed inheritance within a Tai (Siamese) noble family under the rule of an all-conquering Burmese king. The text itself is generally known as *Shin kyaw thu pyatton* ('Lord Kyaw Thu's Precedent'), after the Burmese author of the final and binding judgement, but the 1870 printed edition, which contains five other works from the precedent (*pyatton*) genre, gives two longer titles. Its title page consists of the names of six works in order of appearance, with this one coming first: 'Hanthawaddy White Elephant King and Lord Kyaw Thu – Judgement-precedents'. On the following page is a decorative graphic block, under which is set out the longer title:

The Golden Palace of Pegu City, Hanthawaddy.

The Reign of the White Elephant King, the Great Law-King.

The Governor of Pyitzabon's Children.

The Probate Case Speeches of the Great Law-King and

Lord Kyaw Thu.

This Judgement shall be the Great Precedent.

Let us shorten that to 'Lord Kyaw Thu's Precedent', or simply *The Precedent*,

Pegu's Golden Palace was the centre of government for a vast mainland empire created by the early Toungoo-dynasty kings. The greatest of the conquerors was the White Elephant King of Hanthawaddy, known to history as King Bayinnaung (r. 1551-82), and *The Precedent* is the leading source on law and kingship under Bayinnaung's rule. It reveals a vibrant legalism quite different from those of its neighbours in East and South Asia. Some aspects of sixteenth-century Burmese legalism are reminiscent of Western European approaches to law and kingship, and at the end of the chapter I shall pursue this similarity by way of a contemporary English law report.

Three centuries lie between the events described in *The Precedent* and its publication. May we use the nineteenth-century publication as a source on sixteenth-century law? We lack the reassurance of a sixteenth-century autograph manuscript signed by King Bayinnaung himself.¹ On the other hand, the text printed in 1870 contains no obvious anachronisms, and its portrait of Tai princelings serving the Toungoo emperors as pageboys-cum-hostages is corroborated by earlier chronicles. Probably some portions of the text are interpolated (I note five suspect passages below), but most of it seems authentic enough to be used as evidence of sixteenth-century legal practice. I have checked the printed text against a palm-leaf manuscript held in Meiktila, and have noted the significant differences between them. On several occasions I prefer the Meiktila MS to the book.² *The Precedent* claims to be a single sixteenth-century text, however, and I shall treat it as such.

THE TEXT AND ITS SETTING

The Precedent's Burmese text is eight pages long. Its first half is exposition. Its second half contains the two speeches made by King Bayinnaung and Lord Kyaw Thu that conclude the litigation. In the course of the present chapter I offer a partial translation and summary of the first half

¹ Had such an artefact existed it would have been the oldest surviving Burmese manuscript by a margin of two centuries. The fragility of Burmese palm-leaf texts is touched on below.

² Anonymous 1870 *Hanthawaddy Tayama Mingyi Shin Kyaw Thu...A* translation into English was made on 25 February 1881 by Maung Kin (who described himself as a bailiff living in Rangoon). It was printed and circulated as pp. 37-40 of G.D. Burgess's 'Papers on Inheritance' file (IOR P/1802 June A3 pp. 4-105). Thanks are due to Christian Lammerts for sending me photographs of the Meiktila MS, copied in 1880 and catalogued as MTLU. Lib.pu.0223-06ff. Thanks also to Kennon Breazale for his help with Tai history. DawThan Saw has led me patiently through the Burmese texts. I am deeply grateful to her.

and a full translation of the second. In skeleton form *The Precedent* is a five-act drama:

- a How the inheritance dispute came about
- b The four previous hearings
- c King Bayinnaung's speech
- d Kyaw Thu's judgement
- e How Bayinnaung rewarded Kyaw Thu

For greater accuracy of citation, and following the lead of the text itself, I divide this into twelve sections:

- 1 Facts of the dispute
- 2 The Siamese decision (Judges Byanayit and Byanaraza)
- 3 The first Pegu appeal [Judges Nanda Kyawdin and Mahamun)
- 4 The second Pegu appeal (Judges Dhammaraja and Mahasammata)
- 5 The third Pegu appeal (Judges Rajadhamma and Rajamanu)
- 6 King Bayinnaung's speech
- 7 listed KyawThu's judgement: the appellant's case
- 8 listed Kyaw Thu's judgement: five new maxims
- 9 listed Kyaw Thu's judgement: his legal findings
- 10 Kyaw Thu's judgement: his ethical findings
- 11 [four interpolated or irrelevant paragraphs]³
- 12 How Bayinnaung rewarded Kyaw Thu

Leaving the lengthy interpolation (section 11) aside, nine of the remaining sections are marked on the printed page as starting with a paragraph break.⁴ Kyaw Thu's speech (sections 7-9) is a special case, since it is apparently peppered with paragraph marks: this is because the Burmese sign that marks a paragraph break also serves to show items on a list.

The Burmese writing-system was designed to be inscribed, then ink-washed, onto a treated palm leaf. One text will consist of many such leaves tied together between end-boards, and between the same end-boards are frequently found other texts, sometimes related, sometimes not. The Burmese palm-leaf book is unwieldy and will disintegrate within two or three centuries of being written. The page format allows about fourteen lines per page, and to maximize space, paragraph breaks are shown by a single indent, rather than a new line. The single indent

³ These paragraphs contain general material on inheritance law which has nothing to do with Bayinnaung or Kyaw Thu or the Pyitzabon dispute. Its irrelevance alone suggests interpolation.

⁴ I have ignored one paragraph break within the printed text. It divides what I call section 1 in half.

also signifies an item on a list. Much of Burmese literature consists of lists, whose significance in a legal context will be explained below. Here Kyaw Thu's speech in judgement is laid out on the page as items on a list (I mark these sections above as 'listed'). King Bayinnaung's speech is printed as continuous prose, however, and apparently the king and the judge were following different rhetorical models in their respective speeches.

The Precedent immediately establishes a location. Its first line gives three place-names: 'Yoidaya, Dwarawaddy... Pyitzabon'. Yoidaya (deriving from North Indian 'Ayutthaya') is how the Burmese refer to the central Tai kingdom and its capital city. Late in the eighteenth century the Burmese army sacked Yoidaya, the central kingdom was afterwards re-established with Bangkok as its new capital, and the rest of the world learnt to refer to it as 'Siam' and subsequently as 'Thailand'. Meanwhile the Burmese continue to refer to their eastern neighbour as Yoidaya. Dwarawaddy is the equivalent classical toponym: 'Dwarawaddy' is to 'Yoidaya' as 'Caledonia' is to 'Scotland'. In mainland Southeast Asia (as in Europe) several kingdoms shared a common classical language and literature: this language was Pali, a Prakrit language closely related to that in which King Ashoka (c. 250 BC in India) set down his inscriptions. The Buddhist scriptures as handed down in Pali are normative for most of the Buddhists in mainland Southeast Asia, but within this region of shared classical culture, literature is read, taught, and composed by speakers of three language-families—the Tai, the Mon-Khmer, and the Tibeto-Burman. These language-families are as different from each other as Indo-European is from Turkic and from Nilotic. Generally Tibeto-Burmans live to the west, the Khmer to the east, and the Tai in between. The Mon, who were responsible for most of the earliest Pali-influenced inscriptions in Southeast Asia, used to live throughout that part of the mainland shown in Figure 7.1. A few decades before *The Precedent* was composed, the Burmese-speaking Toungoo dynasty conquered the whole area. They took Chiangmai in 1558, Yoidaya in 1569, and Vientiane in 1574. Pyitzabon (which the Tai spell 'Phetchabun') is a walled city guarding one of the passes up from the Yoidaya plains to Vientiane. Bayinnaung annexed it in the 1570s; his successor lost it in the late 1580s. Between these dates occurred the events described in *The Precedent*.

Having established location, *The Precedent* concentrates on a local family. The Governor of Pyitzabon had a wife and three children.



Figure 7.1 Part of the Toungoo Empire

The eldest child, a boy, was summoned to live in Pegu to serve as a page at Bayinnaung's royal court. He was in Pegu as a schoolboy to learn the ropes of Toungoo government, but also as a pledge for his father's continued loyalty, and the young page had to cut a figure or people would think of Pyitzabon as unimportant. Hence his father sent him up to the capital city 'with gold, silver, ordinary clothing, dress uniform, followers, servants, elephants, and horses'. Three or four years later (probably around 1576) the Governor of Pyitzabon and his wife fell ill. Realizing they would not recover, they wrote a document that divided their wealth between their daughter and younger son. This division of the probate estate was witnessed by senior monks and headmen. By the time the elder son learnt about this in Pegu, probate was complete. He petitioned King Bayinnaung for leave to travel to Pyitzabon and speak to his younger siblings, leave was granted, and he crossed the eastern passes to his home town, but the interview between the siblings went badly. The book simply says that the younger children insisted they were the only heirs. The Meiktila MS adds some specifics to this dialogue. The elder son asked them why they had not sent him news of their parents' death, and asked them what had become of his share of the estate. The younger brother and sister replied:

While our parents were still alive, they divided the estate between us.
We have taken possession of it. There was no share for you, Elder Brother,

because you had already been given clothing, dress uniform, gold, silver, and other things you wanted. When our parents were ill and dying, you were not there to comfort them. Do not be resentful.⁵

Despite the elder son's remonstrations, the younger children would not budge, so he appealed to the King of Yoidaya for a trial. The king assigned his case to a pair of ministers named Byanayit and Byanaraza who, in due course, gave judgement in these terms:

At issue is the division of the property between younger son and daughter which the parents arranged before their death.⁶ There is a maxim that what the dead give, the living shall have.⁷ There is a maxim that WHAT is received in hand is duly given. There is a maxim that parents have AUTHORITY OVER THEIR CHILDREN. There is a rule that A WRITTEN WITNESSED DEED CONVEYS THE OWNERSHIP. There is a rule that IF YOU WERE GIVEN YOUR INHERITANCE BEFORE IT FELL DUE, YOU CANNOT HAVE IT AGAIN LATER. Because these maxims are so weighty, let our decision be that the younger siblings hold joint ownership according to the previous division, while the elder son retains his parents' gifts to him: the gold, silver, ordinary clothing, dress uniform, followers, servants, elephants, and horses (*Precedent*, section 2).⁸

The elder son then returned to Pegu, and submitted an appeal to King Bayinnaung, who assigned the dispute to the judges Nanda Kyawdin and Mahamun. Their judgement was to this effect:

WHAT THE DEAD GIVE, THE LIVING SHALL HAVE. PARENTS HAVE AUTHORITY OVER THEIR CHILDREN. WHAT IS RECEIVED IN HAND IS DULY GIVEN. Therefore let the younger children have rights of ownership over the disputed inheritance. The eldest son's claim for partition fails. The decision of the Siamese ministers Byanayit and Byanaraza is just and correctly reached (section 3).

The elder son tried his luck again, and the second appeal was heard by the Burmese judges Dhammaraja and Mahasammata:

The parents made a separate appointment of manpower, property, gold, and silver to the elder son. He cannot now challenge the division of the wealth remaining to them at their death. The remainder of the estate was handed over to the younger son and daughter by way of a formal document,

⁵ Meiktila MS, copied in 1880 and catalogued as MTLU.Lib.pu.0223-06ff. The additional information is at folio 1, recto.

⁶ The Meiktila MS adds a sentence before the first judgement, in which the Yoidaya king orders 'Let people's behaviour confirm to the respected rule-maxims (*tayaat:gaa:*)'.

⁷ I employ small capitals to distinguish the judicial citation of a maxim from other judicial pronouncements.

⁸ I translate these five maxims as they are given in the Meiktila MS. The printed text repeats one maxim twice over, albeit with a tiny change of wording.

and in the presence of monks and elders. The younger children have ownership and possession of what was divided. Let them continue to do so. The verdicts given by the Yoidaya judges Byanayit and Byanaraza and by the Burmese judges Nanda Kyawdin and Mahamun are right and proper (section 4).

A third appeal under the Burmese judges Rajadhamma and Rajamanu also failed to give the royal page what he wanted, and confirmed the reasoning of the earlier judges:

WHAT THE DEAD GIVE, THE LIVING SHALL HAVE. PARENTS HAVE AUTHORITY OVER THEIR CHILDREN. WHAT IS RECEIVED IN HAND IS DULY GIVEN. Let the elder son have what his parents gave him during their lifetime; and as regards the property left on the death of the parents, let that be shared equally between younger son and daughter. The judgements of Byanayit, Byanaraza, Nanda Kyawdin, Mahamun, Dhammaraja, and Mahasammata were right and proper (section 5).

So the pageboy from Pyitzabon approached King Bayinnaung and asked him for a fourth appeal. Before examining the King's reply, let us pause and fill in some background.

LAW AND POLITICS IN PALILAND⁹

The first judgement suggests that the sources of law comprise 'maxims' and 'rules'. I shall examine below whether these words are synonymous, or whether maxims and rules have different degrees of strength. For now, let us compare the Burmese judge Dhammaraja's approach in the third judgement to the approach of the earlier judgements. Though Dhammaraja does not cite any maxims or rules, he can convey the same information. The Tai judge Byannayit had thus cited the maxim A WRITTEN WITNESSED DEED CONVEYS THE OWNERSHIP. Dhammaraja said: 'The remainder of the estate was handed over to the younger son and daughter by way of a formal document, and in the presence of monks and elders'. Byannayit cites the maxim as a norm floating free of any factual substrate, while Dhammaraja's treatment implies a judgement of fact: The facts as I find them are such that the maxim applies. English lawyers refer to such a mixture of norm and fact as a 'characterization'. Dhammaraja repeats the trick. Where Byannayit cites the maxim IF YOU WERE GIVEN YOUR INHERITANCE BEFORE IT FELL DUE, YOU CANNOT HAVE IT AGAIN

⁹ By 'Paliland' I mean the entire Pali-Buddhist worshipping areas of mainland Southeast Asia.

LATER, Dhammaraja gives the same normative information embedded in a judgement of facts: 'The parents made a separate appointment of manpower, property, gold, and silver to the elder son. He cannot now challenge the division of the wealth remaining to them at their death.' Though Byannayit prefers to cite the maxim and Dhammaraja the characterization, they agree on what the facts are and on what law prescribes. When *The Precedent* came to be used as an educational aid, the students who read it were doubtless expected to learn¹⁰ that the same information could be conveyed by different stages in the logic of judgement.¹¹

The key words so far are 'maxim' and 'rule'. Maxim (*sagaa:*) comes from the root monosyllable 'to speak'. It is literally a 'speaking'—in other contexts I translate it as 'oration'. 'Rule' (*tayaa:*) is a disyllable that apparently does not derive from any root monosyllable (perhaps it is a loanword introduced into the Burmese language very early, but if so, the donor language is not yet ascertained). The word's field of semantic reference most certainly has been borrowed. It is the Burmese translation of the Indie word *dharma*, and can thus mean 'ethics', 'nature', 'law', 'rule', and 'right doctrine'. In one context only do Burmese leave *dharma* untranslated. That is when they speak of *dhammathat*, the name of the genre of law texts in this region most likely to be consulted by villagers, and most likely to be cited in a royal court of law. The second most important genre of law texts are the 'precedents', which can be founding myths, or scholarly references to the classics, or law reports. The third genre are the *rajathat*, the law texts composed to be spoken in the king's name.¹² Similar genre-terms are found widely, and we can speak of a regional legal tradition. This tradition can be subdivided according to the vernacular in which it preserves the classics, then further divided by place and time, so that Toungoo-dynasty Burmese law (sixteenth century) should be distinguished from Pagan-dynasty law (twelfth century) and from Konbaung-dynasty law (nineteenth century). Whilst Pegu is a humid jungle city 17 degrees north of the equator, the capitals of the other dynasties were at 21 degrees or higher, situated in a dry desert through

¹⁰ The Meiktila MS hints at this. When recounting Byannayit's judgement it refers to these arguments as 'rules' and to the other three arguments as 'maxims'. The difference in vocabulary is, I take it, a deliberate flagging-up for later consideration. An eighteenth-century law teacher using a precursor of the Meiktila MS would have said to his students: 'Remember the two arguments that Byannayit referred to as rules? Now compare them with Dhammaraja's judgement. Please observe the ideational equivalence of maxim and characterization.'

¹¹ The logic of judgement has to mix conclusions of law (what ought to be done, deontic logic) with conclusions of fact (what actually was done). Even when a single ought-statement is included among several facts, the mixture requires 'deontic logic'.

¹² Technically, Bayinnaung's speech (section 6) should be classed as a *rajathat* within a precedent.

which flows a vast river. The external challenges faced by the Burmese dynasties were different, and the mix of populations which they ruled was different. My preference is to use as the building-blocks of regional law these separate dynastic legal traditions.

King Bayinnaung was known as 'the victor of the ten directions', and had earned that sobriquet: he towered over Paliland as Napoleon would tower over Europe. But *The Precedent* obsessively refers to him by a different title, 'Great Law-King' (*min:tayaa:gyii:*), which uses Burmese words to translate the three Pali terms *maha*, *dhamma*, and *raja*. At this stage of his career Bayinnaung wishes to be known as a 'Dharma-king', a 'king of righteousness', an 'arbiter of ethics', but he wants to bear that title in Burmese translation. The choice between vernacular and classical is fraught with meaning in most cultures that employ a classical language (Francis Bacon, for example, chose to write his legal theory in Latin, but his *Essays* and *History*, which contained much of his politics, in English). In the Burmese context we have already encountered a few Pali loanwords. The abstract noun in 'Parents have authority over the children' is a Pali loan, and so was the verb which expressed the death of the governor and his wife (who literally 'reaped the result of their *karma*'). Burmese readers probably did not notice these loanwords as such, any more than English readers notice the Latin derivation of 'charity' or 'January'. Later (in section 9), however, Kyaw Thu parades his Pali legal scholarship as something classical and intimidating, which he scorns to translate into Burmese: *Caveat lector!* That instance apart, *The Precedent* is written in short, pithy, Burmese sentences.

As regards the theory of kingship, the, relationship between classical and vernacular is more problematic. The Pali canon contains a fair amount of scattered Buddhist political theory. In the Pali commentaries (compiled around the fifth century) political theory became more systematic, and in the nineteenth century scholars in the region used Buddhist themes to discuss contemporary problems, including especially the European incursion that threatened to wipe out everything they had learnt (Huxley 2007: 46). *The Precedent*, for its part, emphasizes one Buddhist political theme in particular – that of the Great Law-King. This ideal ruler is able to lead by example because he is perfected in the virtues of kingship.¹³ The lesson of the canon is that you can identify a Great Law-King by how he runs his empire. Example speaks louder than exposition. And *The Precedent* is just such an example. Anyone who doubts whether Bayinnaung was a Great Law-King should read *The Precedent*

¹³ Buddhist ethics are almost entirely virtue-based, so what I call 'political theory' Pali scholars refer to as 'the ten virtues of kingship'.

for reassurance. It was to provide such reassurance that it was written. The reason it was subsequently preserved is that later generations liked to contemplate the ethical lessons of their own history.

THE GREAT LAW-KING DICTATES HIS PROBATE POLICY

Back to the text, then. King Bayinnaung himself is about to comment on law and justice, in reply to the page's most recent petition of appeal. First comes a stage direction: The royal herald informed those present to place their hands in the sign of obeisance.¹ Then the King speaks:

Four ancestral rules; five everlasting rules; six types of probate; seven original probate-rules; fifteen¹⁴ beneficiaries of probate; twenty rules about the probate estate; twenty-five rules for clarifying probate. Though the litigants have all advanced their own legal maxims, the discussion of law remains incomplete. Therefore the litigation is not yet over. If a party is not satisfied with a judgement and wishes to make an appeal, let it not be decreed: 'Enough! The case is settled.' The wisdom required for a decision on the distribution of assets must be wide-ranging, critical, and polished. My predecessors in former reigns insisted that such cases be heard over and over again. There are many records and archives, manuals, and *Jataka* available for study. Only probate-learning that is relevant and suited to the facts can bring the dispute to a close. Rules and maxims have standing throughout this royal empire, no matter the particular city or province. Judge Mahosatha¹⁵ and Judge Manu both gave accurate judgements at the age of seven. Wisdom—which is a combination of cleverness, technical know-how, and love—depends on each set of facts. It is not wisdom automatically to praise the great and put down the small. There are many grounds on which decisions turn. One may cite one's supporting arguments from books, volumes, *Jataka*, manuals, and archives. Let a herald summon the three children to attend. Let them address their speeches on the law of probate to the Judge Lord Kyaw Thu (*Precedent*, section 6).

The two final sentences contain the performative statements appointing a judge and convening a hearing. They must be similar to the orders Bayinnaung had given on the three previous occasions that the page had lodged an appeal. The rest of the king's speech contains his message to the world: this is how a Great Law-King handles probate problems. He sounds four themes. First, he names seven lists of probate-rules. Secondly, he

¹⁴ The printed text has '5'. Otherwise, however, the list of lists is in ascending numerical order. I have corrected '5' to '15' following the Meiktila MS.

¹⁵ Pali scholars will be more familiar with the spelling 'Mahosadha'. I use that form henceforth.

discusses whether he has the legal authority to order a fourth appeal. Is there any limit on the number of appeals that may be brought in one litigation? Thirdly, Bayinnaung discusses his sources of law. Having given us some lists of rules, he now adds the names of other genres. Fourthly, he offers an ethical homily on the nature of judicial wisdom, illustrated by two of the region's favourite culture-heroes, Mahosadha and Manu. Finally, he returns to the sources of law without adding much to his original comments. Two of these themes (the lists and the culture-heroes) require exegesis.

King Bayinnaung names seven lists of probate-rules, but does not itemize them. Had he done so, we might have checked how these sixteenth-century lists compare with the lists of probate-rules that appear in eighteenth- and nineteenth-century *dhammathat*, throwing light on the continuing debate over the age of the Burmese legal tradition. Whereas late nineteenth-century European scholars claimed that it was a young tradition born in the 1750s, twentieth-century researchers trace it back to the twelfth-century Pagan dynasty, or even earlier to the eighth-century Pyu empire. Two points are in dispute: When did the Burmese adopt Pali Buddhism? And when did the Burmese political economy become complex enough to require a sophisticated legal system? Whatever the case, Bayinnaung's predilection for packaging normative information into numbered lists reflects the fact that he and his court had been educated in a Pali Buddhist milieu. 'Lists may be a feature of ancient Indian literatures in general, but it is probably true to say that no one makes quite as much of lists as the Buddhists' (Gethin 1992:150).

Rupert Gethin (op. cit.) has described how the *Abidhamma* (one of the three sub-divisions of the Pali canon) uses lists to organize its ontological and psychological material. One list is used as a multiplier, and another as its multiplicand. By applying a list of three to a list of two, six combinations are generated. These six may be combined with other lists to generate further levels of complexity. If you are meditating on *Abidhamma* texts your goal is to travel back from the complexity of the perceived world to the handful of simple items from which it is generated. The *Vinaya* (the sub-division which deals with the constitutional structure of the monastery and the behaviour proper to a monk) also uses lists to organize its legal material, but prefers addition to multiplication. The first list in the *Vinaya* is the four 'self-defeating offences' (murder, theft, sex, and boasting of magic powers). These are the most serious offences a monk can commit, and lead *ipso facto* to his loss of monastic status. The next most serious are the thirteen 'offences which lead to probation' (which include masturbation, building an over-ornate monastery, and falsely accusing other monks of self-defeating offences). There are six more lists,

the penalties for which are increasingly trivial, and these eight lists are added together ($4 + 13 + 2 + 30 + 92 + 4 + 75 + 7 = 227$). The resulting superlist of 227 items (known as the *Patimokkha*) is the foundational document of Buddhist monasticism. Every monk has to join his local colleagues once a fortnight in chanting it aloud, and confirming that he has not offended against any of the items. Hence all Buddhists know how to package legal information into lists and superlists. How Bayinnaung treats probate law in his *rajathat* is how the *dhammathat* treat most topics in Burmese law.

Bayinnaung names two culture-heroes, both of whom proved that a good judge is not necessarily an elderly judge. Mahosadha is a prominent figure in the *Jataka*, the life-stories of the Buddha's 547 previous births which teach Buddhist ethics. Their frame-story is the Buddha-to-be's ethical progress towards a birth in which he can be enlightened. The last ten of the *Jataka* form a unit of their own, often appearing in Southeast Asian monasteries and pagodas as graphic novels, painted in murals, or glazed as half-relief clay plaques.¹⁶ They are studied as guides to ethics, and as literary models of sophisticated narrative technique. In short they are for the Burmese what Homer was for the Romans: a classical model for old-time virtues and artful story-telling. The final two lives (numbers 546 and 547) are especially important.¹⁷ In the *Great Tunnel Jataka* (546) the Buddha-to-be was called Mahosadha, and was famous for his worldly wisdom, while in the *Vessantara Jataka* (547) he was called Prince Vessantara and was famous for exploring the virtue of generosity to unworldly extremes (he gave his wife and children away into slavery to demonstrate his mastery of that virtue). Mahosadha's story starts as a collection of nineteen judgement-tales, decided when he was only seven. The instinctively gifted young judge grew up to become an elder statesman. He survived the plots of jealous ministers and, as a climax to his career, tunnelled into the heart of the enemy's camp, and routed their invasion. In his antepenultimate birth the Buddha-to-be showed his awesome accomplishments as a judge and politician operating in the social world. In his penultimate birth, as Vessantara, he showed his mastery of the antisocial value. In his ultimate birth he achieved enlightenment. Buddhism's ultimate goal requires mastery of politics as well as of meditation.

As for Manu, Bayinnaung does not refer to the Vedic culture-hero, the first human, whom Sanskrit texts describe as author of *Manusmṛti*, the prototype *dharmasastra* law text (compare Davis in the present volume).

¹⁶ Bayinnaung alludes to this division in his list of legal sources. The word I give here as *Jataka* is actually the technical name for all the *Jataka* except the last ten.

¹⁷ Only in his three final births could he converse with his mother as soon as he was born.

Rather, the Burmese Manu is a clever young cowherd appointed as judge by King Mahasammata, after he was seen making wise judgements at an excessively early age. King Mahasammata is featured in the *Sutta* (the sub-division of the Pali canon which deals with doctrine and ethics) as the founding father of Buddhist political theory (Huxley 1996a:487). Both Sri Lankans and Palilanders credit him as the founder of Buddhist social life in all its manifold forms (Collins, S. and Huxley 1996:644). The post-canonical literature from Southeast Asia gives Mahasammata a wise young adviser called Manu, who caps his judicial career by founding the entire genre of *dhammathat* law texts. Robert Lingat (1950: 296) saw 'this childish tale¹ as indicating that 'in brief, it is the Hindu system of law that is introduced¹, and he explained that Manu plays in Mahasammata's court 'the role that the *pradvivaka* does in the *dharmasastras*' (Lingat 1973:267). But this is to ignore how much of the Burmese Manu has been borrowed from Mahosadha. Manu, like Mahosadha, impressed the king at the age of seven. Manu, like Mahosadha, declared a set of seven judgements, then a set of twelve (Huxley 1996b: 602). The Burmese Manu no doubt borrowed his name from Vedic India, but the incidents of his life combine direct quotation of one Buddhist *sutta* with imitation of another. Note that while Mahosadha is a *bona fide* canonical figure, Manu is found only in the law texts of Buddhist Southeast Asia. The Burmese, Tai, and Khmer regard Manu as the founder of their legal tradition. The Sri Lankans do not. Whether Burmese law is essentially Hindu or Buddhist need not be resolved here, but Bayinnaung's reference to Manu at least suggests that the Burmese myth of Manu, the originator of the *dhammathat*, was already circulating in the 1570s.

Bayinnaung then deals with a question of jurisdiction. Does the law empower him *to* grant a fourth appeal? If finality is a virtue in litigation, the pageboy's request should be turned down. Here, though, finality is trumped by considerations of litigant-satisfaction and of learning. As long as there is an aggrieved litigant with enough money to fund another appeal, the litigation is never closed. On this point Bayinnaung is careful to say that he is following a steady stream of precedents from earlier reigns. He adds what is either a reason for his decision, or a further condition to it: there is room for a further appeal when the legal reasoning remains incomplete.¹⁸ The king's final theme is the sources of law. I shall not attempt to decode Bayinnaung's genre-terms, because we no longer

¹⁸ In Europe we have tended to organize courts of appeal into strict hierarchies to achieve a final settlement by the court closest to sovereign power. In Burma, and apparently also in Tibet (French 1995), sovereignty defers to knowledge of *dharmā*, and to be authoritative is less important than to be correct.

possess the books that were in his library. If any have survived to the twenty-first century, they do so in re-written and re-edited form.¹⁹

KYAW THU'S JUDGEMENT

The king's speech appointing Kyaw Thu is followed by Kyaw Thu's exemplary judgement, which settled this litigation for good:

I have complied with the wise counsels of the Royal Order, namely that both sides should address the court. I must now choose between the courses of action they have urged on me. Having heard both pleadings and speeches, I reflect on the law.²⁰

It has been said WHAT THE DEAD GAVE, THE LIVING SHALL KEEP. But parents exceed their authority if they do so while mortally ill, their life hanging in the balance. Urgent is the rule that states: 'Only when the division is between a complete set of children does the recipient take.'

It has been said HANDING A THING OVER IS TRANSFERRING IT. But here the residence-pattern of the children differed. It cannot be said that any assets were handed over to the elder son. Urgent is the rule 'As your residence, so your shares.'²¹

A maxim has been cited: PARENTS RIGHTFULLY HAVE AUTHORITY OVER THEIR CHILDREN. But it is also right that children should be treated equitably. Distribute the wealth so as to achieve equality. Urgent is the rule 'Avoid a division where one gets more than the others.'

True it is that A FORMAL WRITTEN DOCUMENT WITNESSED BY SENIOR MONKS, HEADMEN, ARBITRATORS, AND SCRIBES TRANSFERS THE OWNERSHIP. But not when one of the heirs was absent. Urgent is the maxim²² that A DEED OF DISTRIBUTION SHALL NOT BE VALID UNLESS ALL PARTIES TO THE LITIGATION WERE PHYSICALLY PRESENT. Rightly is it said ANY SON OR DAUGHTER WHO HAS ALREADY DONE WELL SHOULD NOT START A FIGHT OR A

¹⁹ Shin Sandalinka's *Precedents Bright as a Jewel* is a good example of how this process worked. Shin Sandalinka is an eighteenth-century monk who re-edited a hoard of fifteenth-century precedents and chronicles to construct a paean to one of Kyaw Thu's fifteenth-century predecessors. We have no way of knowing the extent to which the monk altered his sources.

²⁰ The Meiktila MS puts it differently: 'After listening to what the two litigants said, and to the various rulings of the Yoidaya, Talaing and Burmese judges, I deliver my considered response.' 'Talaing' is the name by which Burmese refer to the Mon. Here is a hint that one or more of the judges was Mon. There were as many Mon living in Yoidaya as in Burma proper, so any of the eight judges might have been Mon.

²¹ The book adds: 'When parents die, there is need of probate-learning. Give a portion as alms, so that probate may act as a conveyance to *samsara*. This is an enduring rule.' By 'conveyance to *samsara*' the author means 'a way in which the parents' merit in future lives will be enhanced'. I treat this passage as an interpolation. First, because no maxim has been set out to which this serves as the limiting case. Second, because no limiting rule is cited. Third, because the Meiktila MS does not give this sentence, nor anything like it.

²² The Meiktila MS calls it a 'rule-maxim'(tayaa:sagaa:).

lawsuit when told he will get no more.²³ But only if the formal transfer took place during one of the twelve auspicious ceremonies. If the family favourite gets the bulk, then the probate-heap dwindles. An earlier formal transfer means that the assets evaporate. Some guidance on the formal transfer of assets: 'When the probate-heap is left untouched, it prospers,' 'If in the past you made a formal transfer, by now your probate-heap will have become agitated.' Urgent is the rule that a Deed of Division must be even-handed. It says: 'There should be no excessive shares within the family line' (*Precedent*, section 7).²⁴

In this opening passage Kyaw Thu sets out the appellant's case. The respondents rely on five maxims. The appellant concedes that these maxims are good law under other circumstances, but contends that on these particular facts they do not apply because another more urgent rule prevails. Kyaw Thu will later show that he approves the appellant's reasoning, but he has not yet made this clear.

In section 7 he speaks as a judicious summarizer of the arguments on both sides. In section 8 he will discourse on his own understanding of the law:

There are four Great Laws of Equity.²⁵ Urgent is the maxim IT IS THE LAW THAT OFFERS CLARITY ON HOW TO GET THE TRANSACTION RIGHT.

Whoever has to give an official account of facts should speak according to the facts. When performing his task, his knowledge of inheritance law should be constantly at his fingertips. Whoever gives an official account of facts should never speak contrary to the facts. A full knowledge of property-rights requires skill and persistence. When assets are distributed it must be done accurately. An appointee who behaves like this will keep his job a long time, whether he be King, Minister, City-Governor, City-Official, Great Judge of the Law, or Teacher of the Law. The point of the judicial investigation is to divide the wealth in a transparent way. Urgent is the maxim SHOW THE DEEPEST RESPECT TO YOUR EMINENCE THE LAW.

Urgent is the rule that says: 'Whenever it happens that a son and heir is absent from home, staying in some city or village at the time the probate-distribution was made, then a probate-share for him must be weighed and conveyed.'

²³ The context demands a translation something like this. However, a negative is missing from the text as given.

²⁴ The final four sentences may be interpolated. They are prolix and unfocused, and do not follow the economical structure of the first four rules.

²⁵ Literally 'The Four Great Authorities'. In the Pali canon, this refers to an epistemological test for authentic Buddhist doctrine. In Burmese law texts it refers to an approach to fact-finding which examines the variables 'thing', 'time', 'place', and 'use'. It borrows from a Pali passage in the *Great Vinaya Commentary's* treatment of the *de minimis* rule for theft [Sp.305].

Urgent is the rule that says: 'How the parents arrange probate depends on how sons and daughters have carried out their filial duties.'

No heir is entitled to two shares. Urgent is the rule that says: 'If the probate-heap was untrue, no proper division of the estate has taken place. If the probate-division did not take place, no proper distribution has taken place.'

Urgent is the rule that says: 'If a person has been excluded from the probate, then probate has not properly taken place.'

Urgent and productive of correct decision-making is the rule that says: 'None of the full-blood children may be excluded from sharing their parents' estate, even a child who is born as an animal' (*Precedent*, section 8).²⁶

In section 8 he lays down the legal norms that he finds most appropriate to the situation. In section 9 Kyaw Thu will deliver ten characterizations of mixed law and facts.²⁷ After an introductory paragraph, the first five advance reasons why the deathbed division was a nullity; the last five explain why the elder son should get his remedy:

Let us turn to the division of the estate. Attend to these laws, for they promote quick decision-making. The elder son of the Pyitzabon governor—currently in royal service—is appellant. The younger brother and daughter are meeting his case. The inheritance case maxims that instruct:²⁸

After the death of the Pyitzabon governor and his wife, their property should have been treated as an inheritable estate. Let the right answer be²⁹ that the younger son and daughter had no proper authority over it.

The son of the Pyitzabon governor is in the same position as all sons and daughters of a city-governor or a *saw-bwa*.³⁰ The elder son continues to excel in the royal service. Let the right answer be that he is dutifully carrying out his office.

The parents fell ill, then died. The younger son and daughter sent no word or message of this to the elder son faithfully carrying out his royal duties. Let the right answer be that the elder son was unaware because he had not been informed.

²⁶ This alludes to Burma's favourite *pyatton*— 'The Story of the Snake-child's Inheritance'. Because he was born a snake, the elder children excluded their youngest sibling from the inheritance. He expressed his displeasure by coiling himself around the dead parent's wealth and hissing. The wise judge awarded the snake-child the same share as his human elders and mollified by the recognition of his rights, the snake-child slithered off into the jungle, leaving his share behind him. Different law texts give the *pyatton* widely differing interpretations. Here it illustrates the presumption that all siblings have a right in the probate-heap.

²⁷ The Meiktila MS gives only five items (1,2,6,7, and 8).

²⁸ The Meiktila MS is much shorter. It has the same opening sentence, then adds only 'The laws stand thus...'

²⁹ Literally 'It is proper' modified by the verbal affix denoting a mild imperative.

³⁰ *Saw-bwa* is the technical Burmese term for the city governor of a Tai-speaking walled city. Usually it refers to governors in the Shan States, but while the Toungoo Empire lasted, it probably also denoted Tai-speaking communities to the east and south of the Shan States.

The division of the inheritance was improperly carried out. Let the right answer be that a share should have been reserved for absent heirs.

The parents did not acknowledge the difference between elder and younger son. They did not discriminate. Let the right answer be that it was favouritism that caused them to hand over the entirety of the estate to the younger son and daughter.

Pay heed to the maxim WHEN PARENTS ARE MAKING THEIR FINAL ARRANGEMENTS, THEY MAY CONSIDER HOW WELL THEIR CHILDREN ARE REPUTED TO HONOUR THEIR PARENTS.

There is a list of six types of sons (*orasa*, *khettaja*, *hetthima*, *pubbaka*, *kittima*, and *apatittha*). He who goes off to serve the king does so in his father's interest. Let the right answer be that the elder son is an *orasa*.³¹

There have been many previous hearings before the eight learned judges. Let the right answer be that the law has still not been fulfilled.

Let the right answer be WHOSOEVER WAS GIVEN IT, HE SHALL NOT KEEP IT. WHOSOEVER WAS NOT GIVEN IT, HE SHALL GET IT.

Investigations and inquiries are as yet incomplete. The law is still unfulfilled. Let these fresh investigations aimed at a correct partition be the right answer [*Precedent*, section 9).

The penultimate finding ('WHOSOEVER WAS GIVEN IT...') looks as if it might be the remedy sought on the page's behalf. An English judge would say: 'I impose a constructive trust on the younger children on behalf of their elder brother' And if land were at issue, she would add 'Let the land registry be so rectified.' The Toungoo dynasty ran a land registry for productive land (they had to, because most of their revenue was collected in the form of rice), but the Pegu land registry at this date could surely not have exercised effective control as far east as Pyitzabon. Therefore King Bayinnaung had to utilize other techniques to shift wealth located in the distant cornery of his empire. He had to send a written order to his man in Pyitzabon telling him to execute the desired change of ownership locally. If the Toungoo chancery ever developed a standard form of writ for such occasions, it might well have become known as the remedy of WHOSOEVER WAS GIVEN IT.

Kyaw Thu now reaches his final paragraph (section 10), though we need to think where his peroration ends:

It appears from these various grounds that the eldest son, although living separately from his parents, did not intentionally omit to attend to his

³¹ This list is found in several of the *dhammathat*. The eight Pali words are found in the Pali canon (meaning 'legitimate, noble, lower, former, artificial, created') but are not found there as a list; nor, as far as I can trace, is the list found in Sri Lankan post-commentarial Pali texts. Forchhammer (1885:92-3) cites six different versions of the list from six *dhammathat*. He notes that while the eight nouns stay constant, the syntax and meter in which they are embedded vary between the examples.

parents when they were sick and at the point of death. With regard to the property said to have been given to him previously, it consists of property given to him for his maintenance, as being a son entitled to inheritance whilst he in dutiful obedience to his parents entered the royal service for the purposes and in the interests of his father and mother.

I take Kyaw Thu's own speech to end at this point. He has reversed, in favour of the royal page, the judgements made earlier and has explained his reasoning. But the paragraph continues:

Wherefore the arguments that the PROPERTY WAS GIVEN, that THE ELDEST SON LIVED SEPARATELY, that WHAT THE DYING GIVES, THE LIVING SHALL HAVE, that THE AUTHORITY OF PARENT SHALL HAVE EFFECT UPON THEIR CHILDREN, that THERE ARE DOCUMENTARY PROOFS, and that WHAT HAS BEEN GIVEN HAS ALREADY BEEN DIVIDED AND IS IN POSSESSION, are all of them held inapplicable (*Precedent*, section 10).

These sound like the words of a copyist added for filing purposes. An English law reporter would add a list of 'Cases cited but distinguished in the course of judgement'.³² If I am right on this, Kyaw Thu's climax dealt with ethical questions. He ended by ruling on two issues: was the elder son guilty of parent-dereliction? And was wealth given to the elder son as a family investment, or as an anticipated inheritance?

Plainly the first question is ethical. Few indeed are the cultures that approve of filial impiety, and Buddhism is not among them. The second question looks to establish the true intentions of the many players in a complex situation. Each of the five family members had their own mix of motives, expectations, and understandings of the elder brother's leaving Pyitzabon, and the judge must synthesize all this as an assessment of the family's common intention. Thus far an English judge would agree with Kyaw Thu. However the English judge would regard what he was doing as contract law, while Kyaw Thu would have thought of it as situational ethics. Burmese law does not deploy contract as a general category; it treats the sale of a water-buffalo as being different in legal kind from the hire of a midwife, and from the loan of seed-rice to fund next year's crop. However the first rule of Buddhist ethics is that everything that happens in the universe has an ethical dimension. We must do the right thing, whatever we do. Everything partakes of the ethical, including the process by which a family makes its decisions, the process by which Kyaw Thu discovers how a family makes its decisions, and the process by which the Great Law-King appoints his judges. Kyaw Thu's use of the 'Who profits?' test in an ethical context is worth noting. He asks whether the eldest son

³² The Meiktila MS mentions only three of the five.

was the only person to have profited from the transfer. He answers in the negative: the parents also profited. His point is that the price they had to pay for Bayinnaung's continued endorsement of their rule was putting wealth into their eldest's hands.

Kyaw Thu's speech is over, and *The Precedent* now draws to a close:

The three siblings consented to his decision. For that reason the White Elephant King, the Great Law-King, pronounced his satisfaction at what his golden ears had learned. The Lord of Existences, the Great Law-King, awarded Lord KyawThu the title *Dhamma-senapati* ('Prince of the Dharma') and appointed him as Great Judge of the Law [*Precedent* section 12].

Quod erat demonstrandum: that Bayinnaung is a Great Law-King, and Kyaw Thu a Great Judge of the Law.

TOUNGGOO LEGAL REASONING

Evidently Kyaw Thu worked hard to write a convincing judgement. His audience would not have been convinced had he strayed too far from their expectations, so we are entitled to read his words as a guide to what legal reasoning was like in Burma. Can we go a stage further? Kyaw Thu found these facts, and applied those urgent rules. Was he consciously following a logic of judgement as to how facts may be combined with norms to justify remedies? Section 9 with its list of ten findings may help us decide. His first finding (1) is that the younger children lack good settled title to their inheritance. Hence he re-examines the merits of the case, looking both at facts (2-5) and norms (6-7). That leads him to his final sanction-stipulating formula³³ (8-10), and to him issuing the appropriate remedy. Figure 7.2 presents one-dimensional information (a list of ten) as if it were two-dimensional.

The Toungoo scribes lacked the technology to draw such a diagram. If they inscribed three straight lines to make the triangle, the area thus marked would fall out of the palm-leaf, losing the text within it. They were not, however, condemned by the poverty of their writing-system to a one-dimensional life of the mind. Quite the contrary. They could draw flow-charts, diagrams, and geometrical figures with chalk on the board, or with a stick in the sand-pit. Indeed, the Burmese commonly wore number-squares as tattoos, and in graphic representations of the

³³ The 'sanction-stipulating formula' will be familiar to readers of Hans Kelsen (1934: 489). Kelsen had some restrictive views (which I do not share) about what should count as a sanction. I would prefer to call it a 'remedy-stipulating formula' but custom has hal-
lowed Kelsen's phraseology.

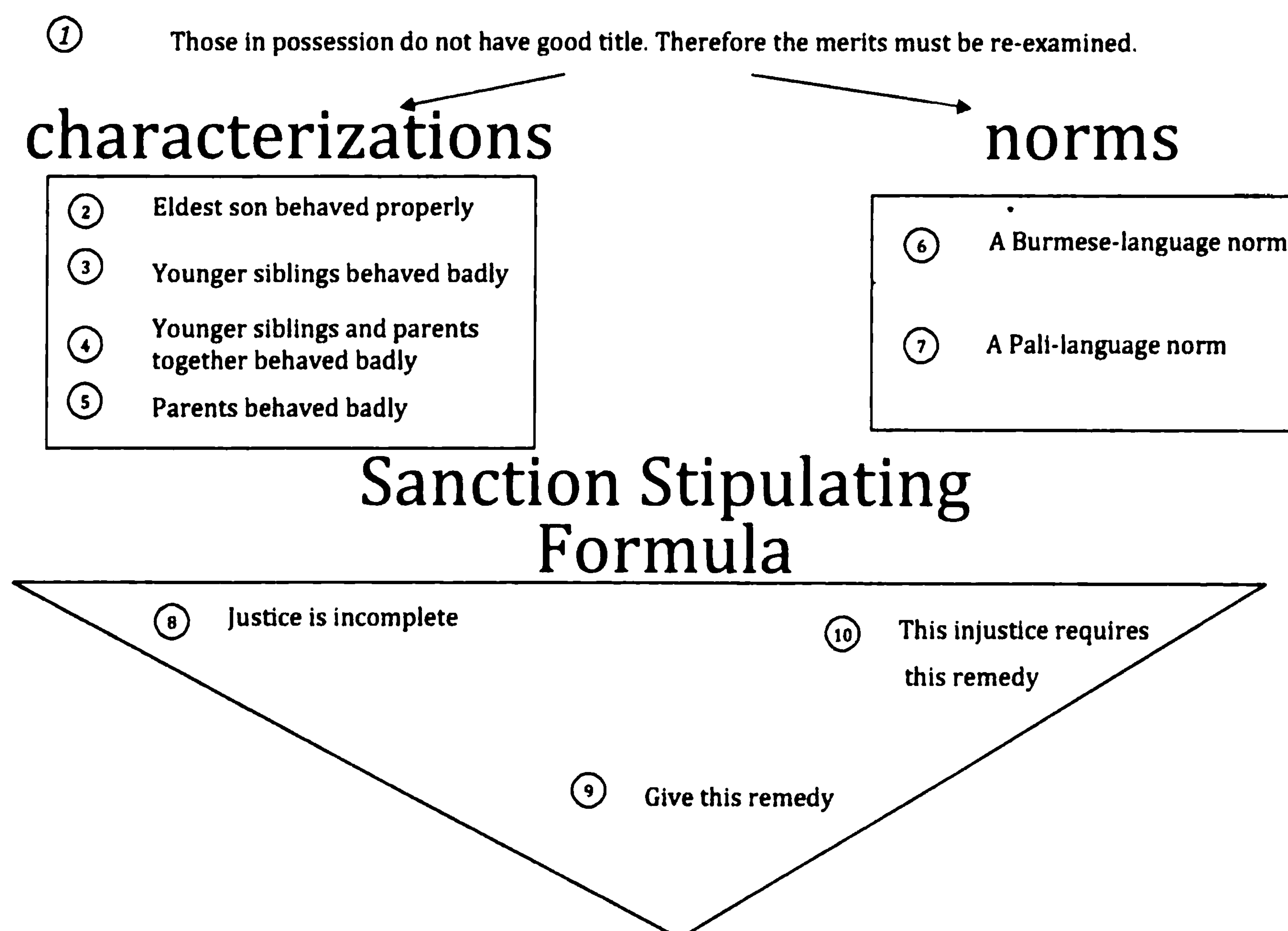


Figure 7.2 Kyaw Thu's ten findings arranged as a diagram

Jataka, each picture is more a flow-chart than a snap-shot. If the main image shows a giant sea-bird lifting the drowning Buddha up to safety, for example, smaller images in the corners will show the storm that caused the ship-wreck⁷ and the arrival of sea-bird and Buddha-to-be on dry land. Pali Buddhism is often referred to by its adherents as the 'Analytical School' of Buddhism. Its practitioners aim to break down complex processes into single units interacting according to simple rules. *Abidhamma* specialists apply their analysis to mental states linked by cause and effect, while *Vinaya* specialists apply it to the ethical judgement of people acting socially. Given their taste for analysis, it would be surprising if Buddhist judges had not experimented with using diagrams to explore their logic of how fact and law combine in judgements.

While Kyaw Thu's ten characterizations (section 9) operate in the logic of judgement, his five rebuttals (section 7) exhibit argument in the courtroom. Arguing before the judge is a social event played out before an audience. Before analysing this rhetoric, therefore, let us imagine the courtroom. It is located in a public portion of the Pegu Palace compound. It is a large free-standing wooden room, whose walls have been retracted for the day. The weather is hot and sticky, and the judge sits highest in the shadiest part of the room with the litigants and their lawyers (*she-ne*)

before him. Around them are the respectable audience of relatives and patrons. Beyond, spilling out of the building onto the steps and surrounding space, are the less respectable audience—loafers, schoolboys, coconut-sellers, lawyers waiting for their case to come on. Two palace guards keep the crowd in order—let us say the one on the left is a virtuoso spitter of betel juice. The pageboy's lawyer wears green head-gear since he represents the appellant. The lawyer for the younger children, the respondents, wears red. Each has a cotton briefcase slung over one shoulder, and each is equipped with official-issue drinking-cups and fans.

These latter details come from the Regulation of Lawyers Ordinance passed on 23 June 1607 by one of Bayinnaung's grandsons: ruling as King Anaukpetlun, he regulated the lawyers' fee structure, decreed which suburb of the city they should live in, and laid down a canon of approved rhetorical practices.³⁴ Can we take the 1578 law report and the 1607 regulations as two views of the same legal system, ignoring the intervening thirty years during which the Eastern Toungoo Empire collapsed, and its former Tai subjects sacked Pegu itself? A Jesuit who witnessed the aftermath of the sack noted that the Pegu river 'is hardly navigable any more even by a small boat because of the multitude of the corpses' (Reid, A. 1993: 282). However, Bayinnaung's grandsons restored the Toungoo dynasty to a kingdom that, although diminished, still ruled the whole Irrawaddy-Sittang basin, and we can place 1578 and 1607 within the same period. The 1607 Act describes itself as a revision of regulations put forward in 'my Royal Father's time', the reign of King Nyaungyan (1597-1605). We may infer that a profession that required regulation in 1597 must have had at least twenty or thirty years in which to go bad. From the 1570s to the 1600s (and probably forward to the end of the seventeenth century) we can speak, I think, of a distinct Toungoo-dynasty legal tradition and profession, shaped by Bayinnaung, battered by a vicious war, then reconstituted on a smaller scale.

Kyaw Thu's rebuttals (section 7) summarize the arguments Green Turban, the appellant's counsel, presented in launching his most recent appeal. They rebut Red Turban's arguments (which *The Precedent* has already summarized at sections 2-5). In doing so, they use contrasting

³⁴ In regulating fees, the Lawyers Ordinance uses the phrase 'take *letpet* and betel from clients' as if this were the technical term for a client's fee. Perhaps this hints at the social world from which the lawyers emerged. Betel is used in Southeast Asia as a currency of respect (monks in public places are often seen chewing betel, which often has just been given them by a layman). *Letpet* (a pickled salad of the young leaves of the tea bush, mixed with nuts and herbs) is the Burmese finger-food most often offered to guests. It also signifies the restoration of good relations after a dispute. Disputes take place on a stage constructed by patron-client linkages and from the ascription of status to the learned, the sanctified, and the wise.

normative labels. Red Turban's arguments, which up to now have prevailed, are described as 'maxims' or things that have been said. Each³⁵ of Green Turban's counter-arguments ends with 'Urgent is the rule that Kyaw Thu implies that norms come in two different strengths, such that when played against a maxim, an urgent rule always wins the trick. The first four rebuttals follow the same formula: Red's maxim, Green's limitation, Green's urgent rule. This formula implies a set theory of characterizations. Define a set comprising all the situations which characterize Red's maxim. This may intersect with other norm-generated sets. Green's limitation describes one such area of intersection with the characterizations of another norm, and Green's urgent rule then names that second norm. In Kyaw Thu's examples what separates the maxims from the urgent rules is unclear. I suspect the difference is role-generated. If I cite it, it is an urgent rule. If my opponents cite it, it is a maxim.

As I argued with respect to the logic of judgement, so with this set theory of characterizations. Both, I suggest, were known explicitly to Kyaw Thu and his audience. This, I recognize, requires a certain faith. What is incontestable, however, is that Burmese lawyers had developed a two-strength analysis of legal reasoning such that in their deontic logic, an 'urgent rule' is one that prevails, while the mere maxim must lose. Is this a sign of legal sophistication? On reflection, I think not. Any legal system which employs advocacy on points of law must develop a two-strength analysis, so as to have words with which to explain why one side won and the other lost. A US lawyer might say that the loser relied on a provision of State law, the winner on Federal law, while a French lawyer might say that the loser relied on one case, but the winner on *une jurisprudence constante*. An Oxonian theorist might argue that the loser relied on 'property-specific justice reasons,' while the winner relied on 'higher-order juristic distillations' (Harris, J. W. 1996:326). The issue is how much legal theory the *she-ne*, or lawyers, knew. How self-conscious were they as to their courtroom aims and the means they deployed?

We have only one other source on Toungoo judicial rhetoric: the list of ten arguments acceptable for courtroom use in the 1607 Regulations. Myint Zan's careful translation and exposition (Myint Zan 2000) is available in most libraries. Rather than reproduce it, therefore, I offer my own paraphrase of the material he deploys. I understand it to be a list of courtroom strategies:

- 1 *Sending from upstream*: Green Turban asks for more than he will get, knowing that concessions will have to be made.

³⁵ Except rebuttal 4 in the printed book. Here the Meiktila MS has 'maxim-rule' (*sagaa:tayaa*;) instead of 'maxim' [*sagaa*:].

- 2 *Grabbing the paddy sheaf by its root*: Green Turban puts forward a lie. Red Turban pretends to accept it, capping it with an even bigger lie.
- 3 *Sailing the laden raft upstream*: Green Turban prevails by sheer intellectual power. He gives an expansive and perspicuous account of the relevant law in its fullest context.
- 4 *Putting just enough into the rice pot*: Green Turban offers Red Turban one wish. By clever drafting, Red Turban gets three benefits for his one wish.
- 5 *Grinding and grinding until the oil comes out*: Green Turban reiterates Argument A, whatever other arguments Red Turban introduces.
- 6 *Ducking away from a charging elephant*: Green Turban does well with Argument A. Red Turban diverts attention by introducing Argument B.
- 7 *Clearing the undergrowth first*: Green Turban leaves his best argument to the end.
- 8 *The game-cock's feint*: Green Turban presents Argument C. Red Turban concedes the point, before pointing out that Argument C justifies the defendant making a large counterclaim.
- 9 *The water-strainer*: Green Turban asks a question of Red Turban, such that Red Turban, however he answers it, must lose the case.
- 10 *Levelling out with the rice pounder*: Red Turban refuses to comment - on Green Turban's accusations until Green Turban backs them up with evidence.

With the exception of item 3, the emphasis is on winning the case rather than perfecting the law. A legal profession that lists the rhetorical strategies open to it is, I submit, likely to have applied its analytical skills to the 'Red's maxim, Green's limitation, Green's urgent rule' pattern of argument.

AN IMPERIAL TOUNGOO LAW?

Empire brings new challenges, be they military, administrative or legal. One such is whether the White Elephant King of Pegu should discard the local law texts of the lands he has conquered. Are Burmese *dhammathat* the sole source of law in his empire, or will he allow his judges to treat Tai *thammasat* and Mon *dhammasat* as valid sources? The various vernacular traditions shared an allegiance to the Pali canon, and thus to *dharma* as universal truth. They also shared genre constraints. Burmese *dhammathat* and Tai *thammasat* were written to meet the same expectations.

But on many issues that matter – divorce, for example, and the credit arrangements that allow a poor rice grower to fund next season's crop – there were differences, so that up in the Shan hills a Tai-speaking princess would have different expectations of divorce than a Mon-speaking market gardener from the lower Salween valley. Most of the region grew wet rice, but in Vientiane and Ava credit arrangements to fund next year's crop were handled differently.

Bayinnaung is said to have collected Tai law texts for his palace library. I have identified two such in Burmese libraries – *Decisions of King Kunar* (a ruler of Chiangmai) (Huxley 1990:61) and *King Jali dhammathat* (named after Prince Vessantara's eldest son) from Lamphun (Huxley 2001b: 252). Possibly Bayinnaung's mention of Mahosadha is an allusion to a third such text, a Tai-language *Traditions of King Mahosadha* from Nan (Huxley 1997). In saying that seven-year-old judges like Mahosadha and Manu both did a good job, does he hint that the Mahosadha *thammasat* in Tai and the Manu *dhammathat* in Burmese are equally good as sources of law? Nan, like Phetchabun, Lamphun and Chiangmai, guards one of the passes leading from the central plains up to the Middle Mekong. It is possible that *The Precedent* conveys a message about the validity of Tai *thammasat* in Pegu courtrooms.

Presumably the Yoidaya hearing of the dispute used Tai language and Tai sources of law. Perhaps some maxims that were familiar to the Tai were unknown to the Burmese. My comparison of Byannayit's judicial reasoning with that of Dhammaraja, above, demonstrated that the same legal ideas can be expressed in different formats. It could also mean that Dhammaraja recast two of Byannayit's maxims as characterizations precisely because they were locally unknown. Kyaw Thu, however, treats these Tai maxims no differently than the three maxims that work in both cultures. Had not the Great Law-King himself said in his appointment speech: 'Rules and maxims have standing throughout this royal empire, no matter the particular city or province' (*Precedent*, section 6)? If Bayinnaung was enunciating his imperial legal policy, with particular reference to his Tai and Mon subjects, that suggests an alternative explanation of how *The Precedent* survived. Bayinnaung might have circulated copies to far-flung corners of his empire. Perhaps Burmese kings commonly used a real dispute as a peg on which to hang a policy declaration.³⁶

³⁶ It would be interesting to compare *The Precedent* with another judicial appointment speech dated 19 August 1758 (Than Tun 1984-90). At the start of the Konbaung dynasty the king lays down some general rules for litigation, using as his peg a case on insulting language brought by a Tai-speaking nobleman against a commoner with a Burmese name.

The 'test case' and 'put-up case' might be deployed as a comparative tool to think about law and politics. Such stratagems, after all, were deployed in Europe as well as in Southeast Asia, and a well-known example comes from Stuart England. Fifteen years after Bayinnaung's death, Queen Elizabeth 1 was succeeded by King James I, greatly improving Francis Bacon's opportunities for promotion. His brother Anthony had worked hard to promote James VI of Scotland's candidature to the English throne; Francis inherited that goodwill after Anthony's death, and within days of hearing of the Queen's death he had talked himself into a government role. He became the king's expert on the legal implications of the union of the Scots and English kingdoms, and wrote position papers that helped shape the issues: *Draft Proclamation* (Bacon 1864-80: x. 68), *Happy Union of Kingdoms* (Bacon x. 90), *The King's Style* (Bacon x. 236) and *Touching the Union* (Bacon x. 218). When the first parliamentary debates took place, he spoke for the crown. For military and financial purposes England and Scotland acted as a union, but they continued to operate different legal systems and award different honours, so that, four or five years after the Union, a valid English contract might still be invalidated by a Scottish judge and a Scots peer might not be entitled to sit in the English House of Lords.

James had hinted early on that harmonization of Scots and English law was a distant prospect. But he had to change something, so he settled on a common citizenship. Let all Scots citizens be recognized as English citizens, and vice versa. Bacon was in charge of bringing this about. He called it 'naturalization', and defined it as a bundle of 'rights to belong, to take part, to a collective identity, and to be considered for honour',³⁷ but it soon became clear that England's parliament, if forced to vote, would vote against naturalization. Bacon therefore adopted extra-parliamentary stratagems, and convened a joint Anglo-Scottish committee to hear evidence and propose further action. It duly reported as he would have wished, acknowledging the distinction between Scots born before 1603 (the *Ante-nati*) and after 1603 (the *Post-nati*).

Bacon's next stratagem was to bring a test case. One-year-old Robert Calvin (born in Edinburgh in 1605) went to court to demand his rights as an English citizen to inherit a house in Shoreditch. But which court had jurisdiction to hear such a case? Although Bacon had suggested 'Britany' as a name for the combined kingdoms of England and Scotland, as yet there was no Supreme Court of Britany to rule on inter-Union disputes. Bacon therefore started the test case in Queens Bench, but moved it for

³⁷ '... *ius civitatis, ius suffragii vel tribus...ius petitionis sive honorum*' (Bacon: x.309).

consideration 'before the Lord Chancellor, and all the judges of England' not in one of London's regular courtrooms, but in the Exchequer Chamber. Bacon donned the green turban on Calvin's behalf and delivered one of the most persuasive speeches of his career (Bacon vii. 641-79). Following full debate, the judges retired each to their own courtroom to deliver judgement. All but one of them ruled for Calvin.³⁸ *Calvin's case* was a put-up case, however much Bacon tried to deny it: 'The case no feigned or framed case, but a true case between true parties' (Bacon vii. 641). It was devised to advance a policy that parliament would not endorse (that it took place in a put-up courtroom helps prove the fact), and its lasting result is that Scots are able to inherit freehold land in England. Bacon was rewarded for his successful handling of the Union issue with a knighthood (1603), a civil pension (1604), and the post of Solicitor General (1607). Compare Francis Bacon of Canonbury with KyawThu of Pegu: like Lord Kyaw Thu, Bacon was a faithful servant of a king, both were legal specialists in a lately much expanded realm, and both, it would seem, used a test-case strategy to further their king's aims.

My rule of thumb for comparing legal traditions is that the better the authors would have understood each other, the more productive the comparison. To what extent could Kyaw Thu have understood Bacon's speech in *Calvin's case*? For his benefit let us substitute — *dharma* for 'laws'. Bacon argues that law and kingship are equally essential to a functioning state:

If the sinews be without the spirits, they are dead and without motion; if the spirits move in weak sinews, it causeth trembling; so the laws, without the king's power, are dead; the king's power, except the laws be corroborated, will never move constantly, but be full of staggering and trepidation (Bacon vii. 646).

Dharma without a king is inert: a king without *dharma* is directionless. Kyaw Thu, as a royally appointed judge, accepts the first proposition. The second proposition follows from Buddhist first principles: because every action has ethical consequences, kings must act as *dharma* dictates. Nonetheless, Kyaw Thu's version of the earliest period of legal history differs from Bacon's. Did kings exist before there was law? The story of Mahasammata, on which the rest of Buddhist politics is built, teaches that *kings cannot reign in the absence of dharma, and it* was the need to punish miscreants in accordance with *dharma* that created the opportunity for kings to exist. Bacon apparently disagrees. As the basis for an argument for why the royal prerogative controls naturalization, he accepts

³⁸ (1608) 7 Co. Rep. 1a (77 E.R. 377), or search *Westlaw* under 'Calvin's case'. The Lord Chancellor Thomas Egerton published his ruling as a pamphlet, later reprinted in *State Trials*.

the opposition's contention that kings preceded legalism. He admits that the 'first kings...governed for a time by natural equity without law: so was Theseus long before Solon in Athens' (ibid. 647). Nimrod, builder of the Tower of Babel, had ruled as a king untrammelled by law. It was the multiplicity of tongues after the tower's fall that provided the possibility of 'civil and national laws' (ibid. 664).

Bacon now turns the argument against the opposition, neatly executing a 'game-cock's feint'. All who accept that kings existed before law must also accept that the 'law' in question is national law: of course natural law has always bound kings. That universal knowledge is what allows us to construe the national laws with strictness and precision, so 'the law of England must favour naturalization as a branch of the law of nature'. Translating this for Kyaw Thu's benefit, no king can exist unconstrained by *dharma*, but the earliest kings ruled without national law. On this final phrase, however, translation founders: Bayinnaung's generation lacked the technical vocabulary that could enable them to differentiate between *dharma* and national law, while England had sharpened the necessary vocabulary following its Reformation, such that natural law (defined by the Vatican) and national law (defined by the king and his judges) vied for authority. Bacon is now developing a logic that will allow him (and his legal confreres) to define for themselves what natural law is. My rule of thumb predicts only moderate fruitfulness for comparing Kyaw Thu and Bacon.

LEGAL REASONING IN LONDON AND PEGU

Like Kyaw Thu's judgement, Francis Bacon's speech in *Calvin's case* is a polished example of courtroom rhetoric. To facilitate comparison Figure 7.3 provides a diagram of its shape. But first I will describe its form without visual aids. Bacon divides his argument into three parts:

I dare not handle a case of this nature confusedly, but purpose to observe the ancient and exact form of pleadings, which is, First, to explain or induce. Then, to confute, or answer objections. And lastly, to prove, or confirm (Bacon vii. 642).

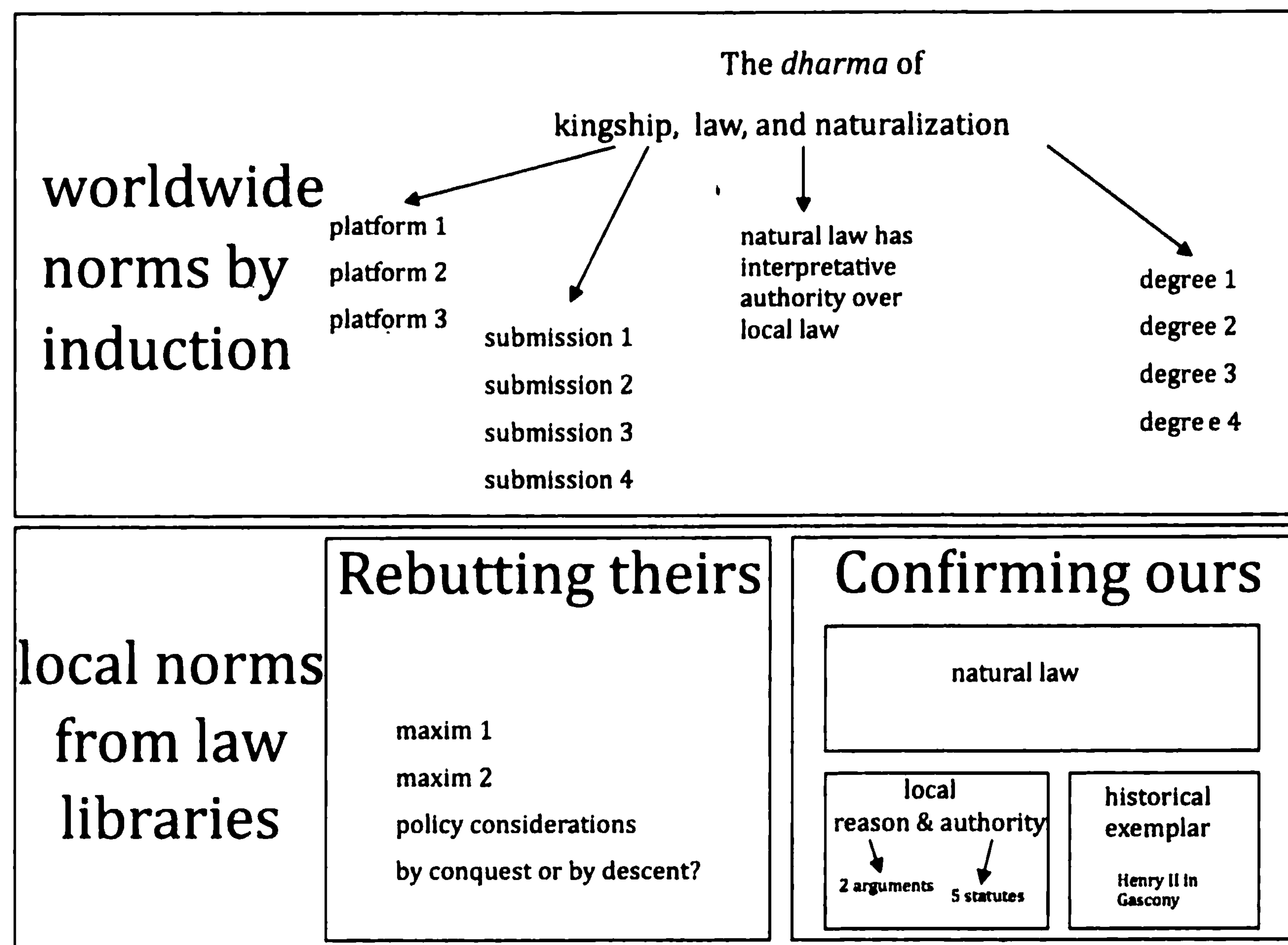
His structure, then, is 'induction, confutation, proof'. The latter two are comparable to the structure of Kyaw Thu's rebuttals, which I summarized as 'Red's maxim, Green's limitation, Green's urgent rule'. Maxim and limitation are combined into confutation, while proof resembles urgent rule. Bacon confutes four of Red's points, two of which are maxims, one an appeal to policy ('certain inconveniences conceived to ensue'), and

one a 'distinction devised' between different ways that a realm may be expanded (ibid. 651). He addresses the first maxim NATURALIZATION FOLLOWS THE KINGDOM, NOT THE KING as if listing the sources of law available to him: 'three manners of proof; first by reason; then by certain inferences out of statutes; and lastly by certain book-cases' (loc. cit.). Red argues that English law can have no extraterritorial effect. Bacon retorts that 'If divers families of English men and women plant themselves at Middleborough, or at Roan, or at Lisbon'³⁹ under certain conditions, 'such descendants are naturalized to all generations' (ibid. 652). Red cites three statutes. One of these (14 E. III) is, Bacon says, 'our very case retorted against them' (ibid. 655). Red argues that three other cases speak of allegiance to the kingdom, not the king, and Bacon retorts that these words were written by 'the reporter, who speaks compendiously and *narrative*, and not according to the solemn words of the pleading' (ibid. 656).

The second maxim WHEN TWO RIGHTS COINCIDE IN ONE PERSON, THEY DO NOT MERGE is dismissed with ease: 'But to shew that this rule receiveth this distinction, I will put but two cases; the statute of 21 H. VIII... and 42 Hen. VIII' (ibid. 658). To the policy arguments (for instance that general naturalization will lead to Scottish migration southwards) he has 'one answer which avoids and confounds all their objections in law; which is, that the very self-same objections do hold in countries purchased by conquest' (ibid. 659). The distinction between realms expanded by conquest and those by descent is, he concludes, 'a device full of weakness and ignorance' (ibid. 663). He destroys it with a *reductio ad absurdum*: 'These are the intricate consequences of conceits' (ibid. 660).

The last third of the speech details Bacon's proofs. Having cleared the ground, he can now present the case his way: 'First, upon point of favour of law. Secondly, upon reasons and authorities of law. And, lastly, upon former precedents and examples' (ibid. 663). His favour of law means the law of nature, and particularly 'life, liberty and dower' which flow from it. Bacon's second set of proofs are his legal authorities. He starts with the earlier cases on allegiance, emphasizing that filial duty and allegiance are relationships that both predate the (national) law. This leads him to argue that the king's natural person 'createth a privity' between his 'bodies politic' of England and Scotland (ibid. 665). He ends by invoking five acts of parliament. His third proofs are the precedents, meaning any previous occurrences that resemble the Union between England and Scotland. He eliminates a few candidates, leaving him with the only relevant exemplar: Henry II's acquisition of Gascoigne, Guienne and Anjou,

³⁹ He means Middelburg at the mouth of the Westerschelde, Royan at the mouth of the Gironde, and Lisboa at the mouth of the Tagus.

Figure 7.3 Bacon's speech for the *Post-nati* as a diagram

which happily supports his case, for England's expatriates in France were 'from their first union by descent...inheritable in England' (ibid. 676). This takes Bacon to his peroration: '*ex dictis, et ex non dictis* upon the whole matter, I pray judgement for the plaintiff' [ibid. 679]. Figure 7.3 summarizes all this as a diagram.

My Toungoo diagram (Figure 7.2) focused on Kyaw Thu's ten findings of mixed law and fact. My Stuart diagram shows that Bacon acted almost entirely in the normative field. He says nothing about deciding contentious facts or the logic of judgement, because there are no facts to be found. Bacon chose his put-up case precisely because its facts were beyond dispute. A glance at one-year-old Robert Calvin (the claimant) is enough to know that he was born after 1603 – *infans ipse loquitur* – and Bacon does not address the assembled judges of the kingdom on anything so vulgar as a fact. Or rather, facts are present, but they perform an unexpected role in his logic. In the first half of his speech, facts are the raw material from which his natural-law norms are created. He describes this as 'induction'. The products of his induction are three short essays on kingship, law, and naturalization. Following the model of his printed *Essays*, these argue *a priori*, merely illustrating his structure of assertions with historical examples from Aristotle, Xenophon, the Psalmist, and Queen Elizabeth I.

As Kyaw Thu would put it, Bacon's *dharma* is constructed from lists and *pyatton*. I doubt that Kyaw Thu could have understood that Bacon's induction was then in the process of expanding to include the analysis of technological processes. I doubt that even Bacon could have anticipated his posthumous canonization as one of the saints of the Enlightenment. Nowadays we chiefly look at his speech for the *Post-nati* in order to map the development of his epistemology between *Natura rerum* (1604) and *Novum organum* (1620). Pegu is a fine place, but none, I think, will refer to Kyaw Thu and Bayinnaung as apostles of early modernity.

So far I have compared Kyaw Thu's ten findings with Bacon's speech as a whole. Now let us compare Kyaw Thu's five rebuttals. Though the fifth on his list elaborates on the structure, the first four confine themselves to a single rebuttal-pattern of maxim, limitation, and urgent rule. This seems impoverished when put next to the rich argumentative resources that Bacon is able to deploy. Stuart lawyers would appear to have had more modes of persuasion available to them than did Toungoo lawyers. I owe this way of comparing legal reasonings to Jean-Louis Goutal (1976) who took random samples from French, US, and English law reports over 150 years, and counted the various rhetorical techniques employed. He was able to classify and count paths of justification scientifically. He came to admire the 'scrupulous craftsmanship' of the English judicial style and to denigrate the 'decadence of justification' in France and the US (ibid. 72). French judges are faithful to 'one particular source of justification', he suggests, while in England the public 'would find it unreasonable to see judges drop new rules like oracles' and therefore accept a plethora of arguments based, for example, on public policy and on *reductio ad absurdum* (ibid. 63). Goutal compares three legal traditions over a long period. I compare only a single work from each of two traditions. My limited comparison does endorse Goutal's finding that modern (post sixteenth-century) English legal reasoning is unusual in its tolerance of multiple modes of argument. On the Burmese side, meanwhile, perhaps other Toungoo judges used their law reports to advance other deontic logics than did Kyaw Thu. But Bacon and Kyaw Thu were dealing nonetheless with comparable problems, and their intellectual or rhetorical responses bear comparison and contrast.

CONCLUSION

Four-fifths of this essay have been devoted to retrieving an important source on a forgotten legal tradition. I have performed that job as best I can. The final fifth attempted to use cross-cultural argument to raise

questions about Toungoo law. My results have been limited. Stuart England and Toungoo Burma shared two uncommon features: a legal profession centred on oral advocacy and a style of government which has been labelled 'adjudicative' (Murphy, W. T. 1997: 77). I had hoped to discover some technical differences that would explain why James I's London was, and Bayinnaung's Pegu was not, a crucible of early modernity, but the reasons seem to lie outside the formal realm of law. My choice of *Calvin's case* to compare with *The Precedent encountered* limits also, perhaps because it was a put-up case without any factual dispute, perhaps because Bacon's genius skews all comparisons. No matter. I have established that sixteenth-century Burmese legal reasoning was more interesting than has hitherto been recognized. My colleagues, whether they work on China, India, Europe, or the Islamic world, will find Burma a useful mirror through which to examine their own specialisms.

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