


## Transgressing the Law: Karma, Theft and Its Punishment

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n March 20<sup>th</sup> 2004, His Majesty, King Jigme Singye Wangchuck formally decreed the abolition of capital punishment (*gzhung khrims*) in the Himalayan kingdom of Bhutan. The rationale for the abolition after a series of major debates in the National Assembly during the 1990s and the early years of this century was that "...the implications of capital punishment, in Bhutanese law, is seen as a contradiction both from a religious and legal perspective... Bhutan being a Buddhist nation, capital punishment is seen as a contradiction to the basic doctrines of Buddhism." (Kuensel 2004).<sup>2</sup> Until March 2004, certain acts of theft were potentially punishable by death. In this paper, I combine an analysis of Bhutanese texts with ethnographic research to examine the relationship between Buddhist doctrines and Bhutanese laws in relation to theft between the seventeenth and twenty first centuries.

To do this involves tracing the shift from the theocracy established during the early seventeenth century by the Drukpa Kagyu hierarch, Zhabdrung Ngawang Namgyal to the monarchy established almost one hundred years ago by Ugyen Wangchuck. As the last remaining, independent Himalayan Buddhist state, Bhutan has consciously sought since the mid 1980s to protect its cultural heritage through various official policies which have sought to "balance tradition with change." Bhutan's vibrant, if arguably equally fragile, Buddhist culture has been used to present a particular image of "the Land of the Peaceful Dragon Kingdom" or the "crown jewel of the Himalayas" (Berthold, 2005:2). Inherent in this official image making process is a re-interpretation and re-presentation of Buddhism in Bhutan – notably an emphasis on non-violence, peace loving and environmentally aware contented subject/citizens.<sup>3</sup> This image and its reliance, in my opinion, on

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<sup>2</sup> Full text of the newspaper report is given in Appendix 2.

<sup>3</sup> See Dodin, T & H Rather 2001, Huber 2001, Huber & Pedersen 1997, Lopez, D 1997. Dubgyur 2005 is a good example of the recent emphasis on presenting Bhutanese law as grounded in Buddhism by the Bhutanese judiciary.

the circulation of non-Bhutanese perceptions and “understandings” of Buddhism ignores the specific historical and local traditions which have until very recently intertwined religious and secular authority. The draft constitution currently being presented to the Bhutanese people appears for the first time since the early seventeenth century to remove the *Dratshang*, the state sponsored monastic body, from the political process.<sup>4</sup>

The paper proceeds as follows. I begin by outlining the Dual System as it was envisioned by the Zhabdrung and presented in two early Bhutanese texts, and its treatment of theft. This system of governance remained in place until 1907 when the current monarchy was established. Although the Dual System as a functioning system of governance fell in to desuetude in the nineteenth century, it continues to define the interrelationship between law and religion. Following on I briefly outline how theft was treated in the first modern law code, the *Thrimzhung Chenmmo*, the Land Act 1979, and more recently in the Penal Code 2004. These texts illustrate the gradual reception and accommodation of non-Buddhist legal norms and values. The second part of the paper examines the laws surrounding *chorten* robberies. Under Section Tha 1 – 12 of the *Thrimzhung Chenmmo*, a second conviction for this category of crime carried a mandatory death penalty. I conclude by arguing that contemporary invocations of the Dual System represent a re-invention of its values and that the draft constitution proposes the first major separation of religion and secular authority in Bhutan.

## PART I

### Law Codes and the Dual System

In this section, I examine a range of historical and contemporary Bhutanese texts. I deal at length with the two earliest texts, the *Lo rgyus* (late seventeenth century) and the *bKa Khrims* (1729). These two texts provide an important framework for discussing the Dual System and the intermingling of religious and state laws that shaped Bhutan and continues, in my opinion, to resonate not only at state level but also at the local level. With the process of political, economic and social reform introduced by Jigme Dorji Wangchuck in the middle of the twentieth century, I briefly examine the first modern law code, the *Thrimzhung Chenmmo*. I then turn to subsequent legislation to examine their provisions dealing with theft; specifically, the Land Act 1979 and the Penal Code 2004. This final text illustrates the recent reception of Anglo-American legal traditions which is redefining the relationship between contemporary Bhutanese law and Buddhist doctrine.

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<sup>4</sup> Whitecross, R 2006 “*Severing the Silken Knot? Buddhism, Constitutionalism, and the Dual System in Bhutan*” paper in progress.

*Lo rgyus* – insights to the use of violence

The *Lo rgyus* is not a law code. Rather, it is an account of the progress by the newly created Drukpa administration into eastern Bhutan during the 1650s.<sup>5</sup> There is no date given for its composition though Aris (1986) suggests that it was composed in the second half of the seventeenth century. From the tenor of the work it appears to have been written by its author, Ngawang to win favour with the Drukpa regime established by the Zhabdrung, Ngawang Namgyal. The Zhabdrung arrived in Bhutan in 1616 and began implementing his vision of creating a religious state.<sup>6</sup> The new religious state was to be ruled according to the “dual system” (*chos srid gnyis, lugs gnyis*). Although, as Ardussi (2004) reminds us the “dual system” was widely invoked as a theory of governance in Tibet, its implementation varied across the Himalayas and Tibetan cultural areas significantly.

Uniting religion and secular government in one administrative system, the Zhabdrung sought to establish a new system of government in the lands which came to form Bhutan. His biographer, Tsang Khanchen provides the clearest statement of the Zhabdrung’s intentions to create a new state based on religious laws and draws on Buddhist canonical writings, *terma* (hidden treasure) texts, the legends of the early Tibetan monarchy and the more recent political alliance between the Sakyapa and the Mongols to legitimate the Zhabdrung’s political vision. As Ardussi rightly points out, these sources provided “a vocabulary of religious purpose and governing process that could be combined, as needed, to describe a variety of actual state entities” (2004:16). The success of the Zhabdrung was attributed to his use of magic to overcome his enemies and to his karmic destiny to establish a “new state for the welfare of its sentient inhabitants” (Ardussi 2004:17).

Unlike the Dalai Lamas of Tibet, the Zhabdrung did not separate religious and secular authority. Under the Ganden Phodrang system of the Dalai Lamas, the Gushri Khan and his successors were specifically entitled Chosgyal of Tibet. The Dual System as operated in Tibet separated the ecclesiastical and secular authorities with civil officials typically having their monastic counterparts. French describes the Tibetan law codes as “based in Buddhism but secular in nature” (1996:452). However, the nature of the “state” as developed in Bhutan did not allow for a clear distinction between religious and secular authority. In Bhutan, the Zhabdrung was the pinnacle of the government and chose to create a subordinate position, the *sDe rid*. The *sDe rid* was responsible for the civil administration of the Drukpa state with the assistance of the three *penlop* of Paro, Daganna and Jakar, as well as the *dzongpon* of Thimphu, Wangduephodrang and Punakha.<sup>7</sup> All lay

<sup>5</sup> The full title is The Clear Mirror [containing] the Story of How the Order Prophesied to the [School of the ] Glorious ‘Druk pa by its Divine Lineage Came and Spread in the Eastern Province of the Sun Within the Southern Mon Country of Four Approaches.

<sup>6</sup> In the *bKa’ khrims*, the Zhabdrung is said to have received the lands of the Great Southern Realm of Four Approaches from the dharma protector, Yeshe Gonpo (Mahakala) who “offered [it]... in the manner of a religious estate.” Aris (1986:129) translates the phrase “*chos gzhis*” as religious estate.

<sup>7</sup> Dzongkha: *dpon slob* regional governor and *rdzong dpon* district administrator. Where Dzongkha/Tibetan terms are used I have followed convention of not making them plural.

officials assumed a semi-monastic character and if a lay official, rather than a full monastic, was appointed as *sDe rid* he was required to take *getshul* (partial ordination) vows and received a new, monastic name. The position of the *sDe srid* over the centuries developed greater independence until the notion of its subordination to the Zhabdrung and his incarnate successors was challenged.

According to the *Lo rgyus*, the Dual System was responsible for “upholding, guarding and promulgating the Precious Teachings [*bstan pa rin po che*] ...in all the broad realms of the subjects and their communities the abundant enjoyment of food and wealth increased and...there was an absence of strife” (Aris 1986:111 – 113). Under this new system of governance, it claims that people were able to trade in safety and obtain “whatever articles he should desire, without theft or banditry” suggesting that the threat of theft and banditry was commonplace prior to the instigation of the Dual System. In part, such claims are propaganda that sought to stress how the Zhabdrung brought discipline and order to a land of “chaos” further legitimating Drukpa authority.

“The golden yoke of secular law administered according to religious principles ...devoid of partiality” refers to a particular vision of the Bhutanese state and the interrelationship, or as Aris describes it, “intermingling” of religious and secular laws. There are constant references to Buddhist teachings which were to be fostered and protected. The Dual System that provides “abundant happiness” is presented as directly attributable to the “mercy and kindness of the Precious One of the Glorious Drukpa, Ngawang Namgyal”. The secular law guided by religious principles was, however, to treat strictly all those who broke the laws. The *Lo rgyus* informs us that:

Severe punishment was meted upon their bodies and lives, so that people were terrified; reports of this were not only noised abroad but spread everywhere and because of their force, the order of the Teachings exists up to present times in the Eastern Province, a token of the achievement of both the *sku drung* and the Precentor.(Aris 1986:111)

The use of violence to enforce and maintain social order is marked throughout the *Lo rgyus*. There is no apparent contradiction with the “mercy and compassion” of the Zhabdrung and the use of physical and even capital punishment (*gzhung khrims*). This is a central feature of the *bKa' khrims* (discussed below) and from reading both of these texts we need to closely examine what is being referred to as “Buddhist teachings.”

Violence is not unusual in the imagery of vajrayana Buddhism. The biography of the Zhabdrung stresses the use of black magic by the Zhabdrung to overcome his enemies. The Zhabdrung is depicted in the protector shrine at Talo monastery performing magical acts dressed as the ninth century Buddhist monk, Lhalung Pelgyi Dorji believed to have

assassinated the “anti-Buddhist” Tibetan king, Langdarma.<sup>8</sup> Aris argues that the paradox between on the one hand, “peaceful non-violence” and on the other, the use of violence to defend the teachings is hardly recognised in Bhutan because “so deeply fused and intermingled are the norms of the church and state in the historical consciousness of the Bhutanese” (1994:24). Reading the *Lo rgyus* and the *bKa khrims* in conjunction with other Bhutanese texts, it is evident that the invocation of Buddhist teachings refers “invariably less to... the doctrines of the Lord Buddha *per se* and more to the specific and local tradition of his teachings which have conferred power and authority on the state” (*ibid.*). The *Lo rgyus* may only refer in passing to acts of theft and brigandage, yet it reveals the general tenor of the Drukpa state and its approach towards breaches of the intertwined religious and state laws.

### *bKa'khrims - Upholding the Dual System*

Under the Zhabdrung, Ngawang Namgyal the first law code that we are aware of for Bhutan was promulgated in 1651 (RGOB 1999:81).<sup>9</sup> In 1729 Tenzin Chosgyal prepared the *bKa' khrims* on the order of the 9<sup>th</sup> *sDe rid*, Mipham Wangpo who instructed, “You must at all costs prepare a record of the legal customs which were maintained intact by the *Umze* and others [and which were based on] legal codes transmitted from the royal lineages and the Chosgyals until the Zhabdrung Rinpoche” (Aris 1989:122 – 123).

The *bKa' khrims* written by Tenzin Chosgyal has been described succinctly as “[organising] along Buddhist lines the relationship between the Drukpa Kagyu monastic community, representing the state and lay patrons (*jinda*) and subjects in the judicial and economic fields” (Pommaret 1997:199). The relationship between the monastic and lay communities revolved around the material support of the monastic community in return for teachings, initiations and other rituals performed for the well-being of the lay community. This relationship was characterised by a variety of taxes payable by the lay community, including *ula* or compulsory labour for the government for a range of purposes – road and bridge building, the construction and repair of *dzongs* and monasteries. Other taxes involved the provision of meat, butter, clothes and in western Bhutan, a monk tax instigated by the 4<sup>th</sup> *sDe rid*, Gyalse Tenzin Rabgye (see Kinga 2002).<sup>10</sup> Beyond the tax provisions and rules for officials, the code covers all aspects of social life, notably inheritance, trade, crime and punishment and even a prohibition of the use of tobacco.<sup>11</sup>

<sup>8</sup> Tibetan: lHa lung dPal gyi rDo rje and Glang Dar ma.

<sup>9</sup> Bhutanese sources are inconsistent on the date of the promulgation of the code of laws. In *Bhutan 2020* (Planning Commission RGOB 1999) the date provided is 1651, but in *Bhutan Civics* the date is given as 1652 (CAPPS 1999:50).

<sup>10</sup> The monk tax (*btsun khral*) refers to former requirement to send one male from each household to the Drukpa monasteries instigated by the 4<sup>th</sup> *sDe rid*, Gyalse Tenzin Rabgye (reign 1680 – 1694).

<sup>11</sup> Tobacco was viewed as polluting the natural environment and to cause the displeasure of local deities and spirits. More recently, there has been a ban on the selling of cigarettes in the kingdom.

**Dharma, Laws and Happiness:  
the Raison d'Être of the Dual System?**

In the preamble to the *bKa' khrims* reference is made specifically to the law codes of Srongtsen Gampo and the early Tibetan kings and other laws contained in "royal" and religious histories.<sup>12</sup> The Zhabdrung is described as:

Having introduced laws where there had been no southern laws and fixed handles where there had been no handles on pots, he [the Zhabdrung] constrained by means of the religious laws like a silken know and pressed down with state laws as with the weight of a golden yoke. Beginning [from the time of] introduction of the great law of the dual system, the successive rulers also preserved intact the observance of state laws in accordance with religion and it is due to this that the possibility has arisen for all subjects ...to enjoy themselves in the glory of happiness and contentment.  
(*ibid.*:129)

The image of Bhutan as lacking law and uncivilised until the arrival of the Zhabdrung develops themes present in the *Lo rgyus*. In the *bKa khrims* the author attempts a delicate balancing act – on the one hand acknowledging Tibet as the source of the laws (religious and secular) and cultural refinements introduced by the Zhabdrung, whilst simultaneously presenting Bhutan as independent of and distinct from Tibet. Of course, such statements such have to be treated with caution because of the political role they played in confirming and legitimizing the supremacy of the Drukpa administration established by the Zhabdrung.

"By good pronouncements, beneficial to religion and the state" (Aris 1986:123) the Drukpa rulers and their officials are to ensure the upholding, preservation and promulgation of the Buddha's teachings. The happiness and well being of their subjects depends on "those very places where a Buddha's teachings have spread" (*ibid.*:123). This is a recurring motif that is stressed at various points throughout the *bka khrims* and is encapsulated in the following quotation:

The good religious observances of humans  
Form the basis of holy dharma  
The practice of the dharma together with  
its basis  
Will gain one happiness on happiness.  
(*ibid.*:127)

Fundamental to securing the happiness of their subjects, according to the Tenzin Chosgyal, are the state laws, without which there would be "no point in the Hierarchs of the Drukpa upholding the doctrine of the Dual

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<sup>12</sup> See Uray 1972 and French 1995, 1996.



System" (*ibid.*:131). So although the observation of dharma is the key to happiness, there is by implication a recognition that without the constraints of state law, people will not observe "good religious" practices – which in turn is based on moral discipline reflecting the Ten Virtuous Acts and Sixteen Acts of Pure Conduct. This is a common theme in Buddhist teachings and Shantideva's counsels in the *Way of the Bodhisattva* that virtuous thoughts are brief and transient and he uses the imagery of post-mortem suffering as a means to create enthusiasm for dharma practice.<sup>13</sup> In Bhutan, the post-mortem judgement of the dead is the subject of a major *cham* performed annually at the *tshechu* and stresses the inability to escape the fruition of acts.<sup>14</sup> The development of *driglam namzha* by the Zhabdrung in the 1640s, based on a code of monastic conduct from Chodra monastery, Ralung sought to address these very issues by creating a code of moral behaviour.<sup>15</sup> There is a corollary to the emphasis on happiness in the *bKa' khrims* with the promotion by the Royal Government of Bhutan since the late 1980s of the concept of "Gross National Happiness."

However, whilst Tenzin Chogyal stated that the state or secular laws of the Drukpa regime should be upheld in general for the happiness of the general population, he argues more specifically that laws should be promulgated and enforced "in particular ... for the purpose of upholding, guarding and diffusing the sangha which [abides to] the *vinaya* rules of the Buddha and [forms] the basis of the doctrine." (*ibid.*:139). The *Vinaya* is at the heart of the religious state established by the Zhabdrung. Its maintenance is linked to the diffusion of the Drukpa Kagyu teachings and the presence within in the dzongs established throughout Bhutan of official monk bodies who performed the rituals central to the preservation of the Dual System.

### Theft, Brigandage and Breaking the Vinaya: Signs of Degeneration

In accordance with these words, one must cut off at its roots the karmic effect of deeds while forever striving in virtuous actions. Evil criminals should not be regarded with compassion but retributions [should be visited upon their] bodies and souls [in order that] the future practice [of such deeds] be eliminated. If, however, on account of shame and pity they are allowed to continue, malevolent people will multiply. (Aris 1986:143)

<sup>13</sup> The verse reads: "As when a flash of lightening rends the night, And in its glare shows all the dark black clouds had hid, Likewise rarely, through the buddhas' power, Virtuous thoughts rise, brief and transient, in the world" (1.5:34) Shantideva 2003 *The Way of the Bodhisattva*

<sup>14</sup> *Raksha Mang cham* appears to be based on chapter 13 of Karma Lingpa's *Bardo Thodrol*, and it seems to be unique, at least in the format of the dance performed in Bhutan, to Bhutan.

<sup>15</sup> *Driglam namzha* has more recently been politicised following the Royal Decree of 1989 re-emphasising it as part of the promotion of a particular vision of Bhutanese tradition and culture under the "One People, One Nation" banner. I examine at greater length the links between the *ge ba cu, mi chos bcu drug* and *driglam namzha* and notions of morality in my doctoral thesis. I intend to revise and present my research in a series of articles.

The law code of Srongtsen Gampo is cited in relation to the Ten Non-Virtuous Actions and specifically to the level of restitution for “taking without being given.” The list of actions a person should avoid mixes up the sixteen rules of pure conduct (*mi chos bcu drug*) and the ten virtuous and non-virtuous actions (*dge ba bcu dang mi dge ba bcu*). In language similar to the *Lo rgyus*, Tenzin Choyal states that “to preserve the state laws, in accordance with religion, acts of evil that transgress religion are to be suppressed.” (Aris 1986:131). The opening epigraph is explicit in its terms – wrong doers should not be treated with compassion, rather they should be punished, even executed, to ripen and purify their negative karma. Although this may be read as referring to the negative karma that the individual created through engaging in non-virtuous actions, there is a second level of meaning that needs to be brought out. Namely, if the state and its officials fail to act according to “religion”, they will equally create negative karma for the country and encourage an increase in criminal activity (malevolent people) as a whole.

For theft, various levels of restitution are set out depending on the status of the wronged or aggrieved party. “Hundred fold restitution for stealing religious goods, eighty fold restitution for the king’s goods, with eight fold restitution for the goods of subjects”( *ibid.*). As Aris points out different versions of the level of restitution exist and this may be based on the nine fold restitution set out in the Tibetan text *rTsa ba bzhi'i khrims* which is similarly credited to Srongtsen Gampo (*ibid.*:167). As noted above Tenzin Chogyal emphasises that laws are promulgated to uphold the *vinaya*, therefore it is interesting to note that he stresses the importance of punishing according to the *vinaya* rules monks who have “broken their vows...[by taking] that which is not given”. Failure to do so will cause the “doctrine’s decay” for “when the religious law is discarded the main protector departs to heaven” (*ibid.*:141).

The *bKa Khrims* itself is an uneven document. Theft is not dealt with in a coherent section, rather there are a variety of references to theft which need to be extracted and woven together. After setting out the table of restitution for the thefts of religious goods, those of the king and so forth, there is one final reference to thieves latter in the text. Tenzin Chogyal states that:

There are no penalties for killing a real thief while in the act of theft...furthermore any persons who kills a highwayman, robber, thief or deceitful liar...should be rewarded appropriately” (*ibid.*:161)

Unlike other acts of violence, manslaughter and so forth for which compensation would be payable, no such compensation is due to the family or relatives of a thief killed in the course of committing the crime. The *bKa' khrims* is silent about the role of evidence and corroborative witnesses, yet we know from elsewhere in the law code and other documents that witnesses did play an important role in a variety of legal processes so we



may assume that there would need to be evidence to support the claim that the deceased had indeed been killed “lawfully” when caught “red handed.”

Brigandage is, as in the *Lo rgyus*, mentioned. However, the concern of Tenzin Chosgyal is not only the impact of brigandage as a breach of state laws (as indicated in the quotation above), but the wider implications, the *realpolitik*, if the victims of brigandage are not Bhutanese. His admonitions on the threat of brigandage focus on the failure of state officials, especially on the borders to uphold the state laws, suggest the importance for the Drukpa state of preserving their delicate relations with neighbouring states and their rulers. At this point, the text implicitly stresses very practical political concerns.

#### **Karma: Mi chos bcu drug and dge ba bcu**

The moral dimension of the Buddha’s teachings are presented in the *bKa Khrims* as having been distilled for lay people and claim a legitimacy based on the belief that they originated with the Tibetan king, Srongsten Gampo. The moral dimension has two sets of principles – the first are the sixteen principles for harmonious conduct and the second, the ten virtuous /non-virtuous acts. Although they are mixed up in the *bKa Khrims* they are referred to throughout the text. These two sets of moral principles continue to be widely circulated in Bhutan. The sixteen principles referred to in the *bKa’ khrims* are set out in a contemporary Class IX - X school text entitled *Bhutan Civics* as:

Michoe Tsangma Chudrug<sup>16</sup>

Not to:

- 1: kill, commit theft or robbery
- 2: have wrong faith
- 3: go against the wishes of parents
- 4: be disrespectful to elders, learned men and leaders
- 5: foster evil thoughts towards family and friends
- 6: refrain from helping your neighbours
- 7: be dishonest
- 8: follow bad examples
- 9: be greedy and selfish
- 10: foster evil thoughts in others
- 11: be late in refunding (repaying) your debts
- 12: cheat
- 13: segregate human beings into rich and poor, high and low
- 14: listen to wrong (evil) advice
- 15: be deceitful: and
- 16: lose patience or be short-tempered.

(RBG 1999:51).

<sup>16</sup> *Mi chos tsang ma bcu drug* – literally means “the sixteen principles of pure human conduct”. It is worth noting that the English translation does not adhere to the Dzongkha text which appears beside it. For more on the *Mani bka’ bum* and the dating of this body of literature see M Kapstein (1992).

Underlying the sixteen principles are the ten virtues and their corresponding non-virtues. Even amongst contemporary Bhutanese, including those most scornful of the monastic community and critical of Buddhism, the notion of virtue and non-virtue permeates and informs their perspective on their own and other's actions. The virtues refer to the basic teachings on karma. The ten virtues (*dge ba bcu*), are similarly set out in the school text referred to above. Rather than a simple litany of "do not kill, steal and so forth" they are set out in a little more detail:

The Ten Pious Acts

- 1: to love and be gentle to all living creatures;
  - 2: to take things only with the permission of the owner;
  - 3: refrain from committing adultery;
  - 4: not to tell lies;
  - 5: not to create problems among friends;
  - 6: not to be rude or hurt the feelings of others;
  - 7: not to be jealous or talk wantonly;
  - 8: not to be greedy, or want the belongings of others;
  - 9: not to wish ill luck on others;
  - 10: to have faith in religion.
- (RBG 1999:52)

The school text describes the Zhabdrung as formulating the "first set of laws in our country...codification of laws were completed in 1652....These laws were deeply influenced by the teachings of Buddhism. According to these laws people were required to practice *Michoe Tsangma Chudrug* (sixteen virtuous acts) and *Lhachoe Gyewa Chu* (the ten pious acts)" (1999:50).

The ten virtues appear in a different, but striking presentation, in a second school text. In Textbook Eight (*slob deb brgyad pa*) (RBG 1991), the second chapter is devoted to explaining the ten virtues and ten non-virtues at length.<sup>17</sup> The chapter ends with a series of questions, which re-emphasise the three virtues and non-virtues of the body, the four virtues and non-virtues of speech and the final three associated with the mind. These final three are important for without control over one's mind, there can be no control over the actions of body and speech. Continually, the mental aspect of self-discipline and control appear in the teachings and commentaries of religious teachers.

The teachings on karma and karmic effect stress the importance of mental intention. Jigme Lingpa (1730-98) advises that "the mere failure to commit the ten negative actions, without having a conscious spirit of restraint, is considered indeterminate. Positive behaviour is defined as the mind's conscious intention to reject negative practices and to adopt their opposites" (*Yontan rgya tsho zla ba'i 'od ser* vol:1 283 cited by Kangyur Rinpoche 2001:354). To control oneself and to engage in the ten virtuous actions is "said in the Ratnavali ...to deliver beings from birth in the hells and the realms of pretas and animals" (Kangyur Rinpoche 2001: 61).

<sup>17</sup> The textbook is written in Dzongkha.

Beyond the doctrinal aspect, the importance of the “sixteen principles for harmonious living” and the “ten virtues and non-virtues” lies in the major focus they place on social relations. Whilst monks and religious practitioners were encouraged to distance themselves from society, in general for the laity the social aspects of life are given a more important place. Tenzin Chosgyal recommends that “enquiries should be entered into concerning how in time gone by the wisdom of good counsel caused subjects to adhere to the laws of the Ten Rules of Virtuous Conduct [and how this could also be done] in the future [ such as was done in the past]” (Aris 1986:137). Similarly, the contemporary presentation of the *dge ba cu* is inextricably linked to a wider process of maintaining traditional values in the face of modernisation. The re-emphasis of *driglam namzhag* and the frequent rhetorical invocation of Buddhist norms and values in public statements, newspapers and so forth arguably mirror the same concerns expressed by Tenzin Chosgyal two centuries earlier. The sources cited in the *bKa' khrims* and the particular vision of moral behaviour are still emphasised, as illustrated above, in contemporary Bhutan.

The *bKa Khrims*, although no longer applicable as the law in Bhutan remained influential in shaping legal processes in Bhutan up until the late twentieth century. The worldview presented in the text retains a high degree of resonance for many Bhutanese. The *bKa khrims* provided, and continues to provide, a particular vocabulary that intermingles religious and secular laws. Therefore, whilst dealing in passing with theft and brigandage, the *bKa' khrims* provides important insights in to the underlying vision of the Drukpa state in the early eighteenth century.

One final admonition from the *bKa Khrims* should be noted. In the event of warfare or the defeat of enemies, it is declared to be “a frightful crime if the body, speech and mind supports of the Buddhas should be burnt, wrecked, and smashed, such actions are to be stopped at their inception” (Aris 1986:145). This prohibited any assault on the physical supports of the Buddhist doctrine and I will examine this theme in Part II.

### ***Thrimzhung Chenmo: the Supreme Law Code***

Although Ugyen Wangchuck and Jigme Wangchuk, the first two kings of the Wangchuck dynasty, probably did circulate laws, there are, as yet, no available law codes written in the first half of the twentieth century. Access to archives remains problematic and according to the late Michael Aris many of the day to day administrative documents from this period have been lost through fires and other disasters. However, it does appear that the *bKa' khrims* remained the main law code up until the 1950s.<sup>18</sup>

The 1950s marked a major shift in royal governance in Bhutan. The third king ascended the throne in 1952 and began a wide-ranging series of

<sup>18</sup> Based on interviews conducted during fieldwork, notably with former government officials and the Chief Justice.

political, economic and social reforms that defined his reign and shaped government policies in the late twentieth century. Amongst the main reforms was the creation of the National Assembly in 1953 and over the next five to six years the drafting and promulgation in 1959 of the first modern law code, the *Thrimzhung Chhenmo*. According to the Foreword the new law code was prepared following detailed discussions throughout the kingdom. From these discussions it was decided “that the bad be abandoned and the good kept” (TC n.d: 2).<sup>19</sup> The Foreword is filled with religious allusions and metaphors, as well as setting out the lineage of the third king as heir to the Dual System. Similar forewords appear in latter statutes up until the late 1990s when there is a subtle yet significant shift in legal language.

There are two chapters which are of particular relevance – Chapter Pa (Chapter 13) on Theft, and Chapter Pha (Chapter 14) on Robbery (Acts of violence).<sup>20</sup> Chapter Pa extends to seventeen detailed sections and provides amongst other things a definition of theft, provisions for search, receipt of stolen goods and interference with mail. The definition of theft is “whoever takes any movable property without the knowledge and consent of the owner shall be deemed to have committed a theft.” This definition is only slightly more elaborate than that provided in the *bKa Khrims*. Chapter Pha is shorter with only seven clauses and similarly provides a definition of robbery, theft with the use of force of physical violence, and the use of self-defence. Each chapter states that the accused if convicted of theft or robbery will be imprisoned for between one month and five years depending on the circumstances and value of the crime. If convicted the accused will in addition to serving a period of imprisonment (*btson*) be required to pay a fine (*chad pa*). In an echo of the provisions of the *bKa Khrims*, Pha 6 states that “if in the course of an armed robbery, the victim or any of his companions inflict injuries or cause” the death of the robber “they shall not be liable to punishment.” There is evidence that imprisonment during the 1960s continued to be accompanied by various forms of corporal punishment, for example, the use of shackles and cangues (Piessel 1988).

The *Thrimzhung Chhenmo* has become the ur-text for all subsequent legislation in Bhutan. References to the *Thrimzhung Chhenmo* emphasis its part in a lineage of law texts passed down from the Zhabdrung, and implicitly from earlier Tibetan sources. In particular, it was and is still presented as embodying Buddhist principles and norms.<sup>21</sup> The language used, mirrors to an extent that of the *bKa' khrims* with the religious metaphors in the foreword and the colophon, and the emphasis on the use of fines and imprisonment. There are even echoes of the sterner approach to law enforcement and punishment can be found in Chapter Tha (Chapter Ten). Chapter Tha deals in general with religious buildings – *lha khang* (temple) and so forth. Amongst the provisions dealing with the maintenance

<sup>19</sup> Dzongkha: ngan 'dor bzang dbyungs

<sup>20</sup> The seventeen chapters of the *Thrimzhung Chhenmo* are numbered sequentially 1 to 17 and cross-referenced internally within each chapter and across the chapters by use of the corresponding letter of the Bhutanese (Tibetan) alphabet – i.e. Ka, Kha, Ga, Nya through to Tsa.

<sup>21</sup> See High Court of Justice (no date) Introduction to the Bhutanese Legal System.

of religious sites and so forth are three sections dealing with thefts from religious buildings and sites. The sections are set out in full in Part II. In brief they state any if any person is convicted a second time of desecrating a *lha khang*, *chorten* or other sacred site, that person would be subject to capital punishment.<sup>22</sup> The singling out of this particular crime, *chorten* and *lha khang* robbery, echoes the prohibition set out by Tenzin Chosgyal in the *bKa' khrims* against damaging any representation of the *Ku Sung Thukten*.<sup>23</sup> When read in conjunction with Chapter Tsa (Chapter 17) on treason, one immediately is struck that this is a category of crime that was viewed as separate from mundane acts of theft or robbery, indeed a category that cut to the heart and well-being of the kingdom. I examine this in greater detail in Part II.

### The Land Act (*Sa Yig*) 1979

Generally regarded in Bhutan as one of the least well drafted acts passed by the National Assembly, the Land Act 1979 amended and replaced Chapter Ka of the *Thrimzhung Chenmo*. It is an important act, notwithstanding its flaws, since it deals not only with the process and requirements of land registration, rights of possession, taxation, grazing rights, change of ownership and the division of land but with crops, irrigation and lands donated to religious institutions.

The Land Act 1979 sets out a range of fines and terms of imprisonment for a series of misdemeanours or breaches of the Act. A major concern that informs much of the Act is the illegal appropriation of "government land." One example that reflects the general tenor of the 1979 Act is Section Ka 9-11. This states that all landed property which has become vacant land (i.e. without an owner) belongs to the Bhutanese state. It cannot be cultivated, sold or purchased without the approval of the government. If it is cultivated by anybody then a fine based on the "cost of the land" cultivated will be imposed. If it is bought or sold then both the purchaser and seller will be liable to imprisonment of between three months and three years.

Equally, the Act addresses the common practice of sharecropping. During a visit to Chimi *lhakhang*, Dorji an office worker in Thimphu stopped to speak to a farmer who was winnowing barley. He had been twice before to look for land in the area and met the farmer on a previous visit. The farmer was offering to sell 0.16 acres and claimed it would produce about 700 kg of rice per crop. This was insufficient since the proposal was that Dorji would buy the land, the farmer would cultivate it and the crop would be divided equally between them. Dorji had estimated that he needed a minimum of 960 kg per year for his family alone. A key concern throughout the tentative negotiations was the accuracy of the annual yield figures provided by the farmer. Advice was sought from local officials and friends of friends over

<sup>22</sup> Tibetan/Dzongkha: *lha khang* – temple, *mchod rten* – stupa.

<sup>23</sup> *Ku Sung Thukten* refers to the Body (*sku*), Speech (*gsung*) and Mind (*thugs*) supports (*rten*) of the buddhas.

the credibility and honesty of the farmer. Dorji's concerns are reflected in Chapter 10 of the Land Act.

Ka 10-11 provides that the owner is to be notified by the sharecropper/tenant of when the harvest will take place. According to the following section, Ka10-12, if the owner or a representative is not present at the harvest he or she cannot complain about the share of the harvest provided by the tenant. However, the Act does recognise the risk that the tenant may seek to hide part of the crop, and Ka10 – 23 states that “if the owner can produce evidence to that effect, then such an act will be treated as stealing and a fine will be imposed.”<sup>24</sup> This is the only specific reference to theft (*rkus*) in the Land Act.

#### The Penal Code 2004

Youth briefed on Penal Code<sup>25</sup>

Lawyer Gembo Tashi and Drangpon Rabjam Kinley Namgay from the High Court in Thimphu spent several hours explaining the law of the country, and their rights and duties to a group of 60 unemployed youths on September 10 in Thimphu. The group included parking fee collectors and youths recovering at rehabilitation centres like the Rewa.

“Our young people should be fully aware of the law,” said Drangpon Rabjam Kinley Namgay.

“They should also be aware of the particulars of the crimes and specific provisions of the Code so that they refrain from getting involved in criminal activities.” He explained further that the Penal Code was not just about crime and punishment.

“The Code's major objectives are to reinstate dignity to victims of crime, increase possibilities of rehabilitation of offenders, and reform them,” he said. “The Code should be seen as a measure to decriminalise people and, thus, have a peaceful and safe society for all.”

The young people attending the talk were mainly briefed on common offences like assault ... larceny, auto stripping, pick pocketing, public intoxication, disorderly conduct.

<sup>24</sup> Ka 10 – 23 Dz: de nyid zhing bdag pos ra gsal khungs dag btong rgyu yod na/ de ni rkus pa'i grangs su brtsis pa'i nyes bya phog/ /

<sup>25</sup> Kuenselonline. 16 September 2005. *Youth briefed on Penal Code*.



Since 2002, an interesting development has been taking place within the Bhutanese judiciary. Reflecting a wider appreciation of the need to educate the public at large and an awareness of the increasing complexity of modern Bhutanese law, small workshops and even mini-expeditions to remoter settlements have been held by judges and other legal officials.<sup>26</sup> The newspaper report above describes one such workshop dealing with the Penal Code of Bhutan. The Penal Code 2004 was passed after being subject to various legislative delays. The Chief Justice attended the National Assembly in order to respond to significant number of questions raised by the National Assembly representatives prior to the ratification of the Code.

The Penal Code contains two chapters in the section dealing with offences against property that specifically deal with theft (see Appendix 1). A third chapter in the section dealing with offences against the state and public order replaces the provisions of Chapter Tha of the *Thrimzhung Chennmo* (see Appendix 1). The language of the Penal Code draws heavily on non-Bhutanese legal terminology and reflects, despite attempts to ground it in Bhutanese “legal culture”, the input of foreign legal advisers (mainly in this case from the United States). Of course, this raises various questions over the competing agendas of the visiting advisers and local lawyers, as well as other epistemological problems of translating legal concepts cross-culturally. However, I intend to leave those questions – serious though they are – to one side and briefly comment on the broad features of the three chapters.

Burglary is defined in section 235 in relation to unlawful entry whilst larceny or theft is defined in section 240 as the taking or moving “the property of another person without the owner’s consent and with the intent to deprive the owner of the property or to appropriate the same to the defendant or a third person.” (2004:32). The new definition significantly augments that found in the *Thrimzhung Chennmo* reflecting both the reception of Anglo-American legal norms and language, and changes in Bhutanese society. The seriousness and accordingly the level of fine and length of imprisonment are as in the *Thimszhung Chennmo* based on the value of the object stolen. The chapter covers robbery (use of force), armed robbery, extortion, and possession of stolen goods. It also includes pick pocketing and the very modern offence of “auto-stripping.”

Turning to offences against cultural and religious heritage, it is significant that these crimes are located under the general heading of crimes against the state and public good. Chapter 24 of the Penal Code replaces Tha 1- 9, 1- 11 and 1 – 12 of the *Thrimzhung Chennmo*. The continuing association of crimes against the *Kusungthukten*<sup>27</sup> with attacks on the material and spiritual well-

<sup>26</sup> The District Judge of Chukha, Dasho Lungten Dubgyur, undertook one of the earliest such expeditions in his own district. He and a small party trekked for ten days to remote settlements in order to explain the court process, discuss with villagers their rights under legislation (notably on land) and so forth (interview, August 2004).

<sup>27</sup> Dzongkha/Tibetan: Literally, the Body, Speech and Mind Support. Ku (*sku*) body, Sung (*gsung*) speech, Thuk (*thugs*) mind and *rten* (support). Referred to in the *bKa Khrims* and Penal Code as the *Ten Sum (rten gsum)* or Three Supports.

being of the kingdom links the Penal Code not only with the *Thrimzhung Chenmo*, but also to the *bKa Khrims*. It represents the on-going close identification between upholding and promoting Buddhist values and the contemporary Bhutanese state. Yet, at the same time this is set against the move to formally separate Church and State with the removal of the *Dratshang* representatives in the National Assembly under the provisions of the draft constitution.

## PART II

### Sacred Sites and Sacrilege: "heinous" crimes and their punishment

Pangsho *gonpa*, May 1999

"Let me tell you about one recent *gonpa* (meditation centre) robbery which I know about" said Ngawang refilling the empty cups with thick butter tea. "Pangsho *gonpa* is near Wangduephodrang. Here is one I know directly from the mouth of a survivor. His friend, the caretaker was less fortunate."<sup>28</sup>

"My friend was assisting the caretaker earlier this year at Pangsho *gonpa*. My friend had accompanied the caretaker to the *gonpa* the previous evening and they were about to set out to work in the forest. Like many caretakers, the caretaker only stayed in the *gonpa* during the night and worked elsewhere during the day."

"As they were closing the door of the *gonpa* three men appeared. Now this was very early in the morning but my friend and the caretaker did not think anything was strange. Two of the men were young and the third was older. They recognised my friend and said "Ah! Ap Sonam so you are here just now!" My friend nodded and greeted them. "Can we have some water. We have been walking and are now thirsty" they said to the caretaker. These were men who knew that the spring was behind the *gonpa* up the hill so why they asked at the *gonpa* was odd. However, my friend, Ap Sonam bent down to unlock the padlock at the foot of the *gonpa* door to go in for water for the three men.

"At that moment, one of the three men drew a sword out from his belt and struck Ap Sonam across his face and neck.<sup>29</sup> My friend fell to the ground and lay there for several minutes as if dead. He was aware of shouting and of a great deal of noise. When he tried to raise himself he was unable to do so, and saw his friend running into the forest pursued by two of the men. At first he did not understand. But slowly, he realised that the men were robbing the *gonpa*. The men who had chased the caretaker into the forest returned and fearing for his life he lay still and acted dead. Once he heard the men leaving he knew that he had to move in case they returned.

<sup>28</sup> All names have been changed.

<sup>29</sup> The reference to a sword (*patang*) is to the common practice of carrying large knives used for a variety of purposes.

Dragging himself slowly through the *gonpa* door he was able to lock the door from within. He was very afraid that the robbers would return and break in to the *gonpa* and kill him.

“The robbers did not come back. Or if they did, they failed to break into the *gonpa*. The following day some monks from the monastery retreat centre above the *gonpa* were passing on their way to buy food. Seeing the blood they began calling out “Caretaker, Caretaker”. My friend heard them and was only able to call out once “I am here”. The monks sent for help from the retreat centre and broke their way into the *gonpa* through a high window. Once inside, they found my friend, Ap Sonam, lying on the floor. The blanket he had pulled around him stuck with dried blood to his body. He was very weak from the loss of blood.

“Where is the caretaker? Apa –la, where is the caretaker?” they asked him. Ap Sonam was only able to say he last saw his friend running into the forest. Once the police arrived they searched the forest and found the caretaker’s body in a stream not far from the *gonpa*. These evil men damaged several statutes and a *chorten* (stupa). I cannot remember what else they took, but I think they took *zung* (sacred relics) from the statutes and *chorten* and some *gzi* (semi-precious stones) and precious coral”.

“Speaking with my friend in hospital at Wangduephodrang, I was saddened to hear of the violence some men are willing to use to rob *lha khang*. Local villagers had noticed a taxi parked on the road not far from the *gonpa*. Word was passed to the police who traced the car to an elderly Tibetan man. Ap Sonam identified him and the other two younger men were also caught. During interrogation, the Tibetan confessed to destroying ten *chorten* and robbing four or five *lha khang*. He had no shame! They would kill anyone who might stop them, rather than be caught. This is why they attacked the caretaker and my friend, Ap Sonam. They destroy the *kusungthukten*,<sup>30</sup> they destroy human life. Truly, we live in a degenerate age!”

\* \* \* \*

In an official statement issued in July 1999, 136 *lha khang* (temples) and 1,132 *chorten* (Skt: stupa) had been subject to theft, arson, desecration and their caretakers attacked and murdered.<sup>31</sup> The attacks on *chorten* fall within the category of the five nearly boundless offences (*mtshams med pa dang nye ba lnga*).<sup>32</sup> The theft in December 2000 of the Rangjung Karsapani, a major relic brought to Bhutan by Zhabdrung Ngawang Namgyel when he fled Tibet in

<sup>30</sup> *Kusungthukten* – representations of the body (*sku*), speech (*gsung*) and mind (*thugs*) of a Buddha. Typically, statues, texts and *chorten* representing each aspect respectively. These are referred to as the Three Supports (*rten gsum* or as set out in the Penal Code s351 *Ten Sum*).

<sup>31</sup> Kuensel, “Assembly will not implement capital punishment for desecration of Kusungthuktens” 10/07/1999:18. This section is drawn from an earlier article published in *the Journal of Bhutan Studies*.

<sup>32</sup> The five nearly boundless offences are: 1 abusing one's mother or an arhat; 2 killing a Bodhisattva who has reached a certain stage; 3 killing one's student or teacher; 4 taking away the Sangha's place of assembly; 5 destroying a *chorten*.

1616 once again focussed public attention on these crimes. Reinforcing the contemporary significance of the *chorten* in contemporary Bhutan has been the erection and consecration of several major new *chorten* by the Bhutanese royal family and state. In November 2001 the Je Khenpo, the spiritual head of Bhutan, consecrated a new *chorten* at Sorchen. The *chorten* is a “memorial for all the labourers who lost their lives restoring the heavily landslide-prone Sorchen stretch on the Thimphu – Phuntsholing highway.” The *chorten* is more than a memorial. Following its consecration by the Je Khenpo, it became a “*khanoen* (spiritual deterrent) against future casualties.”<sup>33</sup> Finally, in June 2004 on a small hill at Dochula Pass on the main road leading from Thimphu to the east of the country a large *chorten* surrounded by a mandala of 108 smaller *chortens* was officially consecrated.<sup>34</sup>

The attacks on the *chorten* and *lha khang* were the first issues around which the vocabulary of *thadamtshi* (respect) and notions of morality emerged during fieldwork. However, although these events are not necessarily commonplace, the reactions and statements made by informants are not unusual.<sup>35</sup> Geertz comments that law “rather than a mere technical add-on to a morally (or immorally) finished society is, along with a whole range of other cultural realities...an active part of it” (1983:218). Trubeck writes:

Social order depends in a nontrivial way on a society’s shared “world view”. Those world views are basic notions about human and social relations that give meaning to the lives of society’s members. Ideals about the law – what it is, what it does, why it exists – are part of the world views of any complex society...Law, like other aspects of belief systems, helps define the role of an individual in society and the relations with others that make sense. At the same time that law is a system of belief, it is also a basis of organisation, a part of the structure in which action is embedded (1984:604).

The events described below and the official and popular responses to them illustrate “ideals about the law – what it is, what it does, why it exists.” In the narratives offered by my informants, they looked to the Bhutanese state, as represented by the National Assembly, the Royal Bhutan Police, the judiciary and the Je Khenpo to restore physical, moral and spiritual order.<sup>36</sup>

<sup>33</sup> Kuensel online “*Chorten* build at Sorchen to avert casualties” 14/11/2001.

<sup>34</sup> Entitled the Druk Wangyal *chorten* (meaning the Thunder Dragon King of Power) the new main *chorten* commemorates the recent military action against ULFA and Bodo guerrillas in south-eastern Bhutan. Kuensel 26<sup>th</sup> June 2004:1 “Druk Wangyal *Chhortens*: a tribute and a legacy.”

<sup>35</sup> Dz: *mtha’ dam tshig* – literally meaning “ultimate/highest vow” it refers to the social concept of respect towards elders, parents, superiors, teachers. It arguably has its origins in the term *dam tshig* or vows taken in relation to Buddhist practice. However, it is used in Bhutan to refer to secular relations rather than solely those of spiritual master-disciple. More recently, it has been, as with *driglam namzha*, politicised by official use of the term.

<sup>36</sup> Je Khenpo – is the spiritual head of the country and head of the state sponsored Drukpa Kagyu monastic body.

The narratives reveal an understanding that can be described as “folk knowledge” (Steiner, Bowers, and Sarat 1999), in the sense that law is part of the framework of everyday life. The Bhutanese engaged in the quotidian are not merely reacting to laws and regulations imposed from outside themselves. Through their own lived experiences and daily concerns, they are actively involved in creating law, not in the formal sense of the law emanating from the state or other institutions and agencies, nor the interpretations of the legal forums. Rather, through the dictates of a shared (in a broad sense) morality or common sense which may stand at a point from which the Bhutanese state, its laws, institutions and officials are critiqued, resisted or even reformulated. Commenting on law in the United States, Brigham notes that “laws sometimes infuse American social life with elements that seem not quite natural. The due process guarantees that the criminal goes free if the constable blunders is one” (1996:20). Bhutanese who at times fail to understand or accept the decisions of the judiciary voice similar concerns. The High Court adopted sentencing guidelines for those convicted of attacks on *chorten* and *lha khang*, which highlighted the complex relationship between religion, state law and their negotiation with local and non-local discourses on sentencing, punishment and, in particular, capital punishment.

### **Violating the Sacred: murder, theft and “treason”**

Two incidents in the last ten years shocked many Bhutanese. First, in 1993 was the murder of a lama and his two novices at Chimi *lha khang* by a gang of five young men. They arrived at the *lha khang* and were given food and drink by the elderly lama. When they attacked, they slit the throat of the lama and smashed the skulls of his two novices with axes. However, they were interrupted in the process by screams from below the *lha khang* and fled. The violence of this attack and the ruthlessness of the young men who carried it out were significant. Not only did they accept the hospitality of the lama and his novices, but they were willing to take human life in order to steal the few relics owned by the lama.

The second incident occurred in November 2000 at Punakha *dzong* when one of the most precious relics in Bhutan was found to be missing. The Rangjung Karsapani, “the principal state treasure” is a bone relic kept within a temple in Punakha *dzong* (Aris 1994:27). The Je Khenpo on returning to Punakha for the winter discovered the theft. A few days later the relic was found left outside the temple. The police subsequently arrested and charged a local man, Tsip Sangchung with its theft. It was later revealed that he had attempted to sell the relic to a collector.

Both of these incidents were highly publicised and evoked passionate expressions of opinion. However, less violent or spectacular cases occur on a frequent basis. Most people described the robbers as “poor, ignorant farmers”, “young, bored and greedy men” and “those who do not respect the dharma or the gods”. Tashi Wangyal notes:

many young people resort to petty crime, substance abuse...yet others who are more ambitious resort to desecration of sacred *chortens* and monasteries to profit from the sale of religious artefacts and antiques. This represents human greed at its most depraved form draining away the spirituality that has helped shape traditional Bhutanese values in the people (2001:117).

As suggested by Wangyal, the issues at the core of the National Assembly debates and private discussions concern more than merely a response to criminal activity. The phrases "enemies of the dharma" (*bstan pa'i rudra*) and "anti-nationals" (*ngolop*) appeared in discussions with informants, in the National Assembly debates and in the newspaper reports of the National Assembly sessions. The representative for the Central Monk Body described the perpetrators of these crimes during the 77<sup>th</sup> National Assembly as "people who have neither faith nor the ability to discriminate between good and evil."<sup>37</sup> Therefore, crimes against sacred objects are differentiated in the minds of government officials, monastics and public alike from more mundane acts of theft. Notably during the 1990s, thefts from *lhakhang* and *chorten* were linked to the illicit activities of "anti-nationals."<sup>38</sup>

Access to the relics, especially in *lha khang* is a key issue. Caretakers are usually drawn from the local community and serve for a period of time as caretaker. There have been a number of robberies from *lha khang* where jewels and precious *gzi* (semi-precious stones) and other items have been found to be missing, often replaced with counterfeit pieces. In a recent case, two men from *Isu geog* in Haa were both charged with the theft of six *gzi* from the *goenkhang* (protector shrine) of Paro Rinpung *Dzong*. One of the men, Wangdi aged 33 was the caretaker of the *goenkhang* at the time that a complaint was made to the police by the Paro Rinpung *dratshang* about the loss of one *gzi*. On investigation a further five *gzi* were found to be missing. Twelve former caretakers covering a period stretching as far back as 1979 were then taken in by the police to be questioned.<sup>39</sup> Tales of caretakers making replicas of the objects they intend to steal circulate widely, placing caretakers under suspicion. In turn, as several informants noted, few villagers want to assume the responsibilities of caretaker for fear of being accused of theft.

When discussing the *chorten* and *lha khang* robberies and the desecration caused of sacred sites, a frequent aspect of the concern voiced by the Bhutanese was specifically about the implications of angering the local protective deities. The *bKa Khrims* states that:

When religious law is discarded the main protector departs to heaven.

It is broken to pieces by the exhalations of the demon brothers.

<sup>37</sup> Kuensel, 77<sup>th</sup> *National Assembly Supplement*, September 17<sup>th</sup> 1999:15.

<sup>38</sup> I am currently writing a paper on the notion of treason in Bhutan, which will develop this theme in greater detail, for a conference to be held latter this year.

<sup>39</sup> *Kuensel* "Two men being tried for dzi theft" 03/071999, p. 6.



When the religious customs of humans is discarded the gods decline  
the classes of black devils laugh: Ha ha! (Aris 1986:141).

The everyday presence of these deities reminds us that below the official presentation of Bhutan as a Buddhist state, that there exists in Bhutan at the local level a range of beliefs and practices which are not Buddhist in origin. In addition, it highlights a concern that the local deities, often converted to being protectors of the dharma by religious figures in the past, may renege on their vows and cause harm to both the local community and its inhabitants (including livestock) and to the kingdom. This is not the place to discuss the nature or even the full implications of these fears or beliefs but it does provide us with an insight into why, even under the Penal Code 2004, *chorten* robbery and attacks on the *Ku Sung Thuk-Ten* remain categorised as first degree felonies.

#### **Capital Punishment: Second Strike Rule and the National Assembly**

Section Tha 1 of the *Thrimzhung Chhenmo*, which dealt with the construction and maintenance of *lha khang* and other religious buildings in Bhutan stated that:

Tha 1 – 9 Any person/persons committing an act of theft/robbery of *ku-sung-thukten* from a private or a government owned *lhakhang* or *goenkhang* shall be sentenced to life imprisonment.

Tha 1 – 11 Any person/persons breaking open a *chorten* or an image and removing the *Zung* shall be sentenced to life imprisonment.

Tha 1 – 12 A person who has already been convicted once for committing theft of a *lhakhang* or a *chorten* and repeats the crime again shall be punished with capital punishment.<sup>40</sup>

As explained by the Chief Justice to the National Assembly during a debate on capital punishment, similar mandatory provisions existed for premeditated murder. Continuing, the Chief Justice explained that there was a provision for capital punishment for treason, though noting that it was not mandatory.

The seriousness with which murder, treason and the desecration of sacred sites are viewed by the Bhutanese authorities was subtly, though indirectly, reflected in the amnesty granted by the King in December 1999. Political figures, included Tek Nath Rizal were granted amnesty, however those convicted of *lha khang* or *chorten* robberies and murder were excluded. Furthermore, whilst it would appear that the terms of Section Tha 1- 12 of

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<sup>40</sup> Capital punishment was abolished by royal decree on 20<sup>th</sup> March 2004. See Appendix 2 for the full news report on the abolition.

the *Thimzhung Chhenmo* were unambiguous about the mandatory punishments to be imposed on those found guilty of such acts, judicial sentencing policy differed from the formal statement of the law. Typically, those convicted a second time for the same category of offence, in this case the desecrations of a sacred site/object, were sentenced to life imprisonment. As a result there was a fierce debate during the National Assembly in 1999 over the application of section Tha 1 – 12, the clause setting down the death penalty for those who have convicted a second time for robbing a *lha khang* or *chorten*.

In the case of Goembo, a 40 year old man from near Paro in western Bhutan with several prior convictions involving the desecration and theft of at least three *lha khang* and several *chorten*, Paro District Court did not follow the provisions of Tha 1 – 12. Rather, on passing judgement on Goembo in October 1998, the Court sentenced him to life imprisonment. This judgement was issued jointly by the courts in Paro and Thimphu shortly after the 76<sup>th</sup> National Assembly during which there were calls “for capital punishment to be awarded for criminals who repeated the offence.”<sup>41</sup> The judiciary faced with the task of maintaining and applying the laws came under heavy criticism. In explaining the life sentence passed on Goembo by the courts in Thimphu and Paro, a judiciary official stressed that the “law [does] not exist merely to impart penalties. The judiciary aim[s] to correct and rehabilitate wayward individuals as [a] means to human and social development.”<sup>42</sup>

During the 77<sup>th</sup> National Assembly, the issue of capital punishment was once more raised for discussion. In one of the longest debates of the National Assembly, the representatives (*chimi*) expressed a wide range of views. The representative from the capital, Thimphu, argued that Bhutan’s sacred sites and temples were being “regularly desecrated and robbed by anti-dharma elements within the country and *ngolops* (traitors) from outside.”<sup>43</sup> He argued that “the anti-dharma elements are exploiting a society firmly entrenched in Buddhist values...to deter these criminals and for the overall security of the country those who are caught must be imprisoned for life, and for the more serious cases, capital punishment must be imposed.”<sup>44</sup>

Other representatives supported the call for the implementation of Tha 1 – 12. In words reminiscent to those found in the eighteenth century law code, the *bKa' khrims* (Aris 1986:143) and the debate on capital punishment during the 73<sup>rd</sup> Session of the National Assembly in 1995, the representative for Chukha argued that the increase in the number of robberies was a direct result of the leniency in enforcing the law. Developing this idea the *chimi* argued that, “Life imprisonment involves a long legal wrangle by the end of which the criminal might even escape. Capital punishment will send the right message and put an end to the desecration of monasteries and

<sup>41</sup> Kuensel, Editorial, 10/10/ 1998: 2

<sup>42</sup> Kuensel, 10/10/1998. These sentiments are similar to those in the newspaper report “Youth briefed on Penal Code” 16 September 2005 cited earlier.

<sup>43</sup> Kuensel, “Assembly will not implement capital punishment for the desecration of *Kusungthuktens*”, 10/07/ 1999:18.

<sup>44</sup> *Ibid.*

*chorten*.”<sup>45</sup> The representative for Haa took up the problems of imprisonment arguing that those convicted do not “undergo rigorous imprisonment. They enjoy many facilities and have an easy life in prison.”<sup>46</sup>

The difficulty facing the National Assembly was recognised by the Dujeygang representative who stressed the spiritual damage caused to the country. “As Buddhists, it hurts us to propose the death penalty. But the alternative is the loss of the very essence of our spiritual well being.”<sup>47</sup> The Dujeygang representative echoes feelings expressed in the debate on capital punishment in 1995. At that time, it was noted that “the proliferation of such crimes is due to the punishment awarded for such crimes not being severe enough.”<sup>48</sup> Implicit in the comments made by the representatives is a concern for the damage to the spiritual well being and by extension the material happiness and physical security of the country is at stake echoing the language and metaphors of the *Lo rgyus* and *bKa'khrims*. The Punakha representative argued that “if evil is not suppressed, good will not prosper”<sup>49</sup> which parallels the phrase cited earlier from the *bKa' khrims*, “acts of evil that transgress religion are to be suppressed” (Aris 1986:).

During the ensuing debate on capital punishment, the *Dratshang* representative argued that although the thefts harmed the dharma, that Bhutan “which is steeped in the Buddhist values of compassion should not enact a law that makes the taking of human life mandatory in the administration of justice.”<sup>50</sup> It is worth contrasting this emphasis on “Buddhist compassion” and its relationship to the state laws from the earlier admonition found in the *bKa' khrims* that “Evil criminals should not be regarded with compassion but retributions [should be visited upon their] bodies and souls [in order that] the future practice [of such deeds] be eliminated.” (Aris 1986:).

However, there were fewer voices opposed to the death penalty in the 73<sup>rd</sup> Session of the National Assembly held in 1995 than in during the 77<sup>th</sup> Session in 1999. In the report for the 77<sup>th</sup> Session, it is clear that several representatives stressed that as a Buddhist nation it would be more appropriate to take steps to prevent further robberies and acts of sacrilege than to take the lives of those convicted. Emphasising the wider dimensions of the debate on capital punishment various representatives pointed out that Bhutan was a member of the United Nations and was seeking to uphold human rights. To impose capital punishment would therefore be a counterproductive measure.<sup>51</sup> The representative from Wangduephodrang, near Pangsho *gonpa* argued that often the most vulnerable sites were remote, privately owned rather than those under government care with caretakers.

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<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> 73<sup>rd</sup> National Assembly 10 August – 2 September 1995:p126.

<sup>49</sup> *Ibid.*

<sup>50</sup> 73<sup>rd</sup> National Assembly 10 August – 2 September 1995:p128.

<sup>51</sup> Kuensel, 77<sup>th</sup> National Assembly Supplement, 17/09/1999:15.

Therefore, as suggested by the Trongsa representative more monk caretakers should be appointed to safeguard the *lha khang*.

The representatives from Trashiyangtse and Tobesa both argued that capital punishment was unthinkable in a Buddhist nation. Rather, it was up to the people to “help protect the country’s heritage. In this era of deteriorating values, every citizen must come forward to help guard the country’s priceless possessions.”<sup>52</sup> This stress on the collective responsibility for the safety and maintenance of the *lha khang* and *chorten* was raised by several of my informants who felt that it was an issue that should be tackled by local communities. Many felt that local communities had failed to respond fully to a *Kasho* [edict] issued by the king in 1993 which entrusted the care of *lha khang*, *chorten* and so forth to the local communities.<sup>53</sup>

At the end of the debate the Speaker of the National Assembly, Lyonpo Kinzang Dorji, observed, “members were satisfied with the existing laws of the land although some felt it was not adequately implemented.”<sup>54</sup> In addition, he noted that although no change was being suggested to the existing laws that “representatives of the government, dratshang and the people suggested that it should be enforced more strictly.”<sup>55</sup> The Assembly resolved that the judiciary should “strictly enforce Tha 1- 9” of the *Thrimzhung Chenmo* and “not show any leniency to those found guilty of desecrating *lha khang* and *chorten* and robbery of *kusungthukten*.”<sup>56</sup> Furthermore, “the Royal Bhutan Police must not keep such criminals in the same prison with other convicts.” Instead those convicted under Tha 1 – 9 “must be kept in strict confinement.”<sup>57</sup> It is unclear quite what was meant by this admonition – solitary confinement or simple segregation from other convicted prisoners.

The debate over the death penalty continued to resurface during subsequent sessions of the National Assembly. During the 79<sup>th</sup> National Assembly in 2001 it was unsurprising after the theft of the Rangjung Karsapani that there should be renewed and more insistent calls for the harshest “punishment for these desecrators.”<sup>58</sup> Since 2001, a new detailed Penal Code has been enacted and capital punishment abolished. The debates surrounding the punishment of those convicted of *chorten* robberies highlight the contested nature of law and its interrelationship with Buddhism in contemporary Bhutan. The move from a retributive system of punishment to one that includes a strong emphasis on rehabilitation as set out in the debates is significant. It reflects

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<sup>52</sup> *Ibid.*

<sup>53</sup> The placing of responsibility on local communities is not unusual. During the 1970s, 80s and 90s responsibility for the prevention of forest fires and the potentially punitive penalties to be applied against any individual or community demonstrate the oscillation of the Bhutanese state towards retaining control and thereby responsibility and delegation of control to the communities.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> Kuenselonline “Assembly members express concern over the safety of sacred *nangtens*” 07/07/2001.

new notions of punishment, influenced in part by a re-interpretation of the relationship between social, religious and legal norms and values and their manifestations in contemporary Bhutan. Implicitly, these changes have required a re-interpretation of the Dual System, which continues to be invoked in official statements. This process reflects wider influences on the government, the Bhutanese judiciary and even the world view of ordinary men and women. Human rights, international laws and the reception, primarily through education of young lawyers, of Anglo-American legal concepts are shaping contemporary Bhutanese governance, legal practices and jurisprudence. Yet, simultaneously the Royal Court of Justice has sought to present the Bhutanese legal system as culturally and morally grounded in Buddhism.

#### **Conclusion: Religious and Secular Values in the Twenty First Century**

The draft constitution published on 26th March 2005 states that it will uphold the Dual System. However, the *Dratshang* will no longer have a right to representation in the National Assembly, nor will Buddhism be declared the official religion of Bhutan. Rather, Buddhism is acknowledged as part of the rich cultural heritage of Bhutan. The Dual System established by the Zhabdrung, Ngawang Namgyal, which intermingled religious and secular laws has remained the main vision of the Bhutanese state, even under the monarchy. The separation of religion and state may never be fully achieved in Bhutan; however, the concerns voiced in meetings with the people have revealed the continued importance of Buddhism to popular conceptualisations of the Bhutanese state.

The development of Bhutanese law in recent years has been characterised by the attempt to balance institutional and procedural changes with a particular vision of Bhutanese values and culture. In the early 1990s, the judiciary came under unwelcome scrutiny from outside Bhutan and since then sought to address a range of issues – e.g. the treatment of prisoners, its criminal procedures and to secure its own independence from the Home Ministry. As part of this process, the first formally trained lawyers were sent to be educated outside Bhutan and increasing numbers of western legal advisers worked with their Bhutanese counterparts on a major series of legislative and procedural reforms. One such reform has been touched on in this paper, the Penal Code 2004. The Royal Court of Justice has at the same time been instrumental in maintaining *driglam namzha*, whilst drawing on the *bKa' Khrims* and Buddhist texts to develop a Bhutanese/Buddhist legal vocabulary.

Set against these institutional changes, the issues and reactions to the increasing incidence of *chorten* and *lha khang* thefts provides an interesting nexus to consider the interrelationship between laws on theft, Buddhist norms and Bhutanese society. Punishment is an aspect of all societies, which is directly implicated in the way in which daily life is organised. Implicit throughout the debates and discussions on the desecration of *chorten* and *lha*

*khang* is the concept of karma (*las*). The immense negativity associated with these crimes was treated as so awful that many felt that it was not necessary to execute these criminals. Rather, it would be better for them and for society, to try to rehabilitate them.<sup>59</sup>

The relevance of the discussions and debates around *chorten* robberies, and indeed the significance of these events, demonstrate their importance for enabling people to examine, contemplate and articulate their own interpretation not only of the violence implicit, in real and symbolic terms, in the robberies and murders, but also for formulating their own interaction and use of the legal, whether formal or informal to negotiate their daily lives. By their words and deeds ordinary Bhutanese men and women construct "legal" meanings, actions, practices and institutions. As they express or enact this legal consciousness, through such statements as "the *gyewa cu* are important", and the restoration of vandalised *chorten*, the Bhutanese draw upon and develop the everyday aspect of law by emphasising underlying social values which are embedded in popular local/national understandings of Buddhism. Law, in both its formal sense and its folk sense draws on, upholds and reflects these values. In turn, these form part of the various discursive registers, which express and embody notions of rights, duties and obligation as well as political and social legitimacy. In the study of law and Buddhism, we should not ignore "precisely that dimension of the text and its context which performs the labour of signification and so gives the text its effect" (Goodrich, 1991:252).

## APPENDIX 1

### Selected sections of the Penal Code 2004

#### PART THREE OFFENCES AGAINST PROPERTY

##### Chapter 17

##### Burglary, Trespass and Related Offences

##### Burglary

235. A defendant shall be guilty of the offence of burglary, if the defendant unlawfully enters or remains in a building, an occupied structure, or a separately secures or occupied portion of a building or structure used as an abode, industry, or business with or without force, with the intent to commit a crime therein, unless the building, occupied structure or separately secures or occupied portion of the building or structure is at the time open to the public or the defendant is licensed or privileged to enter or remain.

##### Grading of burglary

236. The offence of burglary shall be a felony of the:

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<sup>59</sup> The importance of rehabilitation of offenders can be seen with the opening of a Juvenile Offenders Rehabilitation Centre in 1997. Although, the young offenders are there due to petty crimes, it reflects a desire to provide help to reintegrate offenders into society. One story told to me emphasised that people can change once they see the damage they have caused and develop regret.



- (a) fourth degree; or
- (b) third degree, if in the course of committing the burglary the defendant purposely, knowingly, or recklessly inflicts or attempts to inflict bodily injury on another person, who is not a participant in the crime; or is armed with explosives or a deadly weapon.<sup>60</sup>

## **Chapter 18**

### **Larceny, Robbery, Armed Robbery and Related Offences**

#### **Larceny**

240. A defendant shall be guilty of the offence of larceny, if the defendant takes or moves the property of another person without the owner's consent and with the intent to deprive the owner of the property or to appropriate the same to the defendant or a third person.

#### **Grading of Larceny**

244. The offence of larceny shall be a value-based sentencing.

#### **Robbery**

245. A defendant shall be guilty of the offence of robbery, if in the course of committing a larceny, the defendant uses or threatens to use force against another person.

#### **Grading of Robbery**

246. The offence of robbery shall be a felony of the:

- (a) fourth degree; or
- (b) third degree, if an aggravated circumstance is present.

#### **Armed Robbery**

247. A defendant shall be guilty of the offence of armed robbery, if in the course of committing a robbery there exists three or more persons.

#### **Grading of Armed Robbery**

248. The offence of armed robbery shall be a felony of the:

- (a) third degree; or
- (b) second degree, if an aggravated circumstance is present.

#### **Theft of services**

257. A defendant shall be guilty of the offence of theft of services, if the defendant intentionally does not pay for a service rendered to the defendant or another person for whom the defendant is legally responsible upon receipt of a bill for the service.

260. In this Penal Code, the term "service" shall include labour, professional services, transportation services, telecommunication services, including

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<sup>60</sup> Section 7 states that life imprisonment shall be awarded "for the offence against *Ku, Sung, Thuk-Ten, or Zung*". Section 8 specifies that a defendant convicted of a first degree felony will serve a minimum sentence of fifteen years and a maximum of life. Section 9: Second degree felony – carries a minimum of nine years and a maximum of fifteen years imprisonment. Section 10: Third degree felony – carries minimum of five years and a maximum of nine years. Section 11: Fourth degree felony carries a minimum of three years and a maximum of five years imprisonment.

cable television, gas, electricity, water, or other public service, accommodations in a hotel, and restaurant service.

#### **Grading of theft of services**

261. The offence of theft of services shall be a value-based sentencing.

### **PART FIVE OFFENCES AGAINST STATE AND PUBLIC ORDER**

#### **Chapter 24**

#### **Offences against cultural and national heritage**

##### **Damage to religious objects**

349. A defendant shall be guilty of the offence of damage to religious objects, if the defendant unlawfully damages, destroys, or excavates any religious object.

##### **Offence against the *Ku, Sung, Thuk-Ten, or Zung***

351. A defendant shall be guilty of the offence against *Ku, Sung, Thuk-Ten, or Zung*, if the defendant:

- (a) removes a *Zung* from a *chorten* or religious statute
- (b) Commits a larceny of *Ku, Sung, Thuk-Ten, or Zung* of antique values from a *lhakhang, dzong, chorten, museum, or dwelling places*; or
- (c) Vandalising any *Ten Sum*.

##### **Grading of offence against *Ku, Sung, Thuk-Ten, or Zung***

352. The offence against the *Ku, Sung, Thuk-Ten, or Zung* shall be a felony of the first degree.

## **APPENDIX 2**

### **Capital punishment abolished in Bhutan**

Thimphu : 27 March 2004 - His Majesty the King, in a kasho (royal decree) issued on March 20, the 30th day of the 1st Bhutanese month, abolished capital punishment in the kingdom of Bhutan.

The historical decree is momentous, reflecting a profound blend of spiritualism and pragmatism. The implications of capital punishment, in Bhutanese law, is seen as a contradiction both from a religious and legal perspective.

Although capital punishment exists as a written law, it is not being invoked. And if the courts do award capital punishment, His Majesty the King has the legal authority to repeal it. Meanwhile, *Bhutan being a Buddhist nation, capital punishment is seen as a contradiction to the basic doctrines of Buddhism.*

These contradictions are seen as a negation of the written law, thereby, rendering it superfluous.

Capital punishment has existed in Bhutanese law since the codification of the Thrimzhung Chhenmo (supreme law) in 1953 and *the judiciary has come under criticism, even in the National Assembly, for not invoking the law in the most severe criminal cases.*

The royal decree has significant historical roots because *generations of Bhutanese people have enjoyed peace and prosperity in a unique system of governance that has been founded on the tenets of Buddhism.* It comes at a time when the kingdom of Bhutan is going through phenomenal change facing, what many believe, could be an unpredictable future and is, therefore, a message that Bhutan must continue to draw on the strengths of its ancient traditions and on the wisdom of the ancestors.

As the kingdom nurtures a unique socio-economic and political system, the decree implies that *the essence of government must be the rule of law and that law must reflect the spirituality that characterises the Bhutanese system of governance.*

The royal decree also symbolises the compassion and enlightened vision of a Buddhist Monarch safeguarding the interests of not just the population of one nation but of all sentient beings

(Emphasis added).

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