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# *The Journal of Burma Studies*

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## THE IMPORTANCE OF THE DHAMMATHATS IN BURMESE LAW AND CULTURE

Andrew Huxley\*

*Burma's dhammathats are pre-colonial compilations of legal and ethical material. They provide vivid insights into the details of everyday village life and into the process by which Burmese authors adapted Pali texts from India to their own purposes. They appear to be at least as old as any other surviving Burmese literature and contain valuable lessons for contemporary Burma. This article hopes to rescue them from their unjust neglect.*

Pre-colonial Burma was particularly rich in legal and ethical texts. This normative literature can be divided into various types, the most common of which was the dhammathat genre. The Burmese word dhammathat derives either from the Sanskrit *dharmasastra* or from the Pali *dhammasatta*. The contents of the dhammathat consist of rules, lists, and stories drawn from both Sanskrit and Pali sources, but the contribution of the former, I shall argue, has been exaggerated at the expense of the latter. I have been studying the dhammathats for the last twelve years, but have mainly shared my findings with legal historians<sup>1</sup> and Buddhologists.<sup>2</sup> It is a pleasure to address Burma

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<sup>1</sup> Andrew Huxley, "Sanction in the Theravada Buddhist Kingdoms of S.E. Asia," *Receuil de la Societe Jean Bodin* 58(4):335 (1991); Andrew Huxley, "Wills in Theravada Buddhist S.E. Asia," *Receuil de la Societe Jean Bodin* 62(4):53 (1994); Andrew Huxley, "The Reception of Buddhist Law in S.E. Asia," in *La Reception des Systemes Juridiques: Implantation et Destin*, M. Doucet and J. Vanderlinden ed. (Bruxelles: Bruylant, 1994), 139; Andrew Huxley, "Shylock's Bad Karma: The Buddhist Approach to Law," *Law and Critique* 7(2):245 (1996).

<sup>2</sup> Andrew Huxley, "How Buddhist is Theravada Buddhist Law? A Survey of Legal Literature in Pali-land," *Buddhist Forum* 1:41 (1990); Andrew Huxley,

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specialists at last, particularly as it gives me the chance to generalize about Burmese pre-colonial culture and to put right a historic wrong. In order to facilitate their colonial enterprise, my 19th-century fellow-countrymen played down the legalistic aspects of Burmese culture: since the British colonists saw themselves as bringing the rule of law to Burma, evidence that Burma had it already was a potential embarrassment to their project. Conditions during Burma's blood-stained 20th century have not favored a reconsideration of the colonial verdict. The importance of the dhammathats at the most general level is that they force us to reconsider the role of law in pre-colonial Burma. The Burmese were more legalistic than the Thai, the Laotians, and the Khmer. By one measure, at least, they were more legalistic than any Asian culture between the Middle East and Japan. In this paper I shall adduce under five headings the evidence on which these generalizations rest. I hope that readers who are persuaded by my argument will consider how Burmese legalism fits with the other general characteristics of Burmese culture.

### **The Importance of the Dhammathats to Historians**

As the interest of historians in Western universities has swung away from dynasties and battles toward the structures of everyday life, so have those historians begun to recognize the importance of the dhammathats as a source of scholarly information. Topics such as the economics of the rice field, the relationship between the sexes, and the complexities of social status have worked their way to the top of the agenda. Whether one is studying the population statistics of Burma or pre-modern Southeast Asian marital relationships, it helps to know, for instance, what the Burmese knew about the causes of childlessness:

There are three causes which prevent conception in a married woman: (1) the consequences of evil deeds of the husband and wife in previous existences; (2) destruction of the semen by microbes; and (3) previous abortions.<sup>3</sup>

"The Kurudhamma: From Ethics to Statecraft," *Journal of Buddhist Ethics* 2:191. (1995); Andrew Huxley, "Buddhism and Law - The View from Mandalay," *Journal of the International Association of Buddhist Studies* 18:47 (1995).

<sup>3</sup> D2:238 [D33]. References in this form are to U Gaung, *Translation of a Digest of the Burmese Buddhist Law Concerning Marriage and Inheritance, Being a*

The dhammathats are likely to be our only source on gender relations in pre-colonial Burma. The religious chronicles are, for obvious reasons, silent on the topic, while the political chronicles give idealized accounts of courtly love and of heroic feats of polygamy in the palace. Many of the dhammathats share this palace perspective, but *Kungya* [D6] is an early work in Burmese prose which ignores Jataka tales and Indian lists and gets to the heart of village life as it was lived in the 16th century. According to *Kungya*, a girl who has slept with several men can choose which of them to marry, and can demand thirty ticals of silver in the event of a refusal. I assume, with the greatest respect to all concerned, that this would be more useful to Burmese villagers than the learned discussion of the five types of virgin offered by *Wagern* [D5]. *Kungya* contains another rule (otherwise found only in a late 18th-century work) more typical of the village than the palace:

If a woman has illicit intercourse with the husband of another woman, the latter has the right to pull the ears or the top-knot of the former. If such treatment results in the loss of an ear or of the top-knot, the loser is entitled to claim the man as her husband; and if he refuses to take her to wife, he shall pay sixty ticals of silver as compensation. But if no such loss is sustained, he shall pay her thirty viss of copper. The above is the rule laid down in the dhammathats.<sup>4</sup>

It is a small step from the economics of adultery to the economics of the irrigated rice community in general. Eighteenth-century dhammathats such as *Manugye* [D12] give a fairly coherent picture of the legal rules linking irrigated land, contracts of loan,

*Collection of Texts from Thirty Six Dhammathats* (Rangoon: Superintendent of Government Printing, vol. 1, 1902; vol. 2, 1909). This work is sometimes known as *The Kinwunmyingyi's Digest*. "D2:238" indicates s.238 of the second volume; "[D33]" specifies the quotation in that section which comes from the dhammathat numbered 33 in the list at pages 5 to 13 of Volume One. To minimize confusion between the dhammathats, which often have very similar names, I have added this list number in square brackets to every dhammathat cited in the main text. D33 is *the Manucittara* dhammathat. The author and date of this work in Burmese verse are unknown. It was written before 1790.

<sup>4</sup>D2:413[D6].

debt-slavery, and adoption. I believe that these rules were developed by Burma's first paddy farmers in the last five centuries BCE, long before the advent of writing and state institutions. Whatever the larger-scale political organization, the local level of rice production seems always to have been organized like this: one or two wealthy families (let us call their representative "Dives") have access to the best-irrigated land. Kinship ties are important in defining these families, but kinship ties more than two generations distant are ill-defined. The poorer members of the local community (let us call their representative "Lazarus") are bound to the wealthier by ties that are legal in nature. Lazarus may be a crop-sharer on Dives' land, or he may be a son-in-law. Dives may have lent seed-rice to Lazarus, in which case Lazarus, until he pays it back, is either a debtor, a judgment-debtor, or a debt-slave to Dives. In each of these eventualities the relationship between Dives and Lazarus is defined by what is written in the dhammathats. If Lazarus is Dives' debt-slave, he will live and work in Dives' house, but so will many others who are neither slaves nor close kin: some of these will be adopted children, but "adoption" here describes a group of statuses rather than a single status. These legal bonds are not mutually exclusive: Lazarus may simultaneously be Dives' second cousin, his son-in-law, and his debtor. I would sum up this village structure as *a legalistic and highly status-conscious patron-client system*. The Burmese, at least since they first constructed dams and tanks, confirm the legal anthropologists' rule of thumb that irrigators are legalistic.<sup>5</sup>

### The Importance of the Dhammathats to Pali Scholars

Burma, with its rich tradition of works on literary history, has given generously to the world of Pali scholarship. The generosity has not been reciprocated. Pali scholars, when discussing the authorship of works written in India and Sri Lanka, will quote avidly from the *Gandhavamsa*, the *Sasanavamsa*, and the *Pitakat Thamaing* works. But they give only token recognition to the substantial Southeast Asian legal literature written in Pali. The *Critical Pali Dictionary* lists five dhammathats out of a possible fourteen Pali works that have survived to be incorporated in U Gaung's *Digest* and a further twelve

<sup>5</sup> Franz Hoebel, *The Law of Primitive Man* (Boston: Harvard University Press, 1954), 291. Katherine Newman, *Law and Economic Organisation* (Cambridge: Cambridge University Press, 1983), 187.

or so lost works whose authorship or first lines we know.<sup>6</sup> K. R. Norman's survey of Pali literature does not mention the dhammathats at all.<sup>7</sup> Since misleading comments to the contrary are sometimes made, I should emphasize that there is no evidence that dhammathats were written in Pali before they were written in Burmese. Writing in the mid-17th century, Kaingza says:

Neither the dhammathats in Burmese nor in the language of Magadha [=Pali] mention the terms *sinche*, *thet-the* or *she-nay*. Nor do the translations of the Pali dhammathats [= *nissaya*]. But a Mon dhammathat, the rules of which are followed by the Mon people, says that in the beginning of the world King Mahasammata adopted the practice of collecting information by sending out messengers to listen to what the people talked about.<sup>8</sup>

This is the earliest dated source to mention the languages in which dhammathats are written. It implies that Kaingza knew of dhammathats written in (1) Burmese, (2) Pali, (3) *nissaya*, and (4) Mon. It may be that the Pali dhammathats are older than the other three categories, but neither Kaingza nor any other primary source says so.

As the Latin language is to Europe, so Pali is to Buddhist Southeast Asia: a classical tongue which preserves the wisdom of the ancients, unites a polyglot community, and remains the only proper vehicle for religious truth. If legal literature is written in the classical language, its legitimacy will be boosted by these associations: Europeans of the Renaissance would not have regarded Justinian's *Digest* as "written reason" (*ratio scripta*) if it had only been available in Middle High German. However, what a classical law-text gains in legitimacy, it loses in accessibility. Germans who can read Latin will

<sup>6</sup> Helmer Smith, "Epilegomena to Vol. 1 in *Abbreviations and Bibliography*, vol. 2 of *A Critical Pali Dictionary*, by V. Trencker (Copenhagen: Royal Danish Academy of Sciences and Letters, 1924-1948), 5\*-69\*. The five dhammathats are listed at page 47\* under the numbers 2.9.23.1 - 2.9.23.5. Henceforth references in the form "CPD 1.3.6.2" are to this catalogue of Pali texts.

<sup>7</sup> K. R. Norman *Pali Literature* fascicle 7:2 of *A History of Indian Literature*, J. Gonda, ed. (Wiesbaden: Otto Harrassowitz, 1983).

<sup>8</sup> Kaingza, *Maharajathat*, 4th Question, s.l, in *The Origin and Development of Burmese Legal Literature*, Schwe Baw, transl., Ph.D. Thesis, School of Oriental and African Studies, 1955, 2:18. This work is currently held at the Institute of Advanced Legal Studies Library, London, as Thesis #41. I have added the comments in square brackets.



always be a small subset of Germans who can read German. Indeed, the more literate the population, the smaller the subset who can read law texts both in the vernacular and in the classical language. Because Southeast Asia's rates of general literacy during the pre-colonial era were better than Europe's, their problem was especially acute. If the legal literature was to provide rules and penalties for the village, it had to be written in the vernacular. The dhammathats were most useful when self-administered. If the village monk had to be asked for a translation, he might as well be asked to decide the case. Every consultation of the dhammathat would then automatically escalate into a dispute to be settled. One obvious way to solve the problem was by *nissaya* texts, which follow a paragraph of Pali with a literal translation into the vernacular and then a looser paraphrase. By the end of the 19th century there were no purely Pali dhammathats left in Burma: all the manuscripts then in circulation had acquired *nissaya* translations into Burmese.<sup>9</sup> This underlines the ease with which law texts slipped backwards and forwards between Pali and the vernacular. Take, for example, *Winitsaya Pakathani* [D19], written around 1771 by Myat Aung. The first 13 sections of this are based on the *Maharajathat*, written around 1640, but Myat Aung takes a principled objection to dhammathats written in Burmese:

Kaingza's *Maharajathat* has been misunderstood and applied to cases in a manner never contemplated by him, because it is in Burmese. Unless a dhammathat is written in Pali, it cannot retain its original meaning. The rules of law are the contained, and the Pali language the container.<sup>10</sup>

Despite these fine words, Myat Aung's Pali version of Kaingza's Burmese text took less than a century to acquire its own Burmese *nissaya*. And if the so-called Pali dhammathats contain a great deal of vernacular Burmese, the reverse is equally true. The *Maharajathat* itself quotes and elaborates on sizable chunks of Pali text, some of which I think were taken from the Taungpila sayadaw's commentary

<sup>9</sup> G. Douglas Burgess prepared a list of Burmese dhammathats analyzed by language which is printed on p. ix of the Burmese language version of U Gaung's *Digest* (Rangoon: Government Printer, 1898). He has no category for pure Pali works: they had all become "dhammathats in Pali with translation," or in other words *nissaya*.

<sup>10</sup> Shwe Baw, *Origin*, 1:102.

on Sariputta of Polonnaruva's *Palimuttaka*.<sup>11</sup> Here is a rough guide: because legitimization and accessibility pull in different linguistic directions, the Burmese dhammathats tend to become macaronic. They aspire to a condition where 10% of the text is in Pali, and 90% in Burmese.

But Pali scholars should beware. The Pali used for an 18th-century dhammathat would not be easily understood by Buddhaghosa in the 5th century AD, let alone by a speaker of Pali in the 4th century BC. Though grammar and syntax are much the same, the vocabulary contains many barbarous neologisms for phenomena unique to Southeast Asia. Buddhaghosa would stumble over an 18th-century dhammathat for the same reason that Virgil would hesitate over a 20th-century papal encyclical. How "dead" classical languages are updated in this way is an interesting by-way of linguistics. I can recommend two books to any Pali scholar wishing to investigate it: Hoke Sein's three-way Pali-Burmese-English dictionary is a great help with the Pali neologisms;<sup>12</sup> and Jardine's *Notes on Buddhist Law*<sup>13</sup> contain comments from Forchhammer, Professor of Pali at Rangoon University. Forchhammer has a lot to say about the process by which the Burmese invented new Pali vocabulary, including an edifying discussion of how the phrase "unchaste behaviour between two lesbian virgins" might be translated into Pali.

### **The Importance of the Dhammathats to Burmese Literature**

Standard accounts of Burmese literary history have taken insufficient notice of the legal literature. My colleague John Okell has written that from the 12th to the mid-15th centuries Burmese was only written down in inscriptional form, that the earliest surviving Burmese poetry dates from the period 1364-1527, and that the earliest

<sup>11</sup> *Vinayalankara-tika* [CPD 1.3.6.2]. I regard the fact that the Taungpila sayadaw can write both a dhammathat (*Kaingza Shwe Myin* [D7]) and a sub-commentary on the vinaya as demonstrating a normative overlap between the two systems.

<sup>12</sup> U Hoke Sein, *The Universal Burmese-English-Pali Dictionary* (Rangoon: Daily Gazette Press, 1981).

<sup>13</sup> Sir John Jardine, *Notes on Buddhist Law by the Judicial Commissioner, British Burma*, (Rangoon: Government Press, 1882-3). Each of Forchhammer's contributions is headed *Remark*, to distinguish it from Jardine's comments, which are headed *Note*. Forchhammer's most detailed intervention is at Part 6:6-9.

Burmese prose works date from the 16th and 17th centuries.<sup>14</sup> Kaingza's *Maharajathat* [D8], which was written around 1640, should then count as one of the earliest works in Burmese prose. Can this be right? One of the early Burmese poems written around 1500, the Kandaw Mingyaung sayadaw's *Lokasara*, tells us to follow the dhammathat scrupulously. Why must we assume that it is referring to a dhammathat written in Pali? The earliest well-dated dhammathat which survives, *Dhammavilasa* [D4], may perhaps have been written in Pali, but the three surviving versions are in Burmese, Mon, and Arakanese.<sup>15</sup> Why should we believe these translations were made after the 16th century? If manuscripts in Burmese were unknown to Pagan, why were inscriptions about a topic as important as gifts to religion written in Burmese? And why in 1249 did King Klacwa use Burmese to lecture his citizens about theft?<sup>16</sup> I note with interest Michael Aung-Thwin's argument that the orthography and spelling of *Dhammavilasa* [D4] retains features which are typical of Pagan-era Old Burmese.<sup>17</sup> I think it more likely than not that manuscript Burmese dhammathats existed in Pagan. I suspect that works on astrology, mathematics, and medicine were also available in the vernacular. There would be a market for such offerings among semi-educated doctors, magicians, and calendar makers. If this is correct, Burmese literature in manuscript form is two centuries older than Okell credits.

The problem is, perhaps, that the word *literature* evokes poetry and narrative rather than technical works on law. But we should count the dhammathats as literature, since they contain an ingenious mixture of technical law and story-telling. The judgment tales have not been inserted just for light relief. In some cases they have a role to

<sup>14</sup> John Okell, "Nissaya Burmese," *Journal of the Burma Research Society* 50:95 (1967).

<sup>15</sup> Andrew Huxley "Thai, Mon and Burmese Dhammathats - Who influenced Whom?" in *Thai Law: Buddhist Law Essays on the Legal History of Thailand, Laos and Burma*, Andrew Huxley, ed. (Bangkok: White Orchid Press, 1996), 81, 85.

<sup>16</sup> The fullest translation of King Klacwa's *Edict on Theft* (promulgated May 6th, 1249) is in Than Tun, "A History of Burma, Chapter VI," *New Burma Weekly* January 3, 1959, 8.

<sup>17</sup> Michael Aung-Thwin, *Pagan, the Origins of Modern Burma* (Honolulu: University of Hawaii Press, 1985), 121. Does it affect his argument that legal language has a well-known propensity to retain archaic forms (as, for example, English law retains *non est factum* and *cestui qui trust*)? I think not. If law was written down in Burmese for the first time in the 17th century, what possible motive could the scribes have to introduce false Burmese archaisms into the text?

play which can only be described in literary terms: they act as ironic or subversive comments on the rules they are intended to illustrate. The dhammathat compilers were exemplary postmodernists, adeptly using fiction to puncture the pretensions of the normative text. I will give two examples of this point. One obvious problem faced by the compilers was how to convert Hindu caste into Southeast Asian status. Southeast Asians agreed with the Brahmins that human beings were born unequal but did not agree that inequality of birth should be a bar to upward mobility or a limit on whom one can marry. One of the sections which most of the early dhammathats borrowed from *Manusmṛti* concerns the Brahmin who married a wife from each of the four castes. Assuming each wife bears him one son, says the Sanskrit text, the inheritance shall be divided in the proportions 4:3:2:1 as between the Brahman, Kshatriya, Vaisya, and Sudra son. It continues: "But let him not in consideration of virtue give more than a tenth share to his Sudra son, whether he be a good son or otherwise."<sup>18</sup> This underlines the principle that caste must prevail over inherent virtue: upward mobility can only take place in the next rebirth. When the dhammathats borrow the passage, they replace this final sentence with the story of the snake-child. The snake-child was born of human parents and had human siblings, but it was given no share of the inheritance when its parents died. It registered its objection in appropriate snake-like fashion and was rewarded on appeal: the king of Benares ordered that it should receive a share equal to the human children. But the snake-child was motivated by principle rather than greed, and having made its point it gave its share to the youngest human sister. The story appears in 23 Burmese dhammathats and in all of the Mon dhammathats except *Wageru*. They draw various morals from it, but the compilers who originally rejected the final sentence of the *Manusmṛti* account must have had something like this in mind:

Even a snake got a share of the inheritance^] being born of the same parents. Therefore children of the same parents are entitled to share the parental estate without any distinction. The points to be considered in the division are the ability and qualifications of the children.<sup>19</sup>

*Manusmṛti* X.149-155.

DI :57 [D18]; *Vinnichayarasi*.

My second example shows a judgment tale as the mechanism by which a *Vinaya* rule applicable only to monks is expanded into the wider community. There are four rules about monastic inheritance in the *Vinaya*!<sup>10</sup> Three of these concern the principle that a monk or novice who looks after a dying monk in his final illness should inherit such personal belongings as his alms bowl and robes. In order to generalize this as a principle for the laity, three of the earliest Burmese dhammathats convert the *Vinaya* text into a story. We are told of a rich man in Benares whose son becomes a novice at the age of seven and is ordained at twenty-five. The rich man goes in search of his son and eventually discovers that he has died of a fever in a distant monastery. The precious ring which father had bestowed on son is now in the possession of the monk who nursed and buried him. The father asks for it back and, when this is refused, appeals to the highest possible authority: "The Lord Buddha decided that the person who attended on the deceased during sickness and buried him on death should get the ring."<sup>21</sup> This, the dhammathats explain, is why children cannot inherit from parents who were nursed in their final illness and buried by a stranger. Notice the underlying assumption which is too obvious to be made explicit: that, wherever possible, the laity should emulate monastic behaviour. Higher status groups, as was the case in republican Rome and is still the case in India, live under a more restrictive legal regime. Mimicking these restrictions is a step towards sharing their status. Sociologists of India talk of this process as "sanskritization"; we could speak of "vinaya-ization" as a weaker Southeast Asian form of the same process. The *Kozaungkyop*, a 16th-century dhammathat, preserves an interesting variant of this rule from which the *sangha* (the Buddhist monastic community) will always profit: "Whoever feeds a stranger in his last illness inherits whatever he possesses, save for the stranger's jewelry which is donated to the *sangha*!"<sup>21</sup>

<sup>20</sup> Mahavagga 8.26; 5 i 302.

<sup>21</sup> Dī.314 [D3] *Pyumin*.

<sup>22</sup> *Kozaingkyok* Book 8 s.12. This dhammathat is not included in U Gaung's *Digest*. I am quoting the translation in E. Forchhammer, *The Jardine Prize: An Essay* (Rangoon: Government Press, 1885), 67-74.

### **The Importance of the Dhammathats to Lawyers**

The earliest European reference to Burmese law in a scholarly context just predates the Konbaung dynasty.<sup>23</sup> It is to Montesquieu's credit that he discussed the laws of Pegu at a time when most Europeans were fixated on a quite different aspect of Burmese culture.<sup>24</sup> By the 18th century it had become difficult to take the dhammathats' account of their origin at face value: if they dated back to the pre-Buddhist origins of civil society, why were they not known to Sri Lankan scholars? Between 1795 and 1806 attention shifted to the relationship between the dhammathats and Hindu legal literature. Two European visitors to Burma, Father Vincent Sangermano, an Italian Barnabite missionary, and Major Michael Symes, an English diplomat, collaborated in one such study. Sangermano had a copy of a Burmese dhammathat (which he was later to publish), and Symes had a Persian translation of the Sanskrit *Manusmṛti*. In order to compare the two, Symes persuaded Sangermano to translate certain extracts from the Burmese text into Latin.<sup>25</sup> The text from Burmese to Latin was compared with the text from Sanskrit into Persian, and similarities were noted. Meanwhile in Ava, 300 miles farther north, the king of Burma was sponsoring a revival of Indian knowledge. He had arranged for the translation of several Sanskrit works into Burmese, including, in 1795, a translation by an Armenian of Sir William Jones' English translation of the Sanskrit *Manusmṛti*.<sup>26</sup> The king, in Upper Burma, was reaching the same conclusions as the Europeans in Lower Burma, and he expressed them officially in a Royal Order: "In addition to the fact that various dhammathats disagree, the original *Manu Gye* (Manu Explained) has never been brought into this country. . . ."<sup>27</sup> The Burmese king and the European

<sup>23</sup> Charles de Secondat and Baron de Montesquieu, *The Spirit of Laws: A Compendium of the First English Edition*, David Wallace Carrithers, ed. (Berkeley: University of California Press, 1977), 326-327.

<sup>24</sup> See: Donald Brown, James Edwards, and Ruth Moore, *The Penis Inserts of Southeast Asia: An Annotated Bibliography with an Overview and Comparative Perspective* (Berkeley: University of California Center for South and Southeast Asian Studies, Occasional Paper no. 15, 1988).

<sup>25</sup> Sir John Jardine, "Buddhist Law," *The Imperial and Asiatic Quarterly Review*, 4, (3rd Series): 367, 368 (1897).

<sup>26</sup> Michael Symes, *An Account of an Embassy to the Kingdom of Ava* (London: W. Bulmer & Co., 1800), 408.

<sup>27</sup> ROB 31-5-1817. Citations in the form *ROB day-month-year* are to Than Tun, *The Royal Orders of Burma, AD 1598-1885*, 10 volumes (Tokyo: Centre for South East Asian Studies, 1984-90).

scholars, both engaged in comparative legal history, agree that in some sense the *Manusmṛti* is a precursor text for the Burmese dhammathats. But note the babel of languages through which they had to work: their impressions of textual influence were gleaned through the distorting media of Burmese, Sanskrit, Pali, Latin, English, Italian, Persian, and Armenian. Two centuries later, with the benefit of decent translations and a large secondary literature, we can see that their emphasis was misplaced. The number of passages in the early Burmese dhammathats which derive directly or indirectly from *Manusmṛti* is in single figures. They are easily outnumbered by the passages deriving from the Pali canon and its commentaries, particularly from *Samantapasādikā*, the main commentary on the Vinaya.

The dhammathats, then, are more Buddhist than Hindu. But this kind of judgment will always be more aesthetic than scientific, since different influences can be in play at the same time. This must have been particularly true at the time when Burmese law was being written down for the first time. A more elaborate account of influences on the early dhammathats would go like this<sup>28</sup>: Most particular rules have their origin in local custom, dating either to the irrigated rice period, which started around 500 BCE, or to the more distant slash-and-burn past. When written down, these rules sometimes borrow their literary formulation from Hindu legal literature written in Sanskrit and are inserted in a text which is organized overall on principles derived from the Pali Buddhist scriptures.

The dhammathats belong to the family of Buddhist law. Their closest relatives are the Arakanese and Mon dhammathats, followed by the Siamese and Khmer legal literature. More distantly related, but still inspired ultimately by the legal literature of Pagan, are the Northern Tai law texts from Chiang Mai, Nan, Luang Prabang, and Vientiane. Sri Lanka, surprisingly, produced no Buddhist legal literature. Can we link the Southeast Asian Buddhist law texts to those produced in Tibet and China? This question has yet to be answered. If law in Mahayana cultures does prove to have anything in common with law in Theravada countries, it will be through the influence of the Vinaya. The text of the Vinaya in its Sanskrit, Tibetan, Chinese, and Pali versions has diverged to a surprisingly small

For more details, see Huxley, *Reception*, 152-155.

extent.<sup>29</sup> It is the common denominator of Buddhism when viewed from a legal angle. When the urgently needed task of evaluating Vinaya influence on Chinese and Tibetan law codes has been carried out, Burmese law may turn out to be part of a larger family of legal systems than we would presently think.

In one important respect Burma makes a special claim to legal attention. It was the only country between Japan and the Middle East to develop a legal profession independently of European influence. The independent emergence of a legal profession has happened at most four or five times in the world: in 5th-century BC Greece, in 1st-century BC Rome, in the 10th-century AD Islamic Caliphate, and in London and Paris in the 13th century. A great deal of argument surrounds the independence of these cases. Were the English and French developments inspired by Islam? Were the Roman developments inspired by Greece? Max Weber has put these questions at the center of the debate on modernity. He has alerted us to the crucial role which the legal professions of Rome and Western Europe played in bringing about a bureaucratic state and a capitalist mode of production. But Weber's work suffers from the absence of control data: unless we can study a legal profession which did not facilitate modernity, we cannot test Weber's generalizations. Burma provides us with a truly independent case study. But when and where the *she-ne* (Burmese legal counsellors) evolved is still an open question. From the evidence in the dhammathats themselves I have concluded that the "when" could be anytime between 1170 and 1550 and that the "where" could be Pagan, Ava, Toungoo, or even the Mon cities of the South.<sup>30</sup> Further progress can be made only if historians of pre-Konbaung Burma develop an interest in the question.

Nor do we know very much about the actual operations of the profession during the Konbaung period. Wherever a legal profession has existed, from Cicero's Rome to Thatcher's UK and Nixon's USA, some lawyers have turned to politics. Did this change of careers occur in Burma as well? "Politics," of course, must mean something different under a

<sup>29</sup> See: Etienne Lamotte, *History of Indian Buddhism from the Origins to the Saka Era*, Sara Webb-Boin, transl. (Louvain-la-Neuve: Publications de l'Institut Orientaliste de Louvain, 1988), 165-171; Charles S. Prebish, "Recent Progress in Vinaya Studies," in *Studies in Pali and Buddhism: A Memorial Volume in Honour of Bhikkhu Jagdish Kashyap*, A.K. Narain, ed. (Delhi: B.R. Publishing Co., 1979), 297.

<sup>30</sup> Andrew Huxley, *The Burmese Legal Profession, 1250-1885*, paper presented to the Copenhagen Conference of the Jean Bodin Societe, July 1993. Forthcoming in *Receuil de la Societe Jean Bodin*.



Burmese absolute monarch than it did in the late Roman Republic or in 20th-century Britain. I take *a career in politics* in pre-colonial Burma to mean a willingness to commit one's patron-client links to a particular faction in the royal palace in return for appointments to important and potentially lucrative jobs. The *she-ne* were well placed to convert their temporary legal clients into permanent patron-client links. Did they then bargain the manpower under their control to get higher, non-legal office? There is some evidence of this process in the early years of the Konbaung dynasty before Badon's accession in 1781. The first years of Badon's reign see the promulgation of five royal orders, of which the following is typical: "High ranking officers shall not represent a party in a law suit[,] as it might influence the judge. Punish the culprit, irrespective of his official status or family connections."<sup>31</sup> Are we to understand from this that many *she-ne* had been appointed as high ranking officers and were attempting to carry on their old professions simultaneously? Were the high ranking officers entirely subject to His Majesty's whim, or did they have bargaining chips of their own? If we knew as much about the *she-ne* of the late 18th century as we know about the sayadaws of the same period, we might get a fuller understanding of the balance of power between the king and the Supreme Court, the *hluttaw*.

### **The Importance of the Dhammathats to Contemporary Burma**

In theory, the dhammathats are still the ultimate source of Burmese personal law for the majority of the population. In the courts of Rangoon it would be perfectly proper to rely on a passage from a 17th-century dhammathat as a statement of the current law on divorce, adoption, or intestate succession. In practice, however, citation of the pre-colonial legal literature is rare. The important sources of what the British called 'Burmese Buddhist Law' are the 20th-century law reports in which the modern application of the ancient principles was elaborated, and even this vestigial survival is in doubt. Since 1988, when the State Law and Order Reconstruction Council (hereafter SLORC) seized power, it has been unclear whether a functioning legal system continues to exist in Burma. SLORC's name implies a commitment to law and order, but how far that commitment is from being met was illustrated by Dr. Maung Maung, the distinguished legal scholar whose continued loyalty to Ne Win

<sup>31</sup> ROB 7-1-1784. Compare ROB 3-3-1782, ROB 14-8-1783, ROB 18-8-1783, and ROB 29-8-1783.

was one of the puzzles of Burmese politics, in a letter to Patricia Herbert toward the end of 1990: "Poor Burma," he wrote, "we have failed her."<sup>32</sup> During the 1970s Maung Maung had planned and implemented the most radical reshaping of the Burmese legal system since the arrival of the British.<sup>33</sup> Opinions differ as to the success of these reforms, but at least Maung Maung was prepared to face the pressing problem of legal decolonization. How many of the trappings of English law should be discarded as irrelevant colonial flummery, and how many should be retained as essential to any civilized legal system? There is no sign as yet that SLORC has the will or the intellectual capacity to address such questions. There were some indications immediately after SLORC took power that it would wrap itself in the pre-colonial legal culture of Vinaya and dhammathat,<sup>34</sup> but subsequently it has concentrated on martial-law *pronunciamentos* aimed at attracting foreign capital.<sup>35</sup>

I believe that the dhammathats do have a role to play in Burma's search for a new constitutional settlement. The dhammathats may not contain a written constitution on the US model, but the genre as a whole comprises Burma's equivalent to the Philadelphia Convention. Over the centuries kings, lawyers, and monks have used the dhammathats to respond to each other's assertions about law and power.<sup>36</sup> Burma's interest in such matters did not begin with the *Burma Laws Act* (1898) or the *Government of India Act* (1870). The dhammathats contain a pre-colonial constitutional conversation. If the Burmese kings were absolute monarchs and oriental despots, as they were and continue to be characterized in British and SLORC propaganda, why did they agree to the imposition of legal limits on

<sup>32</sup> Patricia Herbert, "Obituary: Maung Maung," *The Guardian* (Manchester & London), July 13, 1994, 9.

<sup>33</sup> Andrew Huxley, "The Last Fifty Years of Burmese Law: E Maung and Maung Maung," forthcoming in *Lawasia*.

<sup>34</sup> See: San Nilar Win, "As the Vinaya Is to the Rahan and the Fencing Is to the Village, so Is Discipline to the Race," *Working People's Daily' Collected Articles*, book 2 (Rangoon), 408-415, first published on November 27, 1988; and Hsan Tun, "Manu Dhammathat," *Working People's Daily' Collected Articles*, book 9 (Rangoon), pp. 231-236, first published on June 4, 1989.

<sup>35</sup> SLORC Council Law 10/88, *Union of Burma Foreign Investment Law*; SLORC Notification 11/88, *Procedures under §32 of the Foreign Investment Law*; SLORC Notification 1/89, *Union of Burma Foreign Investment Commission*; SLORC Council Law 4/94, *Myanmar Citizens' Investment Law*.

<sup>36</sup> Huxley, *Mandalay*, 73-95.

their royal jurisdiction? Speaking through Kaingza, his Minister for Law Reform, King Thalun had this to say:

Irrespective of what the dhammathats provide, what the king ordains is law and must be followed in disputes relating to property, life and injury to the human body. In these three matters what the king commands must prevail.<sup>37</sup>

This is a modest enough claim. The king claims the constitutional power to legislate in three areas: *property*, which primarily means agricultural land but widens out to include the economy in general, *life*, meaning his ultimate power of capital punishment as a synecdoche for punishment and criminal law, and *injury to the human body*, referring to the King's Peace, his duty to put down robbers. Outside these three areas of *rajathat* (royal law-making), the dhammathats are the sole source of law. The king has only a restricted right to legislate. If we substitute *central government* for *rajathat* and *local government* for dhammathat, could this 17th-century constitutional settlement serve as a model for today? I am not suggesting that King Thalun provides an easy solution to Burma's current problems; to the contrary, I believe that reaching a solution will be difficult, and sticking to an agreed solution even more so. Rather, I am pointing out that Burmese constitutional history started in the 13th, not the 19th, century. Those who oppose SLORC, whether from inside or outside the country, have relied too much on Western constitutional models and not enough on home-grown Burmese wisdom.

## Conclusions

Earlier this century, when British colonial officers learned the Burmese language by translating the *Princess Thoodhamma-thari Pyatton*, the importance of Burmese legal literature was still widely recognized. As late as the 1950s and 1960s, Burmese scholars wrote first-rate works on the dhammathats. But more recently interest has dwindled. Unless there is work being done inside Burma of which I am unaware, there are at present only three of us with an interest in the subject. Foremost is Nai Pan Hla, a Mon scholar presently living

Kaingza, *Maharajathat*, 10th Question, s.18, *Origin*, 2:95.

in the United States.<sup>38</sup> Ryuji Okudaira,<sup>39</sup> from Japan, and I are the other two. Though I am sure that all three of us would welcome graduate students, I do not intend this article to be a recruitment brochure. If I have persuaded you that the dhammathats are an important aspect of Burmese culture, you can examine them for yourself by consulting U Gaung's *Digest*. Nobody with an interest in pre-colonial Burma can afford to ignore the ten volumes of Than Tun's *Royal Orders of Burma*. The true purpose of this article is to persuade you that U Gaung's two-volume collection of dhammathats is equally indispensable.

<sup>38</sup> Nai Pan Hla, *Eleven Mon Dhammasat Texts*, Bibliotheca Codicum Asiaticorum, vol. 6 (Tokyo: The Centre for East Asian Cultural Studies for Unesco, Bibliotheca Codicum Asiaticorum, vol. 6, 1992). A less opulent paperback version preceded it; Nai Pan Hla, *The Significant Role of the Mon Version Dharmasastra* (Tokyo: Institute for the Study of the Languages and Cultures of Asia and Africa, 1991).

<sup>39</sup> Ryuji Okudaira, "The Role of Kaingza Manuraja," *Journal of Asian and African Studies* 27:180 (1984); Ryuji Okudaira, "The Burmese Dhammathat," in *Laws of South-East Asia, Volume 1: The Pre-Modern Texts*, M. B. Hooker, ed. (Singapore: Butterworths & Co., 1986), 23.