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THE BURMESE LEGAL PROFESSION 1250-1885

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Max Weber's greatest contribution to legal scholarship lay in deflecting attention from books to people, from sources of law to legal professionals, from the content of rules to the techniques of argument about which rule should prevail. In our choice of subject matter for this year's conference, we are implicitly honouring Weber's pioneering comparative work. Those of us who remain unconvinced by some aspects of his analysis¹ blame the paucity of data available to Weber rather than Weber himself. The emergence of a legal profession is such a rare historical phenomenon that the only examples which Weber knew were all clustered around the Mediterranean Sea. His examples - 1st century Rome, IXth century Islam and XIIth century Europe - were not mutually independent. The later cases were influenced by knowledge of the earlier cases². In this paper I draw attention to a truly independent case. For as long as France has had advocates and England has had barristers, Burma has had its equivalent profession of *she-ne*³. There can be no suspicion of Mediterranean influence in the Burmese case : the causes for the profession's emergence must be sought within the culture and social structure of Burma itself. Burma should, therefore, provide a crucial test case for any grand theorising about the emergence of

1 His notion that a legal system can have objective claims to formal logical rationality is a little too Germanic to travel comfortably across the North Sea.

2 For a convincing claim that the XIIth century Inns of Court in Paris and London were consciously based on the Islamic model, see MAKDISI, « Legal history of Islamic law and the common law: origins and metamorphoses », *Cleveland State Law Review*, t. 34, 1985, p. 230.

3 A guide to pronunciation : both syllables of this Burmese phrase rhyme with « Che » in « Che Guevara ».

legal professions. But unfortunately we know a great deal less about XIIIth century Burma than we do about Ist century Rome or XIIth century Paris, and our ignorance of the early Burmese legal profession is even more profound. This paper is, as far as I am aware, the first in any language to devote more than three pages to the topic. Yet I cannot claim to be producing the fruits of original research. The facts I present here have been gleaned from the standard printed sources. There is, I am fairly confident, a great deal more information to be discovered in the unpublished Burmese manuscript sources. If this paper stimulates someone to undertake such research, it will not have been entirely in vain. Meanwhile, however, there are few uncontroversial facts about the period before the XVIIth century. I shall try to distinguish clearly between the facts and my speculations on them, but I must urge the conference to treat this report with especial caution. I describe a topic which, for all of its comparative value, has not yet been fully researched.

I. An outline of Burmese legal history

I understand the term « Burmese legal history » in a geographical rather than a linguistic sense. I shall sketch legal developments that took place in the well-defined geographical unit known as « Burma » - the drainage systems of the Rivers Irrawaddy and Sittang plus the adjacent strips of land on the eastern coast of the Bay of Bengal and the lower half of the River Salween valley. By the time that speakers of the Burmese language entered this area around 850 CE one important legal revolution had already taken place, and another was well underway. The first legal revolution accompanied the shift from a hunter-gathering economy to an irrigated rice cultivating economy. Irrigation societies need more law than hunter-gatherers societies. A new range of social problems, such as organisation of labour for large scale construction, differential access to irrigated land and agricultural credit (loans of seed-rice) has to be solved. I think of this legal revolution as the change from oral custom to « oral law of the rice plains ». We know of at least two cultures that underwent this shift long before the arrival of Burmese speakers : the Pyu of Burma's central dry zone and the Mon of Burma's southern coast. The Pyu spoke a language distantly related to Burmese. From the XIIIth century onwards their distinctive cultural and linguistic identity was absorbed into that of the Burmese. The Mon speak a language related to Khmer. For most of the period since the XIth century they have fallen under Burmese rule, but even now they have not completely lost their own language, culture and literature. In the XIVth century, and then again in the XVIIIth century, the Mons profited from Burmese dynastic weakness by resurrecting their independent kingdom. The second legal revolution, which was in progress amongst the Pyu and the Mon in the IXth century when the Burmese arrived, was the « Indianisation » of their law. « Indianisation » refers to the process by which the « oral law of the rice plain » came to assume written form in a script derived from India, following assumptions about the scope, nature and history of law derived from India, and all in the context of a religion derived from India. Recent archaeology has

revealed that, among the Pyu at least, the first legal revolution (and the first permanent settlements large enough to deserve the description of « cities ») occurred two centuries or more before they had any substantial exposure to Indian religion and Indian techniques of literacy. The earliest evidence of Buddhism among the Pyu comes from the early IVth century. The earliest evidence of the adaption of Indian scripts comes from the Vth century. « Indianisation » in Burma lasts from then until the Xth century. It is a process of selective adaptation of Indian culture by local leaders of the various rice plains, rather than a process of colonisation. These leaders were in competition with each other, and must also have had to defend their rice plain against raids from hunter-gatherers. The defensive walls which surround the centre of each of the early irrigation systems tell us that this competition was anything but peaceful. By 638 CE, when the Pyu founded their finest Buddhist city of Sri Ksetra [19°N, 95°E], they were not the only Indianising rice irrigators in Burma. Around the mouths of the Salween and Sittang [17°N, 97°E] the Mon were established, though at this early stage they seem to have been as interested in the Hindu pantheon as in Buddhism. Way up north, in the shadows of the Himalayas [26°N, 97°E] we hear of a community known as «the little Brahmins » whom I assume to have been local rice growers who adopted brahmanic hinduism. And thirty miles south of Mandalay [22°N, 96°E] present day Burma's largest irrigation system, the Kyaukse, was already under development. The Kyaukse appears to have been a joint endeavour by Mons and Pyus. By 850 CE it has also become the home of the Burmese - new immigrants from the north-east. The details of « Indianisation » differed between each of these groups, but the general process must have been the same. At first, local leaders are attracted to one of the Indian religions, which offer new techniques for legitimising secular power. Then, because Indian religions are based on written texts, they choose one of the Indian alphabets, and are exposed to as much Indian classical literature as they can acquire. Finally, after several centuries have elapsed, their successors are inspired by Indian law to undertake a second legal revolution. The oral «law of the rice plain» is written down, and law begins to be seen as a semi-autonomous field, a discipline which requires its own experts and practitioners.

In the XIth century the Burmese achieved political dominance over the Pyu and Mon. Some Burmese families had moved westwards from the Kyaukse to establish the new city of *Pagan* at a site equidistant from the three major irrigated rice plains. Within fifty years they had conquered all of Burma south of the 22nd parallel. Pagan became an imperial city ruling over a polyglot population: a centre for Buddhist architecture and scholarship but also a centre for the production of law texts. The second legal revolution may have taken place among the Pyus and Mons as early as the IXth century: the evidence at present is inconclusive. But there is no doubt that it took place among the Burmese in XIIIth century Pagan. Subsequent Burmese legal history up to the British conquest in the XIXth century did not stray too far from the Pagan model of law. I find the following periodisation useful.

A. Early Pagan 1044-1170

Most of the inscriptions from the first century of Pagan's power are written in Mon. The Burmese kings of the period are plainly indebted to Mon scholars, monks, stonemasons and architects. But they also explored the wider world, engaging in diplomacy with Sri Lanka and China, and sending architectural missions to restore the Buddhist holy places of north India. We have no indisputable evidence that law was written in this period, but I would suspect that written land registers of irrigated land were kept, and that important contracts were evidenced in writing. The scholars of Pagan were already writing original books on religion and grammar, but, apparently, only in the Pali language.

B. Late Pagan and after 1170-1364

From 1170 the Pagan inscriptions tend increasingly to be written in Burmese. The first well-dated law text, Kīlacwa's edict on theft, was promulgated in 1249. King Kīlacwa [reigned 1235-49] bears other marks of having been a legal reformer. His chief minister was known by the legally significant honorific of « Manuraja ». The sole Pagan inscription to mention « a dhammathat⁴ which is to be consulted on points of law » comes from either the last year of Kīlacwa's reign, or the first few years of his successor. And the only surviving Burmese dhammathat which claims to have been written in Pagan (rather than before or after) must date either from Kīlacwa's reign or from the thirty years prior. Kīlacwa may not have been the only Pagan king to sponsor the second legal revolution, but he is the only sponsor whom we can name with certainty. In the 1290s Pagan faced an invasion by the Mongols. Ultimately they were beaten back into China, but in the process power shifted from the Burmese kings of Pagan to the Tai speaking Shan kings who established their capitals in the north of Pagan's old territories. By this stage, I surmise that several dhammathats were in circulation. They would now exist in several languages and genres. The first dhammathat would probably have been written in Pali. By now it would have been joined by dhammathats translated into Burmese prose, Burmese verse, Mon prose and, possibly, Pyu prose. The « fall of Pagan » around 1295 does not seem to have disrupted this process. The Shan kings were rapidly Burmanised, and we hear of dhammathats being produced under their rule. Our best known surviving Mon dhammathat, the Wageru, was written immediately after the Mon regained independence with the « fall of Pagan ». Contact with Shan culture alerted the Burmese to the culinary merits of *let hpet* (« pickled tea »). *Let hpet* is a delicious salad made from mature tea leaves, chopped nuts and various condiments⁵. It has a

4 « Dhammathat » means a law text which describes all the applicable laws. In European terms it is a code rather than an individual act of legislation, but it is written by private scholars rather than by the king or his functionaries.

5 « Sesamum oil, garlick and assafoetida » according to one early account: FYTCHE, *Burma Past and Present*, vol. 1, 1878, p. 70

very mild stimulant effect⁶ but its main role is social: to offer *let hpet* is to offer hospitality, friendship and social accord. From about the XIVth century it also came to signify that a dispute had finally been settled. The important role that « pickled tea» plays in the Burmese legal system is one of the significant post-Pagan developments.

C. The Ava period 1364-1555

Burma north of the 24th parallel had become, in Harvey's famous phrase « a snarling bedlam of Shan states ». Central Burma down to the 19th parallel was loosely controlled by a Burmese dynasty based at Ava. Southern Burma contained three or four Mon kingdoms under the suzerainty of the Mon king of Pegu. In Central Burma, and also (I surmise) in Monland, the production of dhammathats continued. The early XVIth century sees the production of second generation dhammathats, meaning texts that specifically quote from and compare between the earlier dhammathats. By 1550, if not before, Burmese law underwent a change in substance and a change in procedure. The substantive change was the abolition of the right to make a will. This appears to be linked to the rivalry for land and manpower that existed between the Buddhist king and the community of Buddhist monks. The procedural change concerned the way in which the constitutive oath was sworn. In Pagan a witness swore « in the presence of Buddha » or « clutching the relics of the Lord Buddha to his side ». But by 1555 at latest, responsibility for guaranteeing the truth of a deposition had devolved to the Nats, a bad tempered group of local spirits who grudgingly accept the Buddha's authority. Theologically, the Nats are the Burmese instance of the process of accommodation which always takes place between Buddhism and pre-Buddhist beliefs. But culturally, from the Burmese point of view, the 37 Nats are the unquiet ghosts of those who opposed the royal family between 1044 and 1400. They may echo pre-Buddhist religion, but the Nats are specifically connected with the growing power of the Pagan royal family and its successors.

D. The Toungoo Dynasties 1551-1752

A small Burmese kingdom on the borders between Monland and Ava produced an Alexander the Great figure in King Bayinnaung [1551-1581], His father had conquered Martaban in Monland in 1541, Pagan in 1545 and southern Arakan in 1546. Bayinnaung completed the conquest of Ava in 1555, thus reuniting the territories controlled by classical Pagan, and then crossed the mountains to Thailand and beyond. He subdued many of the Shan states, took Chiang Mai in 1556, and sacked Ayuthaya, the Siamese capital in 1563. He rounded off his campaigns with an invasion of Laos, sacking Luang Prabang in 1564. The two main motives for such incessant warfare were the accumulation of manpower [especially skilled craftsmen] and the accumulation of booty. Included in the booty were law texts certainly from

6 I find it about as useful for alleviating hangovers as a pot of strong tea.

Monland, Chiang Mai and Ava, and possibly from Siam and Laos as well. After Bayinnaung's death his empire disintegrated and his son was eventually deposed by rebellions Mons. After some years of civil war, a Restored Toungoo dynasty based near Ava reintegrated control of Burma, the Shans and Chiang Mai. The third king of this dynasty, Thalun [1629-1648] took a particular interest in law reform. He, like Klacwa, bestowed the title of « Manuraja » on one of his officials. Kaingza, the recipient of this honour, is the single most important individual in Burmese legal history. He wrote two works on law which survive in something like their original form. In one of these, the *Maharajathat*, he answers questions posed by King Thalun on matters of legal history, substantive law, and their joint law reform programme. From Thalun's reign onwards our knowledge of Burmese law ceases to be speculative. As I shall describe shortly, Kaingza was interested in rationalising legal procedure. He attempted to shift the burden of guaranteeing truth in a trial from the Nats to the judges. He was also a comparative lawyer, making good use of the « booty dhammathats » acquired during Bayinnaung's campaigns. Or perhaps it would be better to say that he drew on sources written in languages other than Burmese. Neither he nor earlier Burmese lawyers would have thought of the dhammathats as having a limited territorial jurisdiction. They were legitimised as containing truths which were universal at least to the southern of the four continents surrounding Mt. Meru, the only part of the world to have received Gautama Buddha's message, and the only part of the world where one might expect a righteous Buddhist all-conquering monarch. « Foreign » dhammathats might contain essential truths, just as might « foreign » works on medicine or astronomy.

E. The Konbaung Dynasty 1752-1885

In the mid XVIIIth century, Monland rebelled once more, and its armies eventually sacked the Toungoo capital. After the usual decade of chaos, a new Burmese dynasty arose from a quiet backwater in the north of central Burma. The first two Konbaung kings reconquered « Greater Burma ». In 1781 King Badon, the fourth of the dynasty, started a forty year reign of peace and prosperity. These years from 1781 to 1819 mark another important period of dhammathat composition. Our first useful European accounts of Burmese law in theory and practice also date to Badon's reign. But from the 1820s onwards the Konbaung kings were not able to prevent annexation by the British in three gulps, separated by twenty year periods of digestion.

II. Conflict Resolution through the Burmese Courts

I would expect a legal profession to emerge out of a legalistic model of conflict resolution. Where disputes are resolved by judges applying written sources of law in predictable ways, and where a hierarchy of appeal courts exists to correct the first instance judge's decision, we have a milieu which offers openings for professional assistance to litigants. Some of our sources describe Konbaung conflict resolution in

such legalistic terms⁷. But others describe it as being essentially based on mediation :

« I got at length to believe, what one would readily infer from their ignorance of any instance of custom as opposed to written rule of law, that there was no custom, and that the rule of law was their only standard when the parties were at arm's length. But while it was the standard, and binding on the courts like a statute, it was little known to the people and less observed. This result is caused as much by the good temper and fair dealing of the people as by the events of history. They are not greedy but ready to compromise and, in family quarrels more especially, kind and reasonable, ready to give a poor widow or a father with several little children more than the fraction stated in the written law. They have like other Oriental folk deep respect for parents, aged relations and the village elders : so instead of going to law they used to, and I believe still do, call in some of these to settle disputes. Now as the family needs are unlike in every case, the awards are special and defy uniformity or attempts to make out of them any unvarying rule... My impression is that the Burman laity have yet hardly acquired the desire and respect for fixed laws... »⁸.

Some « broad brush » comparative lawyers of the school of Northrop go further: they regard pre-colonial Burma as a typical example of «the East Asian mediational approach to conflict resolution ». For them conflict resolution worldwide divides into the European legalistic approach, the Indian status approach and the Asian approach based on compromises⁹. How can we reconcile these conflicting interpretations of the Burmese approach to disputes ? The evidence that Burmese would rather mediate to get a fraction of their claim than litigate to get the whole of it is compelling. But so is the evidence that Burmese enjoyed a good gamble. And legalistic « all or nothing » dispute settlement is a form of gambling : it is a public event from which a single winner must emerge. In this respect « a day in court » is not much different from « a day at the races ». Both events are structured so that the winner takes all, while affording the audience and minor participants the opportunity to place side-bets. No sane Burmese would choose to use the royal courts unless he had to. If mediation offered an acceptable compromise, he would gladly take it. But if attempts at mediation failed to offer an acceptable compromise, no red-blooded Burmese would duck the challenge of going to court. Like war, legalistic dispute settlement offered an opportunity to test one's *kamma* (meaning « merit » or « fortune »), a chance to strut at the centre of the stage, and the exciting prospect of great victory or disastrous defeat. In war-time one needs a competent commanding officer. Likewise in litigation one needs a competent professional lawyer.

⁷ For example, the memorandum written immediately after the British conquest of Upper Burma by the Kin wunmingyi, one of the chief ministers of the last Burmese king. It is translated in SCOTT, *Gazetteer of Upper Burma and the Shan States*, part 1, vol. 2, 1900, p. 485-8.

⁸ JARDINE, «Buddhist Law», *Imperial and Asiatic Quarterly Review*, 1897, 3rd ser., vol. 4, p. 370. Sir John Jardine is a highly credible witness. As Chief Judge of British Burma from 1878 onwards he looked at Burmese law with a scholarly and unpatronising eye.

⁹ LEE, *Legal and moral systems in Asian customary law*, 1978.

The options available for conflict resolution were complex ranging from extreme mediational to extreme legalistic. They can best be illustrated by imagining a typical Konbaung period dispute. Let us assume that A and D are in dispute over the repayment of an agricultural loan. During last year's planting season, D had to borrow seed rice from A. Their agreement on the date for repayment, on the level of interest and on the security for the loan was written down and witnessed by fellow villagers. Though the debt has now fallen due, D refuses to pay it back and further refuses to submit to becoming A's debt-slave (the normal security on such a loan). Firstly, how does A know that this is a legal issue, on which he may seek assistance through the law courts ? The answer is that all the relevant concepts (loan, security and debt-slavery) are discussed in the dhammathats. If something is described in the dhammathats, it is ipso facto legal, since the dhammathats are regarded at village level as the unique source of law. In the capital city, courtiers and bureaucrats might add *rajathat* (the decree of the king) as a second source of law, but I doubt that the average villager would have accepted this modification. Secondly, what options does A have to bring pressure on D without taking the risky and expansive step of going to court ? This will depend on their relative status. If A is much richer than D, then A will command enough able bodied men to arrest D and put him in the stocks until he agrees to pay up. Wealth in Burma was closely correlated to the size of one's household¹⁰. If A's household can muster the biggest gang in town, he can exercise his right to make a private arrest without risking reprisals. Conversely if A is much poorer than D, his only extra-legal recourse is to mobilise public opinion on his behalf. One of our sources refers to the possibility that A can « leave the settlement to D »¹¹. This presumably means that A hopes to shame D into a settlement, either by using the village monk and the village headman as intermediaries, or by picketing D's front door, or, in extreme cases, by committing suicide on D's threshold. If, responding to public opinion, D comes up with a compromise offer, A need not accept it, but if he and D publicly eat *let hpet* together, that signifies that A is bringing the dispute to a close on the proffered terms. If A subsequently revives the dispute in court, evidence that he has eaten *let hpet* with D will act as a bar to the court's jurisdiction. The cases where A will take D to court because extra legal means of settlement have failed will tend to be those cases where A and D have access to roughly the same manpower, or where D cannot be shamed into settlement by public opinion.

If the dispute cannot be settled at village level, there are still options other than the recourse to the royal courts of law. A and D could, particularly in the provinces, agree to a more legalistic version of mediation : they could submit their quarrel to a *hnyi hkön* (« someone learned in the law »). His suggested resolution would only be

¹⁰ The birthrate in Burma has always been low, and I know of no evidence that rich parents had more children than poor parents. But numbers in a rich household are swelled by other factors, such as the acquisition of hereditary slaves, servants, and debt-slaves and the presence of poor relatives, either as guests or adoptees.

¹¹ SCOTT, *op.cit.*, p. 486.

binding if both parties ate *let hpet*, but he would use legalistic arguments to persuade D and A that his suggested resolution is fair. Or they had the option of submitting to a binding arbitration : they could choose an arbitrator and agree in advance to be bound by his decision. The arbitrator is known as *anunyata hkon* : the agreement to be bound by his decision is drawn up in writing and, of course, witnessed by mutual consumption of *let hpet* before the arbitration begins. These means of settlement are available only if A and D both consent. In the absence of mutual consent, the royal courts of law are the only body with the power to compel D's attendance. The royal courts situated in the provincial centres of administration are the lowest level of a hierarchy that stretches up to the *Hluttaw*, the king's privy council in the shadow of the royal palace. All such courts were supposed to follow a standard procedure and to apply the law according to dhammathat and rajathat, but the judiciary at the top of the hierarchy had far more legal knowledge than those at the bottom. In the provincial capitals the royal courts had their own specialist staff, but the provincial governor who sat as judge was as likely to owe his position to military prowess, or aptitude in tax raising, as to legal skills. Furthermore, the provincial governor was entitled to his shares of court fees. However easily A wins his court case, he must still pay 10 % of the sum in dispute as a fee. Burma did not adopt the principle that the losing side must pay all costs in the case. Additionally there would be fees due to various subordinate court officials. Even if A was charged only the official rate for a judgement against D, he would still be cutting the court in for 15 % or 20 % of the value of his seed rice. In practice, judges were likely to be more avaricious, since legal fees were an important part of the provincial governor's remuneration. From time to time the king would intervene to accuse a governor of peculation, strip him of office and confiscate his wealth. Such royal supervision enhanced the king's ideological claim to control the legal system. The cynical may, however, observe that when the king mulcted a peculating governor, the ill-gotten wealth went to the king, rather than back to the cheated litigants. In practice, this was a technique by which wealth extracted from the villagers could find its way into the royal treasury.

There were, then, powerful reasons why A should explore alternatives to the local royal court. Assuming these alternatives failed, what procedures would A have to go through to get judgement against D? First, A must approach the *nakhan*, a court functionary who acts as interface between the litigants and the judge. This is the *inquisitorial* stage of the process. The *nakhan* examines the parties (and perhaps their witnesses) and presents a written report for the judge which is accompanied by the written pleadings of A and D. A date is fixed for the hearing. On the due date, the parties and their witnesses and supporters appear before the judge for the *adversarial* stage. The judge is not the ultimate finder of fact, so this stage is not final. Rather than resolving all factual and legal issues, the judge is supposed to define the issues, and to check the eligibility of A and D's witnesses. The day in court will end with a conditional order by the judge along these lines: «Let A and his three eligible witnesses take the nat-oath tomorrow morning. If they successfully swear that the written contract of loan is not a forgery, then D must pay twice the value of the sum in dispute». On the next day the final constitutive oath stage of the process takes

place. All parties to the dispute (except the judge) assemble at the known residence of a Nat. One by one the witnesses take up the *kyansa*, the book of oaths, and formally repeat their evidence. This final stage is imbued with a religious ambience. The nat must be propitiated with gifts of flowers and a half-coconut. Sometimes an orchestra will play to draw the nat's attention. But these ritual trappings should not mislead us; the oath-taking is still part of a forensic contest. D and his supporters will be watching like hawks for any sign of unwillingness on the part of A's witnesses, or any mishap in the taking of the oath. A XVIIth century Cambodian law report, describing a similar procedure, tells us of a case which was lost because one of the oath takers, on picking up the Sacred Book, let slip a fart¹². Gledhill, in an earlier presentation to the Jean Bodin Society, describes the surviving attraction of the nat-oath in the 1930's :

« I have personal experience of parties who offered to confess judgement if the opposite party would take oath that his cause was just on a particular kyansa with a reputation of vindictiveness for perjurers. The kyansa has a number of palm leafs on which the penalties for perjury here and hereafter are inscribed, and is protected by red laquered wooden covers »¹³.

Red, we might add, is the colour of the nats. The supernatural penalties for perjury inscribed in the *kyansa* invoke certain nats by name¹⁴. And the oath is taken, *kyansa* in hand, at an outdoor spot frequented by a particular nat. Oaths in minor cases might be sworn at the top of the courtroom stairs, home of a nat of petty jurisdiction. For more important cases, the chief guardian nat of the court resided at the foot of the courtroom stairs¹⁵. But the practice varied. The most powerful nat in the vicinity might live in a tree or in an irrigation dam. If a venerated Buddha image was nearby, it would be guarded by an exceptionally vigilant nat. The nat oath involved powerful and risky forces. Just as best western medical practice avoids exposing a pregnant woman to X-rays, so the regulations of British Burma ordered a pregnant woman not to pick up the *kyansa* when making oath. She was to do obeisance to it from a distance. This regulation has survived into post-colonial law¹⁶. It is typical of the Burmese concern for status that this concession to pregnancy should be claimed by men as an honorific entitlement. We have a law report from 1821 reporting an interlocutory appeal. Nga Lu, who is about to take the constitutive oath, appeals to a higher court for the right to make oath in front of the *kyansa*, rather than holding it. His appeal is granted « because he is a wealthy man with a reputation for honesty »¹⁷.

12 Case 45 [Sok v Som] of the Chhap Tumnim Pi Bauran, in LECLÈRE, *Les Codes Cambodgiens*, Hanoi, 1898, p. 123-162.

13 GLEDHILL, «Judicial Proof in Burma», *Recueils de la Societe Jean Bodin*, vol. XVIII. *La Preuve*, 1964, p. 393.

14 The text of the *kyansa* was not standardised. A representative example has been translated in SANGERMANO, *A description of the Burmese empire*, 1833, p. 87-90.

15 Manugye dhammathat III s7, p. 72.

16 *Burma Courts Manual*, 1960, p. 75.

17 Nga Lu v Razashwedaung, «The Yezagyopyatton», 1821, quoted in U SHWE BAW, *The origin and development of Burmese legal literature*, PhD thesis #41, Institute of advanced legal Studies, London Univ., 1955.

Weber would have no difficulty in deducing from my description that Burmese legal procedure was « formal-irrational ». The rules of law derive from specifically legal sources [the dhammathats], but the verdict depends not on judicial reasoning but on supernatural intervention. However, Weber would have great difficulty in explaining what role legal professionals might play in Burmese litigation. He would concede a possible role for nat-mediums as shamanistic intercessors with the supernatural, but what use is reasoned professional legal argument addressed to the human judge when the judge takes no part in the ultimate decision ? The answer to this conundrum is that throughout Burmese legal history the emphasis gradually shifted from the « irrational » constitutive oath stage to the « rational » adversary stage. Burma's experience parallels European legal history, which also moved, in the terms used by Capelletti and Garth, from « irrational proof » to « legal proof »¹⁸. This change seems to be a general legal accompaniment to the increasing strength of the state. In early law the judge wants above all to avoid having to label a witness as a liar, because such a judgement will have ramifications outside the court room. A village headman acting as judge will have difficulty gaining the subsequent cooperation of a witness whose honour he has impugned. The judge may use a wide range of mechanisms, including the ordeal, truth drugs, the constitutive oath and rules prescribing a certain number of witnesses for proof of a certain offence, in order to avoid making controversial valuations of probity. But as law becomes more autonomous from government, as the judge becomes a specialist remote from the life of the witnesses who appear before him, he comes under pressure to give a frank valuation of the evidence he has heard.

By King Mindon's time, just before the British conquest of Upper Burma, his judicial adviser, generally known under his title of Kinwunmingyi, described the role of the judge in these terms :

«- In cases where witnesses were necessary, a party must provide more than the three stated by law. He may call as many as fifteen. If the rival contestant can cross-examine successfully and discredit the evidence of these witnesses, he may do so. It is on the evidence of the remaining witnesses that the case will be decided. If the rival contestant is able to discredit all the witnesses, the first party will not be permitted to produce more witnesses. If only one witness remains, it would be regarded as though the first party could not produce witnesses. If two witnesses remain and their testimony agree with that of the party who called them, the party may swear in more witnesses. If more than three witnesses remain, the best three should be chosen for [the constitutive oath] »¹⁹.

The passage is not without difficulties of interpretation, but it is at least clear that during the adversarial stage a proffered witness may be tested to destruction. He may be so discredited by cross-examination that the judge must declare him a liar and reject his offer to take the constitutive oath. The Kinwunmingyi appears to me to

¹⁸ CAPELLETTI and GARTH, *International encyclopedia of comparative law*, 1984, vol. XVI.6, p. 251.

¹⁹ YiYi, «The judicial system of King Mindon», 45 *J. Burma Research Society*, 1962, p. 7-24. The words in square brackets are mine : Yi Yi writes « examination ».

suggest that this judicial discretion should be exercised without restraint. The more frequent and regular such exercise, the nearer we are to a form of « legal proof ». If the judge always disqualifies the witnesses for the party he would prefer to lose, then the constitutive oath stage is merely a supernatural rubber stamp to a decision reached by a human judge. I doubt that this stage had been reached by the 1870s. It is hard to be dogmatic about this, since the question is mixed up with the issue of the Burmese burden of proof. Was the judge to be convinced of a witness's probity « on a balance of probabilities » [51 % sure that the witness tells the truth] or « beyond reasonable doubt » [75 % sure that the witness tells the truth] ? This is never discussed by the Burmese law texts, since officially the judge was not the ultimate finder of fact. I would guess that in the 1870s, as in earlier times, a judge might well be 51 % sure that A's witnesses were committing perjury but still allow them to take their chances on the nat oath. If I am right, then the constitutive oath stage was more than a mere rubber stamp right up to the British conquest.

Two centuries earlier Kaingza had taken an important step in reducing the irrationality of the constitutive oath stage. Up to the 1640s a witness who had sworn the nat oath had to be watched for a month or two to see whether the nats chose to punish him for perjury. A sudden accident or illness would be taken as evidence of supernatural intervention, and the case could be reopened. Kaingza abolished this « wait and see » period, and listed « the evidence of witnesses who have taken the oath » as one of his « four rules of law which are final »²⁰. This rationalisation of legal procedure did not start with Kaingza ; it had been going on since the XIIIth century. I cannot point by name to any law reformer before 1640, but I can point in general to the massive popularity of judgement tales in classical Pagan and after. These tales, which can be included in dhammathat texts, or collected in the *pyatton* genre of legal literature, or acted out for village entertainment in puppet plays, celebrate the clever ways in which a human judge can uncover the truth. They deal with legal epistemology at the human level. An intelligent human judge can ferret out the truth by specific techniques - for example by cross examining witnesses separately and checking the details of their statements, or by matching oral testimony against the known historical record, or against available physical evidence. The nat oath may be the ultimate guarantor of truth, but these judgement tales show popular pressure on the human judge to do his very best to uncover the truth himself :

« Regarding the case decided on the seventh day, [Manu the wise judge] decided in favour of the plaintiff. Nats and men gave no applause. So knowing that men and nats did not approve, he said 'I have made a mistake. Wait a little. I will reconsider... The owner of the ground where the tree has its roots is the true owner : the owner of the adjacent garden shall not have a right to pluck the fruit '. On this occasion Nats and men applauded » ²¹.

20 Maharajathat 24th Query, s.3 ; p. 216 of the translation in U SHWE BAW, op. cit.

21 Manugye dhammathat, vol. 1, p. 25 of Richardson's translation.

The trend from supernatural means of proof to legal proof must have started with the second legal revolution in XIIIth century Pagan. By 1885 the trend has not succeeded in abolishing the constitutive oath stage altogether, but long before the XIXth century it had gone far enough to open up a space in which a legal profession could operate. The adversarial stage before the human judge was considered important; therefore the litigant would be glad of professional assistance in establishing the truth of his own claims and the collusive mendacity of his opponent's witnesses.

III. The role of the *she-ne* in the XVIIIth and XIXth centuries

The early European observers of the pre-colonial Burmese courts were grudgingly impressed by the legal profession :

« The most intelligent and active officers were usually the [she-ne] : they went through no special qualificatory course, but were usually tolerably well acquainted with the laws, and took trouble with the case, which the officers on the bench did not »²².

Father Sangermano lived in Ava and Rangoon between 1783 and 1806. He spoke fluent Burmese and took an especial interest in legal matters, so his comments carry especial weight:

« In civil cases lawsuits are terminated much more expeditiously than is generally the case in our part of the world, provided always that the litigants are not rich ; for then the affair is extremely long, and sometimes never concluded at all... Each of the parties provides himself with an advocate : and in this country every one can be an advocate provided that they know how to speak well and to reason well, and has some slight notion of the laws of the country. The parties go with their advocates to plead their cause before the Mandarin or his Chon, a species of judge, generally acquainted with the laws and versed in the course of justice »²³.

We shall have to return later to consider what Sangermano meant by saying « every one can be an advocate ». From the king's point of view, however, entry to the ranks of *she-ne* was a formal event under his control:

« The nine she-ne shall take the oath : 'We will never allow ourselves to be influenced by the high or low status of a client; we will always try to be free from the four unhealthy considerations due to greed, anger, ignorance or love ; we will forever take care not to become biased due to the fact that a person is one

²² SCOTT, op.cit., p. 488. Scott is quoting these words without acknowledgement from some early XIXth century observer of the Burmese scene. The same passage appears almost verbatim in MALCOLM, *Travels in south-eastern Asia*, 1842, who clearly labels it as a quotation, though without indicating from whom he quotes.

²³ SANGERMANO, op.cit., p. 86.

of our blood relatives or that he is a very close friend of ours or that he has given us a bribe; and we will confine our arguments within the framework of the 'Dhammathat. If we break any one of the promises given here, may we suffer the calamities mentioned in this book of oaths' »²⁴.

as was the uniform remuneration and residence of the profession :

« The she-ne expect only to get their fees. So let the order of my father regarding them still hold good during my reign. They must don pointed turban, carry a bag, bowl and fan with yellow handle. As fees, for each case that a she-ne appears, let him take 37 ticals of copper. If he takes more, he shall be punished even without the right of appeal... She-ne thrive on speaking lies every day and in that way they have degraded themselves and therefore they must be given quarters outside the city. Let them live separate »²⁵.

Several accounts provide more details of the *she-ne*'s uniform. The pointed top headdress was colour coded - green for the plaintiffs counsel and red for the defendant's - and the bag, which was worn hanging off the shoulder, contained a drinking cup²⁶. Was this distinctive uniform in use before 1607 ? Did the Royal Order of Anaukhpлетун which I have just cited regulate such matters for the first time, or merely confirm existing practice ? King Anaukhpлетун followed his father onto the throne of Ava in 1605, and from 1608 onwards was engaged in military campaigns in the south of Burma. He promulgated four Royal Orders on 23rd June, 1607, three of which concern the *she-ne* and the judicial process. The fourth regulates the offspring of intermarriage between specialist groups residing at the palace. It would appear that the king was attempting to solve certain problems in his home base before leaving for the wars. The other two Royal Orders of the same date manifest some hostility to the profession, and add weight to the hypothesis that the king was exercising control over it, rather than confirming its existing privileges :

« [1] There is always a possibility that a judge would be misled by a she-ne (who is usually a very good speaker) and therefore a judge should take care that a she-ne should not unduly exaggerate the importance of a case. [2] A judge is empowered to give 100 lashes for the first offence and to exile for the second offence if the she-ne commits contempt of court...

« [4] A judge should be able to stop a she-ne who would use clever words to misrepresent a case and if he were not stopped in time, it would be just like conniving at theft or robbery right in the centre of the city »²⁷.

24 ROB 29-4-1769. THAN TUN, The Royal Orders of Burma, AD 1598-1885, Tokyo, published 1984-1990, vols. 1-10. All subsequent references in the form [ROB date] are to this invaluable collection of source material.

25 ROB 23-6-1607. I am quoting the fuller translation in THAN TUN, «Administration under King Thalun», JBRS, 1968, vol. 51, p. 173-181.

26 NISBET, Burma under British Rule and Before, 1901, p. 192 ; Maung MAUNG, Law and custom in Burma and the Burmese family, 1963, p. 16.

27 Copies of this particular order, we are told, were sent to all the judges.

We can, however, rule out the hypothesis that the legal profession was altogether invented by Anaukpetlun in 1607. His father, the prince of Nyaungyan, having rebelled in 1596 was crowned king of Ava in the following year. He issued a Royal Order on the day of his coronation which included, among his advice to judges, the phrase « Take care not to be influenced by clever lawyers »²⁸. The *she-ne* were already well established in late XVIth century Ava. During the Restored Toungoo Period [1605-1752] it seems probable, and during the Konbaung Period [1752-1885] it is certain, that the *she-ne* were regulated by the king. An example of Konbaung Period regulation occurs in the Royal Order of 29-8-1783 :

« [1] High ranking offices shall not represent parties in a law suit, as it would most probably influence the decision made by a judge. [2] Licensed she-ne shall appear at court on behalf of their clients [3] She-ne shall defend their clients only within the limits of the Dhammathat [4] She-ne shall make a written statement for appeal cases and there shall be no threats to stop an appeal ».

A specific instance of royal discipline occurred in 1801 :

« Nga Chin, she-ne, caused much trouble in the case of Nga Po Hla v Niza Kya Yoe ; send him to the areas of deep forest »²⁹.

If my readers still have any lingering doubts about the existence of a legal profession in XVIIth and XVIIIth century Burma, let me dispel them with the following knock-down syllogism. It is a universal truth that professional lawyers are objects of popular distaste and suspicion. The *she-ne* were disliked and suspected. Therefore they were professional lawyers. E Maung tells us that that they were nicknamed *shar-say* [« long tongued »] and that:

« Bad lawyers inevitably, and even good lawyers sometimes, were expected to end up in hell »³⁰.

While Htin Aung cites a centuries-old Burmese saying that the tongue of a lawyer would not burn even in the fires of hell³¹.

Granted that a Burmese legal profession existed, what kind of legal education and training did its members receive ? What did Sangermano mean by saying « every one can be an advocate » ? Sangermano was an Italian, and for seven centuries Italian legal education had taken place in University Law Schools. India during the first millenium CE had known Buddhist universities, but Burma had not adopted the Indian model of tertiary education. Primary education in Burma was carried out by monks. They taught schoolchildren to write both Burmese and Pali, the universal language, in Burmese script. They also taught general ethical principles, based on the scriptures (particular the Jataka) and the local adaptations of Sanskrit « Niti»

28 ROB 29-4-1597.

29 ROB 9-6-1801.

30 E MAUNG, The Expansion of Buddhist Law, 1951, p. 16.

31 HTIN AUNG, Burmese law tales, 1962, p. 26.

literature. Secondary education was monastic in a special sense : a ten year old boy became a monk for a period of up to two years. As well as being an important *rite de passage*, this provided the opportunity for further instruction in Pali and the Buddhist scriptures. Tertiary education, the acquisition of further specialist knowledge of archery, medicine, astronomy or alchemy, depended on apprenticeship to an acknowledged master. Specialist training in law must have followed this general pattern. To become a *she-ne*, one had to be apprenticed to an existing *she-ne*. The practical aspects of the craft were picked up by observation of one's *guru* in court, while the intellectual aspects would be acquired by copying out dhammathat texts. The budding *she-ne* needed his own library of dhammathats, and I assume he acquired it by copying out his *guru's* law library. This speculative picture of Burmese legal education is partially confirmed by the exordium to the Pakinnaka dhammathat, written in 1835 :

« The author, a judge in the reign of Bagyidaw, seventh king of the Konbaung dynasty, recalled how he had played truant in his younger days and how, when he succeeded his father in his hereditary office, he repented of wasted years of his youth and late in life resumed the study of law. He then told how for the benefit of his two sons Maung Thiha and Maung Eka, who he hoped would not follow in his early footsteps, he had prepared this metrical text for their study »³².

Further confirmation comes from the biography of a late XVIIIth century official who became famous for his interpretation of omens. His education was designed to prepare him for government service, and after a period at a monastery he was sent to study with a judge, Justice Satui Maha Sihasu³³. Sangermano must have been scandalised by the absence of formal law schools. His remark that « everyone can be an advocate » must mean that the *she-ne* never had to pass a formal examination before he could enter legal practice.

A The legal relationship between *she-ne* and client

We are better informed about this than about any other aspect of the Burmese legal profession. The XVIIIth century Konbaung dynasty dhammathats give copious details about the enforceable rights and obligations between the *she-ne* and his client. If the Burmese had had a general conception of contractual obligation, they would no doubt have considered this as a species of contract. Instead it was classified as a professional relationship : « Let *she-ne* and doctors be considered the same »³⁴. We are given a general definition of professional activities as involving « remuneration for services connected with superior knowledge of the arts or scientific acquirements »³⁵. I shall summarise the detailed rules regulating the relationship

³² E MAUNG, *op.cit.*, p. 7.

³³ THAN TUN, «The influence of occultism in Burmese history with special reference to Bodapaya's reign», *Bulletin of Burma historical Commission*, 1960, vol. 1, p. 123.

³⁴ Manugye [D12] II s. 20 [p. 51 of Richardson's edition].

³⁵ Manugye [D12] VII s. 14 [p. 186 of Richardson's edition].

between lawyer and client. The client's agreement with the *she-ne* becomes binding when the *she-ne* has drafted the written statement of claim. Thereafter, if the client wishes to hire another *she-ne*, he must remunerate both of them equally. Remuneration is due, even if the case was won without the *she-ne* being called on to speak. Minimum payment is three ticals of silver, but:

*« If a she-ne shall have gained a cause, he has a right to a percentage. If he lose it, he has a right to a reasonable remuneration. If it be a matter of life or death... and the client shall not suffer death... the she-ne has a right to a fee of thirty ticals of silver, the price of his client's body »*³⁶.

One of the judgement tales which are so prominent a feature of Burmese popular culture hints that the first payment between client and *she-ne* took place in open court at the start of the hearing. It tells of the wise reasoning of the Princess Learned-in-the-Law in deciding an action against the king brought by one of the Royal slaves :

*« On the appointed day, the King came to the court, bringing with him six cups of gold and six cups of silver. The slave left his home empty handed, but on the way he was able to catch a turtle and an iguana. When their case was called, the King, with a flourish, gave the cups of gold and silver to his lawyer. The slave was just on the point, of offering the turtle and the iguana to his lawyer, when the king demanded [them]... »*³⁷.

Such stories are an artful blend of fantasy and reality. Here the fantastic element is that a slave would dare to bring a law-suit against his King. But I am prepared to accept the details about remunerating the lawyers as a realistic portrayal of Burmese practice « adding verisimilitude to an otherwise bald and unconvincing narrative ».

The *she-ne* must submit his bill within seven months of the conclusion of the case, or his claim will become barred by a « Statute of Limitations ». If the client runs off without paying and is found after seven months, the *she-ne* can only ask him for «the pure water of friendship », that is, for three ticals of silver. However, if there is a change of dynasty within the seven month period, a general remission of debts takes place, and the *she-ne* can recover nothing³⁸. The client has some rights against the *she-ne* :

*« When a lawyer promises his client to finish a lawsuit in a certain number of days or months, and does not fulfil his promise, he must pay twice the value of the fees he has received »*³⁹.

But the most important liability undertaken by the *she-ne* relates to his acting as surety for the client's attendance at court:

³⁶ Manugye II s. 20.

³⁷ HTIN AUNG, op.cit., #59 « The King who eloped with the wife of his slave » at p. 146-7. A closely related judgement tale is in Manugye VI s. 42.

³⁸ Manugye VII sl4

³⁹ Sangermano's dhammathat IX s. 6, at p. 215 of SANGERMANO, op.cit. The same rule is found in Manuyin [D17] s. 493.

« If the client shall run away, or conceal himself, the she-ne shall bear the whole amount of the decree. If he produce or hand over the client, he is free, and shall have a right to 10 % for his pay and security »⁴⁰.

I suspect that this rule, whether or not it was applied in the XVIIIth century, is based on a XVIIth century confusion between different kinds of assistance in the court process. I shall set out my arguments later.

A topic which attracts disproportionate attention in the Manugye dhammathat is that of betting on the outcome of law-suits. An obscure (and, to my eyes, corrupt) passage deals with bets laid by the parties themselves and suggests that the judge and *she-ne* should be cut in for 10 % of the action⁴¹. Of more immediate relevance is a passage on bets laid by the *she-ne* on the outcome of the case in which they are involved. More than any other source, this gives us a flavour of what professional legal argument was really like :

« Regarding the bets of she-ne who live by that profession made amongst themselves, laughing and slapping their thighs or shoulders ; if... a she-ne, on the strength of his client being a man of rank and wealth, pushes out and draws in his hand, or slaps the floor or the ground, and bets in anger on the result of the suit, let the bet not be paid. If it was not made in anger, let only what was staked be paid; if nothing was staked, let it not be paid. If two she-ne boast of their science and learning laughingly, it is a joke ; if they do so regarding the cause under trial and both equally, there is no offence. If the conduct of both was the same, and a blow was struck, let not the bet be paid... If one party has used more violence than the other, let a deduction be made from the amount of the bet after due consideration, so as to place them on the same footing... If the clients in the suit do not incite the she-ne, they shall be free from blame ; let it be entirely a matter between the she-ne. If the principles do incite them, and they in consequence commit the offence, let them bear the punishment equally. Why is this ? Because the she-ne acted in accordance with the wishes of his client »⁴².

It would appear that the judge sometimes had to act as referee to a fight between the *she-ne* ! Burmese advocacy was nearer to the full blooded physicality of American counsel than to the gentilities of English barristers. But the clients must not egg on their representatives too enthusiastically, or they must pay for their counsel's misdeeds. This curious concept of the client's vicarious liability for a contempt of court committed by his *she-ne* is dealt with, so far as I am aware, by only one other dhammathat⁴³. Yet E Maung has reconstructed a complex history of the doctrine from sources which he unfortunately does not specify :

40 Manugye II s. 20.

41 Manugye III s. 10.

42 Manugye XIII [p. 367 of Richardson's edition].

43 E. Maung, *op. cit.* p. 100.

« The rule of vicarious liability did not apply to make the client responsible for his legal adviser's torts; the earlier rule held the client liable in half the compensation exigible for the wrong ; but later modifications exempted the client altogether. Where the wrong was committed by the legal adviser on the active instigation of his client, the latter, instead of the normal third, was liable in half the compensation that was payable to the person wronged¹⁴.

B. The canon of legal argument

We have by now examined most of the XVIIth and XVIIIth century evidence about the profession. Extrapolating from these snippets of information, my general understanding of the assistance offered by *she-ne* to their clients is as follows. The *she-ne* were barristers rather than solicitors, or, in civilian terms, advocates rather than notaries. Their assistance, in other words, would be needed only after a plaintiff had rejected the path of mediation and opted for a legalistic « all or nothing » resolution of the dispute through the courts. To ask for the assistance of a *she-ne* was to signify that efforts to achieve mediation had failed. It was an escalation of the dispute from the realm of local village interaction to the realm of the town and the royal machinery of government. I imagine that the plaintiff would give as much publicity as possible to his visit to town to consult his *she-ne*. There was always the chance that the defendant would throw in his hand on hearing that the stakes had been raised⁴⁵. If such a happy outcome occurred before the *she-ne* had drafted the statement of claim, then technically the *she-ne* was owed nothing, though in practice I imagine he would be rewarded with some token of gratitude. If, however, the defendant was not bluffed into settlement, he would surely have to consult a *she-ne* of his own. The dispute will have escalated in a second sense from one between two individuals to one between two opposed teams. The client and his *she-ne* are now partners, each with his defined share in the proceeds of successful litigation⁴⁶. The client's witnesses are also members of the team, and would expect some recompense for their trouble even after Kaingza abolished the witnesses' entitlement to 10 % of the sum in dispute.

As a pilot is hired to navigate the ship through coastal waters, so the *she-ne* is hired to identify the optimum course through the currents and sandbanks of legal procedure in the royal courts. The most important part of his job related to proving questions of fact. Challenging the eligibility of the opponent's witnesses and defending the eligibility of his own side's witnesses were equally crucial. Such argument was conducted « according to the dhammathats » in that different dhammathats contain

⁴⁴ E MAUNG, *op.cit.*, p. 57.

⁴⁵ In contemporary UK dispute settlement, the equivalent stage is the « letter before action » written by the plaintiffs solicitor to the defendant.

⁴⁶ That the litigant and his *she-ne* are considered as members of a team is shown by the procedures for deciding a case by ordeal, which are given in great detail by the East Court Manual (ROB 12-2-1785). S. 24 describes the ordeal by submergence in water : « Both parties have to offer food... and music to the guardian spirits. Each contestant's name, age, day of birth and place of residence together with the name of the *she-ne* who represents him, shall be entered beforehand in the register ».

different lists of excludable witnesses, defined usually in terms of occupation and status. The *she-ne*'s highest ambition, however, was not to exclude a witness unheard on the grounds of low status, but to exclude a high status witness after discrediting him through cross-examination. This process also takes place according to the dhammathats, which provide judgement tales and direct hints as to how a witness might be discredited⁴⁷. Would the *she-ne* also argue about questions of law « according to the dhammathats » ? Would the judge have to decide between a rule on inheritance found in the Dhammavilasa dhammathat relied on by the plaintiff, and a differently formulated rule from the Manosara dhammathat relied on by the defendant ? I think he occasionally would, though this would happen most frequently in the Hluttaw, the highest court of the system where judges had claims to specific legal expertise. Even in contemporary UK practice, such arguments are much rarer in the courts of first instance than law students are led to believe. Finally, the *she-ne* must advise on strategy. The obvious question on which he should advise is the prospects of success in an appeal, if the case has gone against his client. I interpret two XVIIIth century Royal Orders as indicating that, if the *she-ne* advised against an appeal but the client wished to proceed with it, the *she-ne* must still draw up the written grounds of appeal⁴⁸. If the case went in his client's favour, it was proverbial Burmese wisdom that one should anyway prepare oneself for an appeal:

*« You have to live with industry, energy, forethought, intelligence and orderliness. Among men, if one who pleads a suit and has won in one year sits back thinking 'I'm on top' and takes no care for the further study of law and precedents, while the loser refuses to accept defeat, when the law is reexamined by the judges of appeal then he who had lost may prove the winner »*⁴⁹

Another strategic option on which professional advice would be sought is the « premature appeal », by which I mean the high risk strategy of impugning the judge before he has even given judgement. If the first instance judge shows signs of delaying the case in order to maximise his fees, the *she-ne* might advise immediately petitioning the king for redress. If the king accepts the petition, the consequences for the judge will be serious :

*« Ministers and assistant ministers who took longer than necessary in trying the Chaung U abuse of office case shall be put in the sun »*⁵⁰.

But if the king rejects the petition, the *she-ne* and his client will face a very angry judge !

E.Maung paraphrases a Royal Order of 1636 which sums up the duties of the *she-ne* in relation to the court and his client:

47 See, for example, the preamble to Kaingza's Maharajathat [Kaingza discredits a monk's evidence by collateral historical information], and Manugye VII s. 18, Winitaya Pakathani, s. 180, Manosara Shwe Myin, s. 236.

48 ROB 14-8-1783 & ROB 29-8-1783.

49 «The Maniyadanabon of Shin Sandalinka», translated by BAGSHAWE, Cornell, 1981, p. 114-5

50 ROB 28-6-1801. The ministers were released after two days in the stocks.

« The king therein set out what he considered to be the duties and functions of a good legal adviser. The unlettered litigant was likened to a dumb man having a dream, which he desired to impart; he could not do so because of his physical defect; and he had to seek out someone who could act for him for the purpose. The legal adviser must faithfully, and in the light of his learning in the law, having due regard to the times and conditions, put his client's case to the best advantage before the court. A good lawyer knew whether his client's case was good or bad ; if the client had a weak case, the legal adviser must so advice the client; if, however, the client persisted the good legal adviser's duty was to seek to minimise the damage to his client. A lawyer who sought to pervert the ends of justice was, the king added, no better than a thief or robber »⁵¹.

C. Career opportunities at the bar

Let us shift perspective from the litigant to the *she-ne*, from assistance in an individual case to assistance as a full time job. What kind of career structure did the legal profession enjoy? I assume that the youngest age at which a *she-ne* could get qualified was about 18. I assume further that, after twenty years of practise in a profession that depends above all on individual reputation, a *she-ne* would know whether he was regarded by his peers as a « high-flier » or a « plodder ». When a UK barrister has reached this stage in her early 40s, she must decide whether she is a high-enough-flier to apply for silk, for promotion, that is, to the ranks of Queen's Counsel (the upper grade of the profession). Alternatively she may consider whether she is enough of a plodder to consider applying for the lower ranks of the judiciary as stipendiary magistrate, or County Court judge. Remarkably enough, the *she-ne* seems to have faced a similar choice at a similar stage in his career. We learn that the courts of the royal capital had their complement of « Royally appointed *she-ne* » who collectively made up the senior rank of the profession :

« Traditionally four ameindaw ya [= « person officially appointed »] practised in the Hluttaw [the « Privy Council »] and eight in the Taya Yon [the Central Criminal Court] »⁵².

The parallel between Burmese and British nomenclature is striking. *Ameindaw ya she ne* means literally a *she-ne* appointed by the king's official order, or a « King's Counsel ». There is a further parallel. In Britain and in Burma the higher ranks of the judiciary could be appointed from among the elite group of King's Counsel:

« Sithu Thi Hkaya is appointed judge. For many years he has served the king as an ameindaw ya she ne (authorised pleader) in the Hluttaw. As he has done his

⁵¹ E MAUNG, op.cit., p. 16. This ROB is not contained in Than Tun's Collection. Is it an alternative textual transmission of the fourth order proclaimed on 23-6-1607, at p. 24 of vol. 1 of Than Tun's Collection ?

⁵² Maung KYIN SWI, The Judicial System in the Kingdom of Burma, PhD thesis #222, Institute of advanced legal Studies, London University, 1965.

duties most satisfactorily in that position, it is expected he would serve better as a judge »⁵³.

I am tempted to speculate about a third parallel. In Britain the Queen's Counsel wear silk gowns and full bottomed wigs to distinguish them from the junior grade barristers. This is just the kind of sumptuary regulation that appealed to Burmese kings⁵⁴. Is there evidence that the *ameindaw ya she ne* dressed differently from junior *she-ne* ? There is not, but there is room to speculate that what has been taken as the distinctive uniform of the *she-ne* (the red and green pointed caps, the fan with the yellow handle, etc.) was in fact the distinctive uniform of the *ameindaw ya she ne*. Most of the descriptions of this uniform refer to the courts of the capital city. If it was worn only by King's Counsel in the Hluttaw and Taya Yon, that would help explain the alarming evidence of European observers that *she-ne* did not exist in the port cities of southern Burma. I am particularly worried by Hamilton's description of the court operating in Pegu in the early 1700s :

« There are no advocates to plead at the bar, but every one has the privilege to plead his own cause, or send it in writing to be read publically, and it determined judicially within the term of three sittings of council; but if anyone questions his own eloquence, or knowledge of the laws of equity, he must empower a friend to plead for him »⁵⁵

If we are prepared to accept that junior *she-ne* wore ordinary dress, we might suggest that Hamilton has misread the scene. The « friend empowered to plead » for the litigant who « questioned his own eloquence » was in fact a *she-ne*. Returning from speculation to slightly more solid ground, the names of the *ameindaw ya she-ne* practising in the Taya Yon in november 1839 have been accidentally preserved. In that month the king promulgated an order about proper behaviour by monks. The surviving copy of the order gives details of the functionaries present in the Taya Yon to witness the proclamation. Listed as well as a judge, a Law Court Prompter, and two clerks whose job is to receive gifts, are five pleaders named Maung Chan, Maung Gyi, Maung Tit, Maung Po and Maung Kala⁵⁶. Though their rank is not specified, they would surely be King's Counsel.

British barristers have a further career option. They can enhance their reputation for legal learning by writing monographs and textbooks. On *a priori* grounds I would expect the *she-ne* to be involved in the composition of dhammathats, but only one such instance is definitely known. The Dayajjadipani dhammathat in verse is an obscure early XIXth century work, whose preface says that it was written :

53 ROB 21-6-1814. Compare ROB 13-12-1810 « Judges do not know the fundamentals of the law. Dismiss them and make a list of names of those who do » and ROB 13-1-1811 « Letwe Nanda Thu, an ameindaw ya she ne, is appointed judge ».

54 See : ANON, «On the sumptuary laws of the Burmans» Asiatic Journal [n.s.], 1841, vol. 34, p. 46-8.

55 Hamilton, «A new account of the East Indies», in Pinkerton's Collection of Voyages and Travels, 1811, vol. VIII, p. 423.

56 ROB 17-11-1839.

« by an advocate bearing successively the titles Candasu, Candasura and Sithunandameikkyawdin »⁵⁷.

But two other dhammathats of the period were written by judges⁵⁸, whom I would expect to have been appointed from among the *she-ne*. The three titles borne by our author, and the three official posts which presumably went with them, remind us of the link which has often existed between the legal profession and politics. From Cicero to the present British cabinet, advocates have found it easy to transfer from the legal into the political domain. Of course, « politics » must mean something different under a Burmese absolute monarch than it did in the late Roman republic or in XXth 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 appointment 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 with 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 »⁵⁹.

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 profession simultaneously ? We cannot answer this without urgent further research on the nature of Burmese politics. The prosopographical techniques by which Symes has enlightened us in respect of Roman politics might yield results in Burma, but there are two problems in tracing Burmese career structures. Firstly, the Burmese do not have a surname, and are quite likely to change their given name in mid-life for reasons of auspiciousness. Secondly, high ranking officers tend to be identified in our sources by their official title rather than by the name which family and close friends would use. Pending further enlightenment, my guess is that, insofar as there was a political sphere under the Burmese kings, many *she-ne* would join it.

⁵⁷ U GAUNG, Digest of Burmese law, preface, 1898. The Dayajjadipani dhammathat is #29 on the Digest list.

⁵⁸ D21 and D11 in the Digest list.

⁵⁹ ROB 7-1-1784. Compare ROB 3-3-1782, ROB 14-8-1783, ROB 18-8-1783 and ROB 29-8-1783.

IV. When and why did the profession emerge ?

The earliest reliable manuscript evidence shows that the *she-ne* were flourishing in Ava by the end of the XVIth century. How much earlier can we push the birth of the profession ? Were *she-ne* in existence before the fall of Pagan in 1290 ? What caused the emergence of the profession ? My answers to these questions are merely informed guesses. All evidence of *she-ne* before the XVIth century is suspect on one ground or another. Either it may not refer to *she-ne*, or it may have been fabricated and interpolated at a later date. My colleagues will be disappointed that I cannot provide the firm account of the profession's genesis which would be so useful for comparative studies of legal assistance. In compensation, I offer some speculations which appear plausible to me.

Pre-colonial Burmese sources offer two versions of the origin of the profession. J.G. Scott refers to a story he heard shortly after the British conquest of Mandalay :

*« Advocates, pleaders or barristers were, we are told, unknown until a case occurred when certain suitors from the jungle came before the king and were not able to understand the court language. A court official was therefore allowed to assist them and turn their rustic jargon into comprehensible speech. These as standing before the king were called Shay-nay. as it were mouthpieces for the parties to the suit, and the king, who acted as judge. The convenience derived from their superior knowledge and experience afterwards led to the establishment of a regular body of barristers »*⁶⁰.

Since this story makes no specific claim for the date of the profession's emergence, I shall only comment that, relying solely as it does on a plausible etymology, it is a typical Burmese « Just-So Story ». The second version comes from Kaingza's Maharajathat:

*« The old books of law do not mention the term she-nay. However, it is said that in the time of King Duttabaung, the people coming to the courts had with them persons who are conversant with the facts of their cases and who argue on their behalf before the judges. The practice had the approval of the king, who commanded the persons appearing before him by uttering the words she-ga-nay [remain in front]. Thus persons who speak for the persons in court have since been known as she-nay »*⁶¹

The reference to King Duttabaung is the standard Burmese way of referring back to Pyu culture, and particularly to the Pyu city of Sri Ksetra [flourished 638-780]. If we

60 SCOTT [sub nom. « Shwe Yoe »], *The Burman - his life and notions*, 1896, p. 511.

61 Kaingza Maharajathat [D8] 4th Query [p. 19 of U Shwe Baw's translation].

believe this tradition, we have to accept that the *she ne* were operating in classical Pagan, for there is no other route by which a Pyu institution could have entered Burmese life. But Kaingza himself, by highlighting the absence of evidence in the old books of law [by which I assume he means Pagan era dhammathats], indicates that he does not believe the tradition. He may, like us, have been struck by the artificiality of attributing a derivation of Burmese etymology to a Pyu king who reigned before the Burmese language had arrived in Burma.

Neither of the traditional explanations of the origins of the profession is any help. What is the view of modern scholarship ? The trio of Burmese lawyers who wrote accounts of Burmese law in the 1950s unanimously agreed that there was a legal profession operating in XIIth century Pagan. But the latter two, Htin Aung and Maung Maung, merely repeated the arguments of Mr Justice E Maung whom (with every justification) they regarded as the leading legal historian of Burma. E Maung's approach, here as elsewhere, was to combine the internal evidence of the Burmese law texts with an analysis of the information on their authorship supplied by the XIXth century Burmese literary histories. He established a set of dates for the surviving dhammathat texts which identified the earliest of them, Dhammavilasa [D4], as having been written in XIIth century Pagan. He then relied on our surviving text as evidence of Pagan practice :

« At any rate by the XIIth century A.D. the legal profession appeared to have established itself as an institution in the administration of justice. Dhammavilasa Dhammathat ruled that a lawyer was entitled to his fees, even if he had not been called upon by the court to answer his opponent's pleas »⁶².

But our surviving text was copied in the 1830s⁶³, and we must assume that eight or nine intermediate texts stand between it and the XIIIth century original. Any of this chain of copyists would have had the best of motives for adding interpolations to reflect changing legal practice : they were interested in the dhammathat as a source of contemporary law rather than the dhammathat as a historical source for the study of Pagan. And we must be doubly suspicious when professional self-interest is involved. I argued earlier that, at least from the mid XVIth century, the most likely copyist of the dhammathat texts was the trainee *she-ne*, both as part of his apprenticeship, and as a means of acquiring his own law library. Given that disputes over payment between the *she-ne* and their clients must have arisen regularly, the Dhammavilasa ruling was extremely convenient to the profession. There is more reason for this particular interpolation than for any other⁶⁴. And we have further evidence to suspect

⁶² E MAUNG, *op.cit.*, p. 14. His views are repeated by HTIN AUN, *op.cit.*, p. 27 and MAUNG MAUNG, *op.cit.*, p. 16.

⁶³ See BURGESS, «Prefatory Note» to U GAUNG, *A digest of Burmese buddhist law concerning inheritance and marriage*, Rangoon, 1898, p. ix.

⁶⁴ Not that I discount other interpolations in our present text of D4. In my contribution to our last conference, I argued that an extensive rewriting of Dhammavilasa's treatment of wills took place in the early XVIIth century.

that the Dhammavilasa reference has been interpolated. Kaingza was certainly familiar with the Dhammavilasa dhammathat, yet he specifically denies that any dhammathat mentions the *she-ne*.

E Maung, it would appear, has put too much trust in the surviving Dhammavilasa text. Perhaps this is the trap into which legal historians are most prone to fall. Certainly the best general historian to consider the question took a more positivistic approach to Pagan historical sources. Dr Than Tun spent the first decades of his professional life investigating the epigraphy of Pagan. He produced a number of books and articles on the subject which, rigorously eschewing all the chronicle accounts, based themselves entirely on contemporary inscriptions. One of these described Pagan's legal system⁶⁵. His treatment is exhaustive⁶⁶, but he is silent on the existence of a Pagan legal profession⁶⁷. His silence must be taken as indicating a belief that it did not exist, since he also denies what most of us agree to be the *sine qua non* of a legal profession's emergence - the existence of written law texts. Than Tun believes that the single inscription which mentions a Pagan dhammathat must in fact refer to a copy of an Indian dharmasastra⁶⁸. Than Tun's negative reading of the epigraphic evidence was challenged twenty five years later. Aung Thwin cites five Pagan inscriptions which he interprets as evidence of a functioning legal profession :

« *Witnesses were called to testify, having sworn on the abidhamma, and 'pleaders' for both the state (called man khran) and the defence (called khran caya) presented their arguments... Su Chan Ratanakumtham, 'barrister Ratanakumtham' was referred to as the counsel for Anantasu... 'Barristers' or 'attorneys of the state' were called rhiy to niy amu chan khran so san pha ma sui, literally meaning 'pleaders who reside in front of the king' »⁶⁹.*

Than Tun and Aung Thwin must disagree about the nature of the legal assistance described by these Old Burmese phrases. We can envisage several ways of assisting a client in court which fall short of acting as a barrister. Among these « interpreting », « acting as scribe » and « standing bail for the client's appearance » would be highly relevant to Pagan legal process as we understand it from the other inscriptions. The literal translation of the Old Burmese titles is not in itself conclusive : an interpreter or a surety standing bail could be described as « residing in front of the king » just as well as a barrister. Since I lack any competence in deciphering and translating the Pagan inscriptions, I say no more about them. Instead I would draw attention to some XVIIth century evidence which has so far been overlooked.

65 THAN TUN, «The legal system in Burma AD 1000-1300», Burma Law Institute Journal, 1959, vol. I, p. 171.

66 170 footnotes in 11 pages !

67 Readers of OKUDAIRA, «The Burmese dhammathat», in Laws of S.E. Asia, Ed. Hooker, 1986, vol. 1, may be misled by the statement to the contrary at p. 27, n. 53.

68 THAN TUN, «History of buddhism in Burma AD 1000-1300», JBRS, 1978, vol. 61, p. 49. — « Probably it refers to an Indian law book ». But cf. his view in THAN TUN, op.cit., p. 174 that « The middle of the XIIIth century was the time when Burmans began to codify law, civil and criminal ».

69 AUNG THWIN, Pagan, origins of modern Burma, 1985, p. 124-5, 230-1.

Kaingza's Maharajathat [D8], written in the 1640s, in addition to describing contemporary Burmese law and reforming some aspects of it, is an early work on Burmese legal history. Many of the questions which King Thalun asks concern the accuracy of popular legal maxims and the history of legal institutions. In his answers Kaingza gives us specific and highly important information about the history of *she-ne*. In answer to King Thalun's 4th Query, Kaingza tells us that none of the four kinds of dhammathats with which he is familiar [Burmese, Pali, Pali translated into Burmese and Mon] mention the term *she-ne*. But in answer to the King's 10th Query, question 16, he quotes an [unidentified] Pali dhammathat as follows :

*« Persons who represent the parties in the suits and conduct their cases before tribunals, enjoy one tenth [ie are entided to a fee of 10% of the value of the suit]. The reason being, if the person responsible for conducting the suit relating to a debt, recovery of a slave, etc., runs away or fails or declines to appear, and fails to conduct the suit, then he should pay the amount involved in the suit to the parties in the suit »*⁷⁰.

I would interpret this as follows : the Burmese legal profession, under the name *she-ne*, is well established by Kaingza's time, but is not mentioned under that name in any dhammathat. A Pali dhammathat (which most likely was an earlier version of one of the texts that we know as Manosara [D1] and Pyu-min [D3]) did contain a passage about assistance in court which Kaingza quoted out of context to provide dhammathat authority for the profession as it existed in his day. I wonder whether Kaingza went further than quoting out of context. Did he improve the quotation by interpolating the phrase « and conduct their case before tribunals » ? If one omits that phrase, and substitutes the more neutral word « assists » for the verb « represents », then the Pali dhammathat could have been describing a group of people who regularly stand bail for someone's appearance at court.

If the Pali dhammathat describes some Pagan legal institution, as I would assume, it seems to have been something like bail rather than something like legal counsel. I can easily imagine the following typical situation occurring in Pagan. A, complaining that D owes him money, has sufficient manpower to put D in the stocks. D still denies the debt and appeals to the royal court. The court sets a date for the hearing, but must decide immediately whether to order D's release from the stocks. « You can be released if you find someone willing to stand surety for your appearance at court » would be a natural thing to say. And equally natural would be the corollary that a surety who has much to lose should also have something to gain. In contemporary American terminology, the « bail shop » should operate « on a contingency fee basis ». If this is the Pagan institution which Kaingza's Pali dhammathat described, it would certainly overlap with patron-client relationships of mutual assistance. Everybody would have one or two patrons, better placed than themselves, to whom they would immediately turn in the event of a private arrest. The patron, depending on his wealth and the degree of D's loyalty in the past, could either

70 U SHWE BAW, op.cit., p. 100.

offer to pay off the debt on D's behalf (thus subrogating the debt to himself), or offer to stand as D's surety, or tell D to get lost. In the last event, D must hastily search for a new patron. In the larger towns, at least, I can imagine that a patron actively in search of new clients would do well to place his agents near the stocks. From a certain angle, such a patron might be regarded almost as a professional surety.

I suggest that *she-ne* were unknown before 1300, and that Kaingza, in his anxiety to provide textual support for the profession, misquoted a Pagan-era dhammathat dealing with suretyship. If I am correct, Kaingza's interpolation had an unexpected knock-on effect. Dhammathats of the XVIIIth century and later took Kaingza's discussion as indicating that *she-ne* should guarantee their client's appearance at court. I should like to know whether this rule was ever actually enforced against a *she-ne* representing a defaulting client. I accuse Kaingza of interpolation, but not of having been wrong on the essential point. The legal profession could easily have developed out of those who stood surety for the client's attendance on a semi-professional basis. Before leaping to this conclusion, we should examine some other forms of Pagan legal assistance which might have contributed to the birth of the *she-ne*. In the first section I assumed that contracts for the loan of agricultural necessities were written down in early « Mon inscription period » Pagan. The rich lender might have access to a scribe, but what about the borrower ? Professional scribes in Pagan were either bonded to the king or were slaves of some rich person. There was no scribal profession touting for hire among the rest of the population. Hence :

« For recording affairs, other than official, various people of both sexes and of both lay and ecclesiastical were employed. Perhaps a noted literary person who was present at the occasion would be asked to write the record. The same thing happens in engraving the record on stone. There were no professionals and we even find monks who did that »⁷¹.

On the occasions when an ordinary person needs a scribe, he must rely on the kindness of strangers or, more likely, the kindness of his patron. It is easy to imagine a process by which literate patrons, helping their clients by writing a legal document, can become legally skilled patrons, helping their clients with legal advice and legal advocacy. Or by which illiterate patrons lent the services of their bonded scribe to favoured clients so often that the scribe acquired a legal expertise.

A more specific case of agency (and possibly legal assistance) operated between the monks and lay society :

« There were also people who looked after the comforts of the thera and they were known as kappika. The klon san looked after the comforts of all the inmates of the monastery. Perhaps the kappika and klon san were the liaison officers used by the monks when dealing with the outside world. They would be asked to

71 THAN TUN, op.cit., p. 177.

represent the monastery in law suits or to act as agents in buying things needed by the monastery »⁷².

This could also have served as a model for the more general representational function of the *she-ne*. Out of these ingredients, and also out of court functionaries such as the court interpreter and the court clerk, emerged the *she-ne*. We cannot conclude in which of my periods of Burmese legal history the profession first surfaced, other than to say that it was later than 1170 and earlier than 1550. If you believe Aung Thwin's inscriptions, then the *she-ne* arrived between 1170 and 1249. If you prefer to allow a century to elapse between the popularisation of written law and the development of a legal profession, then 1250-1364 looks plausible. If, in the absence of convincing evidence that it took place earlier, you want to ascribe the latest possible date for reasons of caution, then choose the Ava period, 1364-1555. My own slight preference is for the XIVth century.

V. When and why was the profession abolished ?

When the British conquered Upper Burma in 1885 they could have retained and adapted the profession instead of abolishing it completely. Their decision to abolish it can be explained as part of a wider attitude of contempt towards the institutions of the Burmese monarchy in Mandalay, which in turn derives from the piecemeal nature of the British annexation of Burma. By 1885 when they conquered the centre, the British had sixty years experience of governing the periphery. The important decisions had been made in the 1820s in relation to Arakan and Tenasserim :

« In the provinces held by the East India Company, a salutary change has taken place in the administration of justice... professional pleaders are not allowed, but each party manages his own cause, or gets a friend to do it for him »⁷³.

Correspondence between Mr Maingy, the British Commissioner for Tenasserim, and his superiors on the subject has been preserved, and is summarised by Furnivall:

« One trouble was the employment of advocates. It was a source of pride to the commissioners that no vakeels or advocates were recognised; time and again they refer to this as a most valuable feature in their judicial administration, but with an ominous absence of any expression of approval from Calcutta. When at length the growing mercantile community petitioned the Government of Bengal that they might be permitted to engage advocates, the Commissioner objected that this would 'raise up a set of low adventurers seeking a livelihood by

72 THAN TUN, A history of Burma down to the end of the XIIIth century, 1959, serialised in New Burma Weekly. The reference is taken from the second page of Chapt. VII, part. 11, which appeared in the issue of 28th February, 1959.

73 Rev. Howard MALCOLM, «Travels in south-eastern Asia, embracing Hindustan, Malaya, Siam and China» I am quoting from extracts in the Ceylon Miscellany, 1842, vol. 1, p. 186.

*conducting cases on speulative terms '. But he was overruled. The matter had, in effect, already been decided when Mr Maingy introduced the rule of law »*⁷⁴.

If the Burmese, *mutatis mutandis*, had started their conquest of Britain by a fifty year occupation of Cornwall and Cumbria, they too would have heard much discontented discussion about the overbearing nature of the faraway London regime. Even today Cornwall and Cumbria are too peripheral to the centre to boast of any Barrister's chambers, and I assume that *she-ne* were similarly absent from Arakan and Tenasserim. But Sangermano hints that European merchants hired *she-ne* in the 1790s in the main Lower Burma ports. Why, when the British annexed Lower Burma in 1852, did they ignore the existing legal profession ? Fumivall has given us the answer. Pressure for a British style legal profession came from « the growing mercantile community » in Rangoon and Syriam who wanted their commercial disputes settled by English law on the advice of English barristers. Their experience of Burmese dispute settlement had not been entirely happy.

*« I was myself acquainted with two rich European merchants and shipmasters who ruined themselves so completely by a lawsuit that they became destitute of the common necessities of life, and the lawsuit withal was not decided, nor ever will be »*⁷⁵.

How Lower Burma was to be provided with English style lawyers was a problem yet to be solved. Fumivall tells us that in 1875 a « law class » was offered in Rangoon on an experimental basis, but failed to attract students⁷⁶.

By the 1870s the British proponents of a forward policy in Burma were denigrating the Mandalay regime [sometimes accurately] for propaganda purposes. Elsewhere in S.E. Asia the British were sensible enough not to believe their own propaganda. When a lightly regulated buffer state was deemed expedient (in the northern Malay States, for example, or in the Shan States) then the sultans and sawbwas whom the British had up until then been portraying as oriental despots were confirmed in power and allowed to keep their administration intact. But by the last Anglo-Burmese War the British had swallowed their own propaganda about the peacock throne. All aspects of Mandalay's administration were deemed suspect. With the conquest of Mandalay, the Burmese legal profession was swept away along with the Burmese court system, Burmese legal procedure and the structure of Burmese local government. One or two of the ex-king's ministers were treated with deference in return for information, but the motive for collecting such information was pure curiosity. A century later Burma is still struggling to reconstruct what the British so wantonly destroyed in the decade following its « pacification ».

Did the *she-ne* march meekly into oblivion in 1885 ? I like to think not. I prefer to think that the profession underwent a forced reconstruction. Their pointed red and

⁷⁴ FURNIVALL, *Colonial policy and practise*, 1948, p. 32.

⁷⁵ SANGERMANO, *op.cit.*, p. 86.

⁷⁶ FURNIVALL, *op.cit.*, p. 127.

green caps were replaced by horsehair wigs. Their yellow handled fans gave way to Geneva collars and gowns of stuff and silk. Personal instruction in how to argue from the dhammathats ceded to a three year pilgrimage to Lincoln's Inn and the Temple, the holy places of the common law. In short, the *she-ne* mutated into barristers. I do not claim that the 1884 generation of *she-ne* underwent the arduous task of requalifying in England. The protracted « pacification » of Burma lasted as long as did their active professional lives. For as long as unsettled conditions delayed the complete reconstruction of the courts, the *she-ne* could continue to exercise their skills under a variety of different guises. They could be court translations, or « court informants on native law ». But the next generation of would-be *she-ne* were forced to contemplate training in England as a barrister.

« By about the year 1910 a number of Burmese who had been called to the bar in London were in active practice both at Rangoon and Mandalay, where the British government opened the highest courts in the country. While in England they had lived and studied with the sons of wealthy English families and of the English nobility, for in those days the Inns of Court were the exclusive domain of British aristocracy; therefore on their return to Burma they were neither impressed nor overawed by the British civil servants or the British judges »⁷⁷.

Seen in this light, the establishment of a Law Department at the University of Rangoon in 1920 offering a local path of qualification to the advocacy may not have been entirely altruistic. British lawyers in colonial employment would find it much easier to look down on locally trained Burmese barristers than on Burmese barristers who had been fellow students in London, and who may have beaten them in the final examinations. The « barristocrats », these London-trained Burmese lawyers, played a disproportionate role in the politics of the colonial period. In my contribution to our last conference I described their role in mobilising public opinion on both sides of «the Burmese Will question ». But their role was not limited to discussion of such « Law and Development » issues : Maung Maung describes politics in the early 1920s as « the monopoly of the barristers »⁷⁸. In the 1932 elections to the Legislative Council, just under half of the Burmese and Indian members returned were lawyers⁷⁹. From 1920 to 1937 the number of Burmese lawyers increased inexorably, even when the amount of litigation was in decline. In 1923, when rolls were compiled for the new High Court, there were 230 Advocates (meaning those of whatever nationality who had trained at the Inns of Court) and 85 First Class pleaders (the products of the University of Rangoon course). These were the functional equivalent of English barristers. In addition they were 1,182 second and third class pleaders, with rights of audience similar to English Solicitors. In 1924 the Advocates and First Class Pleaders were amalgamated (putting the Rangoon training on terms of formal equality with the

⁷⁷ HTIN AUNG, *A history of Burma*, 1967, p. 276.

⁷⁸ Maung MAUNG, *Burma's Constitution*, 1956, p. 11.

⁷⁹ TAYLOR, *The State in Burma*, 1987, p. 164, fn. 42. Of 75 Burmese and Indian members, 33 were lawyers.

London training). Thereafter the total rose from 315 in 1923 to 399 in 1930, 438 in 1938 and 440 in 1940, despite a drop from 1937 onwards in the second and third class pleaders « which may perhaps be explained by the emergence of other opportunities for a livelihood for men of meagre educational attainments after the separation of Burma from India »⁸⁰.

The Burmese were far more likely to train for the legal profession than for medicine or engineering or accountancy. I admit that this may be due to factors other than the continuity with the pre-colonial *she-ne*. The British, for example, seem to have encouraged the trend by opening up high legal office to native talent. As early as 1920 a Burmese lawyer was appointed as Chief Justice and by 1930 3 out of the 7 government advocates were Burmese. But there is some evidence that the Bar in Mandalay recognise a continuity with the pre-colonial past. After a long debate the separate jurisdictions of Upper and Lower Burma were amalgamated in 1933 :

*« Formerly Upper Burma had been a separate judicial province under a judicial commissioner independent of the Chief Court at Rangoon... One obstacle to the abolition of a separate Court at Mandalay was the opposition of the local bar, who would lose much of their practice if the more important cases were tried in Rangoon, and they fortified the local sentiment in favour of Mandalay as the former capital of the Burmese kings »*⁸¹.

It is a moot question whether during the colonial period Burmese talent was overconcentrated in the legal profession, resulting in the impoverishment of other useful skills. The reasons for law's popularity were twofold. The profession was familiar, being only a slight variation of what had existed before the conquest. And the profession allowed Burmese and British to compete on formally equal terms in a public sphere.

Conclusions

Whatever the causes of Burma's pre-colonial legal profession, they are to be found in factors which were unique to Burma. Burma, along with Laos, Cambodia and Thailand, makes a distinct family of Buddhist legal systems. The members share a common classical heritage which each has wedded to its distinctive national tradition. Burma's dhammathat traditions are historically linked with the law texts of its Theravada Buddhist neighbours. Yet none of its Buddhist neighbours developed a legal profession remotely like the *she-ne*. The causes of the emergence of the *she-ne* must be sought in the peculiarly Burmese traditions, rather than in Pali classicism. Perhaps the polyglot and multi-cultural ethos of Pagan played a role. Perhaps it is linked to the fact that Burma had less of a landed nobility than its neighbours, and had

⁸⁰ A study of the social and economic history of Burma (the british period), Rangoon, Part. V, p. 156.

⁸¹ A study of the social and economic history of Burma (the british period), Rangoon, Part. V, p. 153.

to offer commercially services that elsewhere came as part of a feudal package. Perhaps it reflected certain deep Burmese assumptions about appropriate interpersonal behaviour. Burmese has a word for an emotion - *anade* - which has no precise parallel in other languages. It refers to a tongue tied deference, partly pleasant and partly humiliating, which is felt in the presence of someone of higher status. Hiring a *she-ne* to act as your mouthpiece before the judge might have acted therapeutically to dispel this particular feeling.

RECUEILS DE LA SOCIÉTÉ JEAN BODIN
POUR L'HISTOIRE COMPARATIVE DES INSTITUTIONS

TRANSACTIONS OF THE JEAN BODIN SOCIETY
FOR COMPARATIVE INSTITUTIONAL HISTORY

LXIII

VASSISTANCE DANS LA RESOLUTION DES CONFLITS

ASSISTANCE IN CONFLICT RESOLUTION

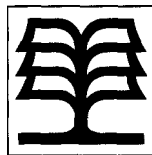
Première partie — First Part

L'ANTIQUÉ
ANTIQUITY

Deuxième partie — Second Part

LE MONDE EXTRA-EUROPÉEN
NON EUROPEAN WORLD

De Boeck



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Bruxelles, 1996