

Research Article

Buddhist Values as Legal Values in the Constitution of Bhutan

Michaela Windischgraetz

University of Vienna

DOI: <https://doi.org/10.2218/himalaya.2023.8032>

Abstract

The Constitution of Bhutan of 2008 largely separates religion from the state. Nevertheless, the state authorities are obliged to protect certain Buddhist aspects as part of the country's cultural heritage. The article shows that "Buddhism" becomes a legal term when the state authorities must interpret it in line with the state's objectives. The court case concerning the film Hema Hema serves as an example of the conflicts that can arise between a religious and a state view of legitimate conduct.

Keywords

Constitution; religion; Buddhism; cultural heritage; art

Recommended Citation

Windischgraetz, M. (2023). Buddhist Values as Legal Values in the Constitution of Bhutan. *HIMALAYA* 42(1): 48-60.



This work is licensed under a [Creative Commons Attribution-NonCommercial-No Derivative Works 4.0 License](https://creativecommons.org/licenses/by-nc-nd/4.0/).

Introduction

Bhutan adopted a democratic Constitution in 2008. The Constitution largely separates religion from the state. Article 3, Section 1 of the Constitution of Bhutan defines Buddhism as the country's "spiritual heritage" and entrusts its promotion to the religious authorities. Article 4, Section 1 and Article 9, Section 20 oblige the state authorities to foster a society rooted in the "Buddhist" ethos and to protect "Buddhist" aspects as part of the country's cultural heritage. From the perspective of normative pluralism, the Constitution leaves questions of religious order to religious specialists and questions of state law to the state authorities. However, the objectives of religious law differ from those of state law, and actions that might seem appropriate from one point of view might not be acceptable for the other. Therefore, state law and the religious order can intersect, overlap, contradict each other, and come into conflict.

This article investigates aspects of the relationship between the national legal order and Buddhism in Bhutan. The article considers the principles of the Constitution that regulate this relationship and it focusses on permutations of the "legal" and the "religious", in the sense that elements of "legal" and "religious" acts of ordering are at times repositioned within each realm and from one realm to the other (Bertram and Kirsch 2009: 3). We hypothesise that "Buddhism" becomes a legal term when the state authorities must interpret it in line with the state's objectives. This seems to be especially true for the state's obligation to foster a society rooted in a Buddhist ethos and to protect Buddhist aspects as part of the country's cultural heritage. In making this case, I examine the ambivalent, complex status of Buddhism in Bhutan's public law and the ways it draws upon long-standing conceptions of religious governance traceable to early Tibetan texts. And, by considering the legal status of Buddhism in an important court case concerning the film *Hema Hema*, I demonstrate how some of these tensions play out in practice.

State, Law, and Religion

The relationship between religion and the state has been established in many ways. The spectrum extends from theocracies (see, especially, Hirschl 2010) to secular states. The political and religious spheres of a society, too, have been organised in many ways, and scholars like Cole (1996: 19-22) have developed typologies to understand them. However, a closer look at individual cases reveals that this relationship is much more complex than the models suggest. The relationship of religion and the state in modern nationstates is determined by their historical and socio-cultural conditions (Madeley 2015: 209, 213 ff). The variety of these conditions requires us to analyse the relationship case by case and with regard to questions of boundaries between the spheres of state and religion and of mutual interference and power relations; correlating the Constitution of a particular state to a particular model may not be useful.

In Bhutan—different from certain states with Theravada majority, where the state has the power to manage the conduct and wealth of Buddhist monks (Schonthal 2014: 150-151)—the state does not interfere with the inner affairs of the Central Monastic Body or other monastic communities. However, the Constitution of Bhutan obligates the state to protect Buddhism, at least regarding certain aspects; it resembles provisions such as Section 79 of the Constitution of Thailand, which states that "the State shall patronize and protect Buddhism", and Article 9 of the Constitution of Sri Lanka, which awards Buddhism the "foremost place" in society and requires the state to protect and foster the Buddha Sasana (the religion's teachings, institutions, and adherents). Such provisions "Buddhicize" political authority by indicating the state's overarching commitment to supporting Buddhism (ibid.: 151).

A state may be connected with religion at the level of ends, public policy and law, and institutions and personnel (Bhargava 2015: 229). States may claim a separation at the level of institutions and personnel but they

may have established or endorsed a certain religion or be connected at the level of policy and law. Such policies and laws might flow from, and be justified in terms of, the union or alliance between religion and the state (ibid.: 230). Even states that are considered secular usually have laws regulating aspects of religion. Like many other modern nation-states in South and South-East Asia, Bhutan has adopted a Constitution that complies with globalized standards; it is based on the rule of law, separation of powers, and the implementation of fundamental rights. Similar to that of other Buddhist majority states, the Constitution of Bhutan gives Buddhism special status and has an ideology of legalism characterised by the desire for a single authoritative collection of prescriptive law (Schonthal 2014: 151). Other normative orders like religious or customary ones usually have to defer to state law. Bhutan is said to be a “Buddhist state” or “Buddhist constitutional monarchy” but state law sets the rules for the relationship between the state and religion, at least officially.

Religion in the Constitution of Bhutan

To understand the place of religion within the legal order of Bhutan, one must understand the history and impacts of its Constitution. The Chairman of the Drafting Committee makes clear in his Commentary that the Constitution draws on Buddhist and Western philosophies as it should satisfy Bhutanese aspirations, have global conformity, and a spiritual and philosophical basis (Tobgye 2015: 23). The Drafting Committee¹ studied the country’s religious, cultural, philosophical, and political bases and the constitutions of many of the world’s nation-states (ibid.: 20).² Article 7, Section 4 of the Constitution of Bhutan provides for the freedom of religion,³ and the Constitution embodies and reflects the values, philosophies, and objectives held dear by the people of Bhutan (ibid.: 23) and follows a globalized model of constitutions, focusing on the separation of powers and providing a catalogue of fundamental rights.

Buddhism as the Spiritual Foundation of the Bhutanese State

Blessed by the Triple Gem⁴, the protection of our guardian deities, the wisdom of our leaders, the everlasting fortunes of the Pelden Drukpa⁵ and the guidance of His Majesty the Druk Gyalpo Jigme Khesar Namgyel Wangchuck (Preamble, Constitution of Bhutan)

This invocation, right at the beginning of the Preamble of the Constitution of Bhutan, marks the country as Buddhist and, together with the seal—in the form of a mandala (Whitecross 2014: 263)—evoke the records of historical and religious beliefs and its derivative values (Tobgye 2015: 49). Thus, the Preamble draws on the teachings of the Buddha and on the protection of celestial beings and the institution of the Buddhist Drukpa Kagyu school as the bases of the Constitution. The Preamble, an integral part of the Constitution, emphasizes its particularly sacred⁶ character. This makes it impossible to speak of the Constitution of Bhutan as an entirely “secular” one, particularly when read alongside Articles 2 and 3 regarding the role of the King of Bhutan and Buddhism as the spiritual heritage of Bhutan.⁷

The King as Upholder of *Chos Srid Gnyis*

Article 2 of the Constitution of Bhutan regulates the institution of the monarchy. Section 1 institutes the Druk Gyalpo, the King of Bhutan, as the head of the state. Section 2 refers to *chos srid gnyis*, or “Buddhist government” (Ishihama 2004: 15-16), a form of government involving both spiritual and secular matters.⁸ The Constitution mandates that this form of dual spiritual-secular government “shall be unified in the person of the Druk Gyalpo, who as a Buddhist, shall be the upholder of the *chos srid*”.

To understand the political and religious implications of *chos srid*, one must consider the origins and the development of this concept, which reaches far back

into Tibetan-Buddhist history. The mythological basis of *chos srid* can be found in the Bodhisattva figure of *Avalokiteśvara-Lokeśvara*, through whom the union of the spiritual and temporal had been expressed mythically, ritually, ideologically and functionally (Seyfort Ruegg 2004: 11). Early *gter ma* literature (Mayer 2019: 11) of the second diffusion of Buddhism in Tibet developed the idea of a king ruling Tibet by religious as well as secular law. In the *bka' chems ka khol ma*, a text that purports to be the testament of the Tibetan King Songtsen Gampo (Srong-btsan sgam-po 605?-649) and which was compiled probably in the 12th century, the king Songtsen Gampo appears as an incarnation of the Bodhisattva *Avalokiteśvara*, thus suggesting a contiguity between religious and royal power. The text stresses that the king strived to tame the population “by religious laws (*chos khrims*) and royal laws (*rgyal khrims*)”. The text also mentions the ten virtuous/unvirtuous deeds (*[mi] dge ba bcu*), which further combine what one might call moral and state law. The term *chos srid* is seen abundantly in *Mani bka' 'bum*, which takes the *bka' chems ka khol ma* as one of its sources, as well as in other subsequent texts (Ishihama 2004: 16). According to these texts a Buddhist government (*chos srid*) was established for the first time by Songtsen Gampo and flourished especially during the reign of the second of the so-called Dharma Kings Trisong Detsen (Khri-srong lde-btsan 742-800) (ibid.: 16).

In addition to the term *chos srid*, Tibetan and Bhutanese terms that refer to this diarchic form of governance include *lugs gnyis* (twin system), *tshul gnyis* (twin method), *tsug lag gnyis* (twin science) or *khrims gnyis* (twin rule) (Seyfort Ruegg 2004: 9). This “dual system” tradition was continued in Bhutan by the founder of the nation Zhabdrung Ngawang Namgyal (Zhabs drung Ngag dbang rnam rgyal 1594-1651). In the edict of Punakha Dzong Zhabdrung Ngawang Namgyal calls himself a *Dharmarāja* (*chos rgyal*) similar to the previous *Dharmarāja* Songtsen Gampo (Srong bstan sgam po), who as a “religious ruler” combined the roles of a religious and

a secular lawgiver (Windischgraetz and Wangdi 2019: 13).⁹

The current concept of kingship in Bhutan clearly draws on these traditional Tibetan-Buddhist political concepts (Schwerk 2019: 26 ff, Whitecross 2022: 84).

The Constitution of Bhutan requires the King to be Buddhist because otherwise it would be impossible for him to uphold the *chos srid gnyis*. Besides being seen as a *Dharmarāja* (*chos rgyal*) (Pommaret 2016: 254), a religious king, he is seen as an embodiment of the Bodhisattvas *Avalokiteśvara*, *Manjuśri*, and *Vajrapani* (Pommaret 2016: 253). Thus, the idea of a Bodhisattva-cracy (Seyfort Ruegg 2004: 8), a state headed by the embodiment of a Bodhisattva, is upheld in continuity of the centuries-old tradition of Tibetan-Buddhist political philosophy. The political system in Bhutan has changed three times—Zhabdrung’s theocracy, absolute hereditary monarchy in 1907, and democratic constitutional monarchy in 2008—but the concept of a religious king as the upholder of *chos srid gnyis* remains alive (Pommaret 2016: 258, Whitecross 2022: 90).

Despite its focus on traditional Buddhist concepts, the Constitution stresses on upholding the norms of universal human rights and prohibits discrimination based on religion (Tobgye 2015: 110). Article 3, Section 2 of the Constitution says that “the Druk Gyalpo is the protector of all religions (*chos lugs*) in Bhutan”. Thus, it requires that the Druk Gyalpo is the King of all Bhutanese citizens regardless of religion or sect and a symbol of unity of the Kingdom and of the people of Bhutan (ibid.: 110).

Buddhism as the Spiritual Heritage of Bhutan

“Buddhism (*sangs rgyas kyi chos*) is the spiritual heritage of Bhutan (*'brug gyi srol rgyun gyi chos*)”, according to Article 3 of the Constitution; yet, the responsibility for promoting Buddhism as the country’s spiritual heritage lies with the religious institutions and personalities and not with the state authorities. Article 3, Section 3 ensures that religion remains separate

from politics in Bhutan:¹⁰ “Religious institutions and personalities shall remain above politics.” Traditionally, people in Bhutan hold religious institutions and personalities in high esteem; if the religious personalities participated in political activities, or so the Constitution implies, the democratic system could malfunction, and it is thought that separating religion from politics enables Bhutan’s government to strengthen the country’s spiritual and religious heritage and also eschew fundamentalism and sectarian policies (Tobgye 2015: 111). In accordance with this principle, Section 184 of the Election Act, 2008 bars religious persons—of any religion, including Hindu priests and Muslim imams—from participating in the electoral process.¹¹

The separation of religion from politics—as laid down in the Constitution of 2008—has transformed the character of the Bhutanese state (Whitecross 2014: 365). Before 2008, the Central Monastic Body used to send ten representatives to the National Assembly and two representatives to the Royal Advisory Council. This was meant to ensure the continuity of the dual system of governance and permit the spiritual and political systems to intersect (Dorji 2015). The contribution of the Central Monastic Body to these bodies was abolished after the transition to democracy; the transition was difficult and caused tensions between the government and religious organisations (ibid.). Many of the draftspersons of the Constitution were members of the elite in Bhutan who had been educated in India and who might have been aware of the debates over secularism there, but most Bhutanese, who live in rural communities, were unfamiliar with concepts such as secularism and the “separation of church and state” (Whitecross 2014: 364).

The Constitution still privileges religion but we can discern a far-reaching disconnection of state authorities from religious ones at the level of roles, functions, and powers (Bhargava 2015: 229-230). This disconnection is not without exception: according to Article 3, Section 4, it is the King’s duty to appoint the Je Khenpo (*rJe*

mKhan po), or the Chief Abbot of the Zhung Dratshang, or the Central Monastic Body. The Je Khenpo has to be ordained according to the *‘Brug-lugs*, which means that only a Buddhist monk of the prevalent order of the Drukpa Kagyu (*‘Brug-pa bka’-rgyud*) is eligible as Je Khenpo. Furthermore, certain Buddhist religious rites have to accompany the sessions of the Parliament: according to Article 10, Section 6 of the Constitution, each session of the Parliament shall be opened with a Zhug-drel-phunsum tshog-pai ten-drel¹² (*bzhugs gral phun sum tshogs pa’i rten ’brel*)¹³ and each session shall conclude with the Tashi-mon-lam (*bkra shis smon lam*).¹⁴ Additionally, intersections can also be found at the level of lower-ranking law. The Religious Organizations Act, 2007 establishes a regulative authority for the purpose of this Act, the Chhoedey Lhentshog, which comprises both secular and religious persons. Thus, religious persons, some ex officio, some nominated by their respective religious communities, become integrated into the state administration. The state and religious institutions have important financial connections: according to Article 3, Section 7 of the Constitution, the Zhung Dratshang and the Rabdeys (*rabs sde*)¹⁵ shall continue to receive adequate funds and other facilities from the state.

Thus, the state privileges the Zhung Dratshang of the Drukpa Kagyu school against other Buddhist schools, especially Nyingma (*rnying ma*), the second largest Buddhist school in Bhutan, which relies on private funding to maintain their temples and monasteries. This applies all the more to other religions, especially Hinduism, as it has the second largest following in Bhutan.

From the perspective of traditional political theory, the state’s funding of the Zhung Dratshang can be seen as continuing the *mchod yon* (priest-patron) relationship between a ruler and a Buddhist monk or community. As a base for understanding, the relationship between the spiritual and the secular in a Buddhist setting serves the relationship of a lay donor (*sbyin bdag, yon bdag*) who gives ritual gifts or donations (*sbyin pa*) to a monk or a Buddhist

community “who is worthy of gifts” (*mchod gnas*). The donor gains merit by supporting the sangha who in turn teaches the dharma. This relationship should eventually lead to liberation for both sides.¹⁶ Throughout history, in Tibet as well as in Bhutan, this peculiar relationship manifested itself in different ways according to the circumstances prevailing at the time.

Towards a Buddhist Society

If we look within Bhargava’s system at the level of ends, we can detect the overlap of the objectives of the state and Buddhism. According to Paragraph 2 of the Preamble of the Constitution, “the state shall enhance [the] happiness and well-being of the people”. Thus, the Constitution’s objectives are the same as those emphasized by the early legal-historical sources of the Tibetan imperial period (Windischgraetz and Wangdi 2019: 15). The ultimate objective of the Drukpa rule and the introduction of law in Bhutan is to bring benefit and happiness, as a source for enlightenment, to all beings of the country, according to the Golden Yoke (*gser gyi nya’ shing*), an inscription displayed at Punakha Dzong and attributed to Zhabdrung Ngawang Namgyal, the founder of the Bhutanese state (ibid.: 14). That the achievement of happiness is the aim of the Drukpa State is clearly explained in another legal code of Bhutan, the *bKa’ khrims* of 1729: “If there is no law, happiness (*bde skyid*) for the beings does not arise. If the beings are not happy, there is no sense that the Dharma masters of Drukpa uphold the twofold teachings” (Aris 2009: 131). Thus, then and now, in the Buddhist hierocracy of the Zhabdrung and his successors as well as today in the modern nation state of Bhutan, the prominent goal of the law was and is to achieve happiness and well-being of its people, and this goal is defined largely by religion (Bhargava 2015: 230). The concept of “gross national happiness”¹⁷ thus reflects a centuries-old tradition of Tibetan-Bhutanese socio-political reasoning (Whitecross 2022: 90).

The State shall strive to create conditions that will enable the true and sustainable development of a good

and compassionate society rooted in Buddhist ethos and universal human values (Article 9, Section 20, Constitution of Bhutan).

Thus, Article 9, Section 20 goes one step further towards making explicit the religious mandate of the state to establish a society rooted in the “Buddhist ethos” and its Six Perfections (*paramita*, *pha rol tu phyin pa drug*) of Mahayana Buddhism, or the principles of generosity (*dana*, *sbyin pa*), morality (*sila*, *tshul khrims*), patience (*ksanti*, *bzod pa*), zeal (*virya*, *brtson ‘grus*), meditation (*dhyana*, *bsam gtan*), and wisdom (*prajna*, *shes rab*). (Tobgye 2015). The first three principles can be understood as general moral principles that can be applicable to a general public. The next three paramita are principles for people who meditate and thus do not seem appropriate as Constitutional principles for all citizens.

Buddhism as the Cultural Heritage of Bhutan

The State shall endeavour to preserve, protect and promote the cultural heritage of the country, including monuments, places and objects of artistic or historic interest, Dzongs, Lhakhangs (*lha khang*), Goendeys (*dgon sde*), Ten-sum (*rten gsum*), Nyes (*gnas*), language, literature, music, visual arts and religion to enrich society and the cultural life of the citizens (Article 4, Constitution of Bhutan).

As part of the cultural heritage of Bhutan, Buddhism is an object of protection. The religious terms mentioned here denote Buddhist entities: *lha khang* are temples, *dgon sde* are monastic communities, *rten gsum* signify the triple support of the Buddhist teachings (stupas, statues, and scriptures), and *gnas* being sacred sites of pilgrimage. Thus, the text makes clear that Buddhist sites and objects shall be protected as part of the country’s cultural heritage.

Article 3 assigns the responsibility to protect the spiritual heritage of Bhutan to religious

persons and institutions. Article 4 entrusts the charge of promoting and protecting the cultural heritage of Bhutan to the state; it defines the Constitutional duty broadly and allows for its fulfilment in various ways. Legal acts can be adopted on the basis of this provision and may serve as a guideline for the interpretation of lower-ranking legal acts by the competent authorities and courts.

Buddhism as a Legal Category

The Constitution of Bhutan separates religion from politics; the spiritual authorities no longer have the authority to (co-) decide laws or state Acts on Buddhism. Therefore, Buddhism is a legal term within the Bhutanese legal order. The Constitution obligates the state to strive towards a society rooted in the Buddhist ethos and to preserve, protect, and promote Bhutan's cultural heritage. That obligation involves the religion and raises several questions: How should Buddhism be defined? How should the Buddhist ethos be ascertained? Which aspects of the Buddhist religion represent the cultural heritage of Bhutan? Who has the authority to speak for Buddhism? Who shall decide how Buddhist features should be protected? The state authorities are responsible for interpreting the legal norms within their jurisdiction because the obligations are those of the state.

Buddhism promotes the principles and values of peace, non-violence, compassion, and tolerance, according to Article 3 of the Constitution; apart from that, the leeway for the interpretation of "Buddhism" and for shaping the notion of "Buddhism" is wide. Secular civil servants interpret Buddhism in legal terms according to their understanding and based on their learning at home in their village and by attending religious events (Whitecross 2014: 366). The people of Bhutan, government officials, and the framers of the Constitution of Bhutan understand and interpret Buddhist principles and values a certain way. That understanding and interpretation has been incorporated into the text of the Constitution; its spirit reflects how ordinary

people, not Buddhist scholars, understand the essence of Buddhist teachings (ibid.: 350 ff, 366).

The Constitution of Bhutan is one of the few Constitutions in the world that protects culture explicitly (Tobgye 2015: 116).¹⁸ During the consultations prior to the enactment of the Constitution, the fourth King of Bhutan mentioned mask dances (*'chams*) as an example of visual arts that should be protected (ibid.: 118). For a definition of "culture" the Chairman of the Drafting Committee refers to Talcott Parsons and cites:

[...] culture consists in patterned or ordered systems of symbols which are objects of the orientation of action, internalized components of the personalities of individual actors and institutionalized patterns of social systems [...] primarily a system of symbols conveyed through the medium of ordinary words or more complex artistic expressions (ibid.: 117).

Religious and spiritual representations, tangible and intangible, can be part of the culture of Bhutan and thus can be protected under Article 4. Culture changes over time, however, and the framers of the Constitution were aware of that: Article 4, Section 2 states that the state shall recognize culture as an evolving dynamic force and shall endeavour to strengthen and facilitate the continued evolution of traditional values and institutions that are sustainable as a progressive society. Thus, the Constitution provides authorities the discretion to determine how to protect the cultural heritage of Bhutan.

The Hema Hema Case

"Hema Hema: Sing Me a Song While I Wait" is a 2016 film produced by Pawo Choyning Dorji and directed by Dzongsar Jamyang Khyentse Rinpoche, a high-ranking Buddhist lama well regarded in Bhutan and abroad. To be screened in Bhutan, films need a certificate from the Bhutan InfoComm and Media Authority (BICMA). But the BICMA

declined to issue the certificate and banned the film from being screened in the country “due to the various religious masks (*lha tshogs* masks)¹⁹ used by the characters in the film, which is not in keeping with our own tradition and culture” (Zangmo 2017); the masks were being used in rituals—they were not just items sold to tourists.²⁰ Dorji decided not to appeal the decision (Lamzang 2017).

The Bhutan Broadcast Service aired a story on the ban in December 2016 and showed a trailer of the film. As BICMA had banned the film from being screened in the country, they imposed a fine on the Bhutan Broadcast Service for screening the trailer. The matter went to court. The Thimphu Dzongkhag Court held the Bhutan Broadcast Service guilty of violating Section 111 (1) of the Bhutan Information and Communication Act, 2006²¹ and of reporting false information under Section 30 (2) of the Act. On appeal, however, the High Court overturned the judgment and ruled that the Bhutan Broadcast Service and journalists have the freedom to disseminate information, as per Article 7, Section 3 of the Constitution of Bhutan, which says that “[t]here shall be freedom of the press, radio and television and other forms of dissemination of information, including electronic” (Dema 2019), and that they have the responsibility to disseminate information, as per Article 7, Section 5 of the Constitution, which says that “[a] Bhutanese citizen shall have the right to information”. Notably, the High Court did not balance these Constitutional rights against other Constitutional provisions, especially Article 4, which obligates the state to protect the country’s cultural heritage.

Dzongsar Jamyang Khyentse Rinpoche, a high-ranking Buddhist lama, had no hesitation using the masks in his film.²² One would suppose Rinpoche, and people like him, to know what is religiously appropriate and that, given his global profile, his film would enhance the reputation of Buddhism and Bhutan rather than perpetrate any damage. However, the state authorities used their discretionary power and applied a legal

understanding of Buddhism to the understanding of religious practices by religious persons; the rearrangement of religion and state effects permutations of the “legal” and “religious” (Turner and Kirsch 2009: 3).

From the perspective of Buddhism, the dharma must be taught in a way that is intelligible to students and benefits them. The teacher must use *thabs* (skilful means) and teaching methods that suit their disciples’ intellectual and spiritual capacity. We may assume, therefore, that Rinpoche chose the medium of film deliberately, to raise questions of identity and karma and teach the bardo to a wide audience.²³ In the past, many Buddhist teachers were known for using unorthodox methods, and many of the so-called “mad” yogis like Drukpa Kunle²⁴ are still highly revered, although the latter has been described as an outlaw and “a wild, womanizing, antinomian crazy yogi”.²⁵ All human practices are ever-changing, however, and developing over time and space. Religious practices are changing, too; Buddhist ethics and morality is being institutionalized and the shifted boundaries between religion and politics are becoming criteria of modernization or secularization (Schwerk 2019: 39). Today, Buddhist teachers have to comply with state law, and compliance can restrict their freedom in teaching and explaining the dharma, their primary task. Teaching methods that might seem “too modern”—some of my Bhutanese informants referred to Dzongsar Jamyang Khyentse Rinpoche as “ahead of our times”—might seem inappropriate to the state authorities and thus liable for penal action.

Buddhism is part of Bhutan’s cultural heritage. To protect it, the state authorities must interpret it. Protecting Buddhism as part of Bhutan’s culture serves an end different from a religious one: protecting Buddhism, at least in some of its aspects, and striving to promote a society rooted in a Buddhist ethos, as enjoined by the Constitution, are part of shaping the cultural and national identity of Bhutan.²⁶ Bhutan is proud of being the last surviving Buddhist Kingdom in the Himalayas. As a nation, Bhutan builds its unique character, besides other features,

on its Buddhist history. Integrating the narrative of a Buddhist past and of a particular Buddhist heritage and ethos shared by all Bhutanese citizens into the Constitution is crucial for the endeavour of imagining (Anderson 2006 [1983]) the Bhutanese nation-state.

Conclusions

Implementing a comprehensive legal order in the modern nation-state of Bhutan and integrating the Buddhist aspects into the Constitution have led to particular, even unexpected, permutations of the secular and the religious. Within the national legal system, the state authorities must decide questions that require a definition of “Buddhism” or “Buddhist ethos”. The state authorities comprise laypeople whose understanding of the religious differs from that of religious specialists; thus, “Buddhism” becomes a legal term that needs to be interpreted according to the objectives of the legal order. The legal order is national, and so the understanding of Buddhism as a legal term will serve national objectives, with the unintended effects of undermining the clerical authority of the Buddhist monks.²⁷ At the same time, the religion of Buddhism has become a global movement and transcended boundaries between peoples quickly and easily. The Silk Road provided an economic and cultural link between Asian countries and stretched as far as ancient Europe; it may be seen as an early example of “globalism” (Nye 2002).

Today, many teachers of Buddhism from traditionally Buddhist Asian countries teach a global community of disciples, adapting methods to the needs and understanding of their disciples wherever they are located in place and time. The methods may involve practices and discourses beneficial from the religious point of view but illegal from the viewpoint of the legal system of a particular nation-state. Thus, the consequences of the Bhutanese court’s pronouncements on Buddhism are not only local but global as well.

Michaela Windischgraetz is a Professor of Law and the Head of the Department of Employment Law and Social Security Law at the Faculty of Law, University of Vienna. She holds a second diploma in Social Anthropology and Tibetan and Buddhist studies at the University of Vienna. Since 2016 she is serving as a visiting professor at the JSW School of Law in Bhutan.

Endnotes

1. The 39-member Constitution Drafting Committee was set up by Royal Decree in 2001. The Chief Justice served as the chairman. The committee represented all sections of society: representatives from the twenty *Dzongkhags* (districts) directly elected by the people, two members from the *Dratshang* (monastic body), the Speaker of the National Assembly, seven members from the Royal Advisory Council, three from the judiciary, and six from the government (Tobgye 2015: 30 ff).
2. Modern nation-states with a Theravada Buddhist majority deliberately looked to traditional Buddhist sources for political legitimacy and moral authority and followed the same process in drafting their Constitution (Schonthal 2014: 151).
3. We do not discuss it in detail in this article because space is limited.
4. Buddha, Dharma and Sangha, cf. Glossary to the English version of the Constitution of Bhutan.
5. Glorious Bhutan, cf. Glossary to the English version of the Constitution of Bhutan.
6. 5th King Jigme Khesar Namgyel Wangchuck in a public consultation in Samdrup Jonkhar, 22 April 2005 (Tobgye 2015: 49).
7. Stressing the ambivalence of Bhutan as a secular state and the role of Buddhism in the Constitution (Whitecross 2022: 90).

8. The similar expression of *chos srid zung 'brel* can be translated as “conjunction of religious law (dharma) and government”; see Seyfort Ruegg 2004: 9; The glossary to the English version of the Constitution of Bhutan says “dual system of religion and politics (temporal and secular)“.
9. Instead of *chos srid* the Punakha edict uses the term *bstan srid* with an equivalent meaning.
10. The Dzongkha text of Article 3, Section 3 '*brug lu chos 'di* means “religion in Bhutan“ and does not refer to the Drukpa Kagyu school (*'brug lugs*, which is used in Article 3, Section 4 to refer to the *Je Khenpo* denomination).
11. Thailand and Myanmar use the same logic to limit the franchise of Buddhist monks. On this see: Larsson 2014, 2016.
12. Traditional ceremony for the acquisition of the triple attributes of grace, glory and wealth during a formal and auspicious occasion. Spelling according to the English version of the Constitution.
13. Spelling according to the Dzongkha version of the Constitution.
14. Prayers for the fulfilment of good wishes and aspirations.
15. Monastic bodies in *dzongs* other than Punakha and Thimphu.
16. Building on this basic model reaching back in history to the times of the Buddha, Tibetan political theory from the 13th century onward shaped the relationship between the religious powers and secular orders. This was especially true for the time of the Mongol overlordship over Tibet in the 13th century, when Sa-skya paṇḍi-ta Kun-dga' rgyal-mtshan (1182-1251)—the great abbot-hierarch of the Tibetan state of Sa-skya—and his nephew and successor 'Phags-pa Blo-gros rgyal-mtshan dpal-bzang-po (1235-1280) established an understanding—a kind of religio-political concordat—first with the Mongol prince Godan and thereafter with the Sino-Mongol emperor Qubilai Qan (rg. 1260-1294).
17. Article 9, Section 2 of the Constitution of Bhutan obligates the state to strive to promote conditions that will enable the pursuit of “gross national happiness”, a term coined by the fourth king as early as 1972. The concept of gross national happiness guides all state authorities in Bhutan in promoting sustainable development that gives equal importance to non-economic aspects of well-being. Progress should be viewed through the lens of not only economics but also from the spiritual, social, cultural, and ecological perspectives. See e.g. Ura 2011, Locke 2020, Windischgraetz 2023.
18. Similarly, Article 3, Section 3 of the Treaty of the European Union stipulates that the Union “shall respect its rich cultural and linguistic diversity, and shall ensure that Europe’s cultural heritage is safeguarded and enhanced”.
19. The transliteration of Tibetan and Dzongkha characters follows the system of Wylie 1959.
20. We do not discuss if BICMA had a sound legal foundation for the ban as according to the previous version of the BICMA Act films could be banned only if they incite violence; disclose national secrets or violate national security, sovereignty, or freedom; or disrupt foreign relations.
21. “No film intended for public exhibition shall be advertised to the general public through any medium before the grant of a certificate by the Authority.”
22. In an interview Rinpoche explains the religious background of the use of the masks and shares his suspicion that the authorities might not have understood it: <https://www.facebook.com/hemahemafilm/photos/hema-hemas-director-dzongsar-khyentse-rinpoche-talks-to-business-bhuttans-chencho/2214747502084523>
23. Cf. e.g. Sonam Wangmo Dukpa, review in Kuensel, 12 Dec 2016, <https://kuenselonline.com/hema-hema-sing-me-a-song-while-i-wait/>
24. 'Brug-pa kun-legs, a Tibetan yogi who lived from 1455–1529, spending a great part of his life traveling back and forth to Bhu-

tan, and known as Bhutan's Divine Madman.

25. Monson, Elisabeth and Drukpa Kunle, <https://treasuryoflives.org/biographies/view/Drukpa-Kunle/10857>. Allegations of sexual assault by teachers of Tantric Buddhism are being widely discussed now but these cannot be explored here.

26. The identification as "Drukpa" developed from a religious confessional into a cultural and national identity, cf. Schwerk 2019: 24.

27. As in Sri Lanka, cf. Schonthal 2016: 29-48.

References

Anderson, Benedict. 2006 [1983]. *Imagined Communities. Reflections on the Origins and Spread of Nationalism*. London: Verso.

Aris, Michael. 2009. *Sources for the History of Bhutan*. Delhi: Motilal Banarsidass. By arrangements with „Arbeitskreis für Tibetische und Buddhistische Studien, Universität Wien“.

Bhargava, Rajeev. 2015. Secular politico-legal regimes in religiously homogenous and diverse societies. In Silvio Ferrari (ed.) *Routledge Handbook of Law and Religion*, 229–244. London: Routledge.

Cüppers, Christoph. 2004. *The Relationship Between Religion and State (chos srid zung 'brel) in Traditional Tibet: Proceedings of a Seminar held in Lumbini, Nepal, March 2000*. Lumbini: Lumbini International Research Institute.

Dema, Tashi. 2019. Hema Hema: BBSC wins case in HC. *The World News*, last modified October 1, 2019. <https://theworldnews.net/bt-news/hema-hema-bbbsc-wins-case-in-hc> (last accessed on April 2, 2020).

—. 2019. "High Court rules in favour of BBSC in the 'Hema Hema...' case." *BBS*, last modified September 30, 2019. <http://www.bbs.bt/news/?p=121910> (last accessed on June 4, 2023).

Dorji, Gembo. 2015. Zhung Dratshang: The Central Monk Body of Bhutan. *The Druk*

Journal, Winter Edition (December 2015). <http://drukjournal.bt/zhung-dratschang-the-central-monk-body-of-bhutan/> (accessed on April 2, 2020).

Durham, Jr., W. Cole. 1996. Perspectives on Religious Liberty: A Comparative Framework. In Johan D. van der Vyver and John Witte, Jr. (eds.) *Religious Rights in Global Perspective: Legal Perspectives*, 1–44. The Hague/Boston/London: Martinus Nijhoff Publishers.

Ferrari, Silvio. 2015. *Routledge Handbook of Law and Religion*. London: Routledge.

French, Rebecca R., and Mark A. Nathan. 2014. *Buddhism and Law. An Introduction*. Cambridge: Cambridge University Press.

Ginsburg, Tom, and Ben Schonthal. 2022. *Buddhism and Comparative Constitutional Law*. Cambridge: Cambridge University Press.

Hirschl, Ran. 2010. *Constitutional Theocracy*. Cambridge/London: Harvard University Press.

Ishihama, Yumiko. 2004. The Notion of "Buddhist Government" (chos srid): Shared by Tibet, Mongol and Manchu in the Early 17th Century. In Christoph Cüppers (ed.) *The Relationship between Religion and State (chos srid zung 'brel) in Traditional Tibet: Proceedings of a Seminar held in Lumbini, Nepal, March 2000*, 15–32. Lumbini: Lumbini International Research Institute.

Larsson, Tomas. 2014. Monkish Politics in Southeast Asia: Religious Disenfranchisement in Comparative and Theoretical Perspective. *Modern Asian Studies* 49 (n.d.), 40–82.

—. 2016. Keeping Monks in Their Place? *Asian Journal of Law and Society* 3 (no. 1): 17–28.

Locke, Jessica. 2020. Buddhist Modernism Underway in Bhutan: Gross National Happiness and Buddhist Political Theory. *Religions* 11(6): 297.

Madeley, John. 2015. Constitutional models and the protection of religious freedom. In Silvio Ferrari (ed.) *Routledge Handbook of*

- Law and Religion*, 209–244. London: Routledge.
- Mayer, Robert. 2019. Rethinking Treasure (part one). *Revue d'Etudes Tibétaines*, no. 52 (October 2019): 119–184.
- Monson, Elisabeth. 2021. Drukpa Kunle. <https://treasuryoflives.org/biographies/view/Drukpa-Kunle/10857> (accessed on January 18, 2021).
- Nye, Joseph. 2002. Globalism Versus Globalization. What are the different spheres of globalism — and how are they affected by globalization? *The Globalist*, last modified April 15, 2002. <https://www.theglobalist.com/globalism-versus-globalization/> (last accessed on June 4, 2023).
- Pommaret, Françoise. 2016. The Cakravartin King. Symbolism of the Bhutanese Monarchy. In Tashi Tshering and Thierry Mathou (eds.) *The Bodhisattva King. His Majesty Jigme Singye Wangchuck of Bhutan*, 252–269. Thimphu: Bhutan Publishing House.
- Schonthal, Benjamin. 2014. The Legal Regulation of Buddhism in Contemporary Sri Lanka. In Rebecca Redwood French and Mark A. Nathan (eds.) *Buddhism and Law. An Introduction*, 150–166. Cambridge: Cambridge University Press.
- . 2016. “The impossibility of a Buddhist State”, *Asian Journal of Law and Society*, 29–48. <https://doi.org/10.1017/als.2016.4>
- Schwerk, Dagmar. 2019. Drawing Lines in a Mandala. A Sketch of Boundaries Between Religion and Politics in Bhutan. *Working Paper Series of the HCAS “Multiple Secularities – Beyond the West, Beyond Modernities”*, no. 12: 3–50. Leipzig: Leipzig University. <https://doi.org/10.36730/2020.1.msbwbm.12>.
- Seyfort Ruegg, David. 1995. *Ordre Spirituel et Ordre Temporel dans la Pensée Bouddhique de l'Inde et du Tibet. Quatre Conférences au Collège de France*. Paris: Collège de France: De Boccard.
- . 2004. Introductory Remarks on the Spiritual and Temporal. In Christoph Cüppers (ed.) *The Relationship between Religion and State (chos srid zung 'brel) in Traditional Tibet: Proceedings of a Seminar held in Lumbini, Nepal, March 2000*, 9–14. Lumbini: Lumbini International Research Institute.
- Tenzin, Chogyal (bsTan-'dzin chos-rgyal). 2004. *Lho'i chos 'byung' phro mthud' jam mgon smon mtha'i' phreng ba*. Thimphu: KMT Publisher.
- Tenzing, Lamzang. 2017. As Hema Hema producer challenges decision BICMA says they can appeal. *The Bhutanese*, last modified January 21, 2017. <https://thebhutanese.bt/as-hema-hema-producer-challenges-decision-bicma-says-they-can-appeal> (last accessed on April 2, 2020).
- Thinley, Zangmo. 2017. Hema Hema producers challenge BICMA ruling. *Kuensel Online*, last modified January 21, 2017. <https://kuenselonline.com/hema-hema-producers-challenge-bicma-ruling/> (last accessed on April 2, 2020).
- . 2017. Hema Hema cannot be screened in Bhutan: BICMA. *Kuensel Online*, last modified January 12, 2017. <https://kuenselonline.com/hema-hema-cannot-be-screened-in-bhutan-bicma/> (last accessed on April 2, 2020).
- Tobgye, Sonam. 2015. *The Constitution of Bhutan: Principles and Philosophies*. Thimphu: Bhutan National Legal Institute.
- Tshering, Tashi, and Thierry Mathou. 2016. *The Bodhisattva King. His Majesty Jigme Singye Wangchuck of Bhutan*. Thimphu: Bhutan Publishing House.
- Turner, Bertram, and Thomas Kirsch. 2009. *Permutations of Order. Religion and Law as Contested Sovereignties*. Farnham: Ashgate Publishing Ltd.
- . 2009. Law and Religion in Permutation of Order: An Introduction. In Bertram Turner and Thomas Kirsch (eds.) *Permutations of Order. Religion and Law as Contested Sovereignties*, 1–24. Farnham: Ashgate Publishing Ltd.
- Ura, Alkire, Zangmo. 2011. *The Gross National Happiness Index of Bhutan – Method and Illustrative Results*. Thimphu: Center for Bhutan Studies.
- Whitecross, Richard. 2014. Buddhism and Constitutions in Bhutan. In Rebec-

ca Redwood French and Mark A. Nathan (eds.) *Buddhism and Law. An Introduction*, 350–368. Cambridge: Cambridge University Press.

—. 2022. The Zhabdrung’s Legacy. Buddhism and Constitutional Transformation in Bhutan. In Tom Ginsburg and Ben Schonthal (eds.) *Buddhism and Comparative Constitutional Law*, 73–98. Cambridge: Cambridge University Press.

Windischgraetz, Michaela. 2023. Old Powers and New Forces in the Bhutanese Constitution – Anticipating the Resilience of a Young Constitution. In S. Jhaveri, T. Khaitan and D. Samararatne (eds.). *Constitutional Resilience in South Asia*, 55–70. Oxford: Hart Publishing.

Windischgraetz, Michaela, and Rinzin Wangdi. The Black-Slate Edict of Punakha Dzong. *JSW Law Research Paper Series*, no. 20-02 (June 2019): 1–61, <https://dx.doi.org/10.2139/ssrn.3537406>.

Witte, John Jr., and Johan D. van der Vyver. 1996. *Religious Rights in Global Perspective: Legal Perspectives*. The Hague/Boston/London: Martinus Nijhoff Publishers.

Wylie, Turrell. 1959. A Standard System of Tibetan Transcription. *Harvard Journal of Asiatic Studies* 22 (1959): 261–267. <https://doi.org/10.2307/2718544>.