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### The Legal Cosmology of Buddhist Tibet

Rebecca Redwood French

*University at Buffalo School of Law*

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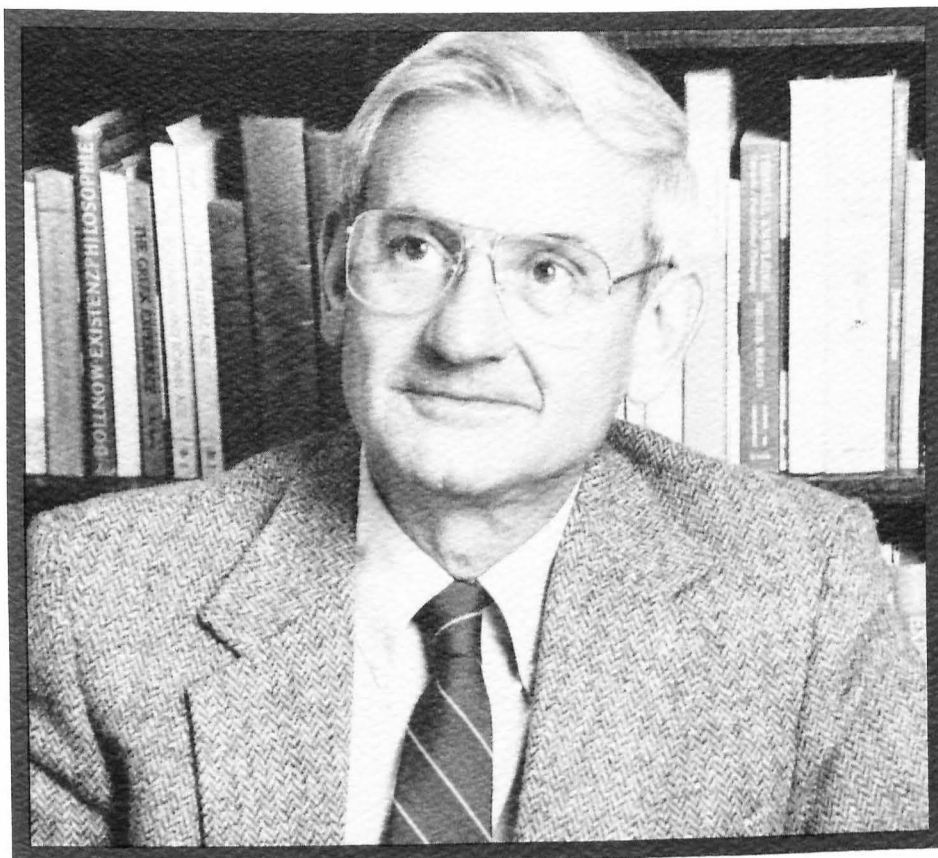
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# THE LEGAL COSMOLOGY OF BUDDHIST TIBET

Rebecca R. French

**F**rom March 3 through March 7, 1994, The Divinity School, the Institute for the Advanced Study of Religion, and the Workshop on Buddhist Intellectual Practice of the University, hosted the Numata Conference on Religion and Law in Southeast Asia. The following is excerpted from a paper delivered on March 4, 1994.\*

In the effort to think anew about the relationship between secular law and Buddhist law, as well as the relationship between traditional and modern concepts of civic religion, I will present secular Tibetan law as it existed during the reign of the Dalai Lamas, a new and engaging topic in Buddhist studies. My first goal will be to discuss briefly the organization and administration of the Tibetan secular legal system, the roles of officials and legal representatives, some jurisprudential concepts and the law codes.

A second focus will be to reorient our understanding of Buddhist law toward a more interpretive and actor-centered framework. I will begin with a legal case, narrated by a Tibetan, which took place in Lhasa in the 1940s and which will be presented in two parts. Each part will be followed by an exegesis of the questions I found myself asking as it was recounted, questions which came from my own presumptions and preconceptions as an American attorney with training in anthropology. Each of the answers to these questions builds part of the cultural backdrop in which this narrator actor operated as a legal actor—his use of myths, relations of power, concepts of time, space and personal identity, the legal rituals, history, religious principles, reasoning patterns, procedures, available roles, symbols—a backdrop which I call Legal Cosmology. It is my view that for each case at law, a participant draws from this Legal Cosmology, these particular shared categories, social practices and concepts, and fore-



grounds them into presentations for a particular set of circumstances.

My third endeavor will be to question the ways in which we are constructing our categories of meaning in this inquiry, in particular the terms “religion,” “Buddhism,” “secular law,” and “religious law.” In attempting to reconsider and understand the modern connotations of these terms, I think that we will find layers of epistemological—indeed, even ontological—assumptions about the nature of our inquiry which will help us to reflect on, and perhaps introduce new questions into, our exegetical and theoretical enterprise.

**I**would like to begin with a story, edited from a verbatim taped transcript of a Tibetan layman who worked

\*The editor is grateful to Peter Gutschalk, Divinity School Ph.D. student in the History of Religions, for editing this article from the original conference manuscript.

as a legal representative in the capital city of Lhasa, in the 1940s. Kungo Tsewang Tamdin had been introduced to me, by the Director of the Tibetan Library in Dharmasala, India, as a very knowledgeable man who had handled cases in the government courts for the Vatican-like state of Sakya, as well as for private clients. The conversations between Kungo Tsewang Tamdin and I spanned several years in the mid 1980s in Dharmasala. Here is a short excerpt:

Every year in the same month, almost a thousand [*Sa skya*] monks traveled west from their home monastery in *Khams* [in eastern Tibet] to *Ngor* monastery in central Tibet to receive teachings from the *Sa skya* [high lamas]. When they came this long distance, they begged food and clothing along the way from the people in the districts.

[Now] one year I learned that a man and his friends had become very angry with [a large group of] monks [for their insistent begging] and after a fight, had killed two of them. This was a very terrible happening and became a well-known event in the entire area.

Now, the person who had killed the monks was a member of the Tibetan army and so the local community [where the incident occurred] sent a petition to the Tibetan Cabinet [in the government in Lhasa]. So the man [who had done the killing] was brought to that office in Lhasa and he was whipped with the "initial whip" by the guards of that office.

Then two women who had known the murdered *Sa skya* monks well and were from their home village [in *Khams* in eastern Tibet] came to see me [at home] and asked that I would go into court for them. I said that I had nothing to appear to the court for. They asked me to appeal to the court for the *sTong* payment. For one ordinary monk, [they said] the payment is 9 *rDo tshad*, so for two monks it was 18 *rDo tshad*. [They said that] if the monks had robbed or fought [prior to the murders], then the amount of the *sTong* payment would be reduced. So, in response to the request of these women, I said that I would petition to the court office for them.

So, I went to the office to the west of the city and found that there were two very important Tibetan officials acting as judges in this case. One was of the Cabinet Minister rank and the other was of the next lower rank. Instead of carrying a written petition with me, I just went to the office and made the request orally. After presenting the entire oral petition, the judges told me they would consider the claim of the women

and said that I should return when [all of the issues of] the case [had been] decided.

Let's stop half way through this simple case. Already, we understand many things about this case, but we understand them through projections about our own legal system which may indeed be *mis-understandings*. In order to approximate what Tsewang Tamdin is representing as he understands it, we need to know a number of things about the Tibetan milieu, as he perceived them, such as: the meaning of the word *sTong*; how the monks and army officers were viewed in the society; when, how and for whom Tsewang Tamdin could intercede; who signs a document and where; what language codes were used in each particular setting, etc. The ways in which actors fashion their own intersubjective meanings and narratives represent the heart of legal practice in this Buddhist society. In the next section we will investigate just what those meanings and understandings were for Tsewang Tamdin, and find perhaps that many of our presumptions are mis-directed.

#### THE CONCEPTS OF THE NATURE OF REALITY AND ILLUSION, THE COSMOS AND TIME

Tsewang Tamdin commented to me several times in reference to this case, that because the Tibetan legal system acknowledged the Buddhist threefold nature of reality, he was prepared for arguments shifting the reality/illusion frame of this incident from the appearance level of reality, the *parikalpita* in Sanskrit, to the relative or *paritantra* level or to the final perfected level of reality, the *parinispanna*. When questioned as to what this meant, he responded that he was poised to find out that the facts as represented were not the real facts, that is, to find out that one or either of the monks were actually tulkus, reincarnations of their predecessors, or high level tantric masters which would have significantly changed their social value. He would not have been surprised to have been told that the army officer was not what he appeared to be, ie., that he had some other religious identity. Arguments might be made that this incident was a karmic necessity to burn off the bad seeds of the monks; it might be rationalized in the context of karma due to some previous relation between the parties. He said that parties had argued that a death was not a death at all but a transmission of life to another being staged as a death. While doubting that these arguments would influence the judges in a murder case, Tibetan legal representatives had to be prepared for several possible reality shifts that foregrounded the Buddhist notion of the illusory nature



*In Tibet, the occupation of the defendant in a murder case determines the venue of the trial.*

of this worldly life and the ultimate reality of perfected vision.

The temporal dimensions of this case also markedly determined our narrator's approaches and responses. Fine distinctions made on the basis of the dates of particular statutory changes, so common in western law, are not strongly at issue here. We are not told in the story how long after the murder the case was reported or how long after that the defendant was in confinement, or even which statute applied because of when it took place.

#### THE MANDALA OF THE LAW INCLUDING INSTITUTIONS, SPACE AND LEGAL UNITS

How did Tsewang Tamdin understand the relationship between the site of the case and the central city courts? What were the spatial and temporal components of these relations? Tsewang related these ideas to me, as many Tibetans had, using the root metaphor for the Tibetan cosmos, a mandala pattern. The Tibetan mandala presents the entire universe and all realms within a single essential plan, representing at one and the same time the consistency of movement in/out and up/down, the cyclical nature of rebirth, reified social and spatial hierarchy, the universalized path of individual mental conscience and the ultimate union of the sacred and the secular in a single cosmic design. The mandala is also the root metaphor for the levels of the legal administration in ever decreasing circles, from the outerlying districts of the plateau, to the district headquarters, to the governors offices, to the Cabinet in the capital city and, ultimately, the central godhead of the Dalai Lama. This form was repeated in Lhasa, for the central administration building which housed the Jo wo, the most famous sacred statue of the Sakyamuni Buddha in Tibet. Thus, mapping the legal system of Tibet in mandala form both integrated law into this pervasive religious schema and legitimized it with a symbol of cosmic integration.

Why were the deaths of these two monks being handled not in ecclesiastical but in governmental courts? Monastic institutions had their own court processes fol-

lowing the Vinaya with appeal available, ultimately, to the Dalai Lama. Murder and a few other serious offenses committed by monks, resulted in their expulsion from the monastic community and their treatment in the secular courts. In Tibet, the occupation of the defendant in a murder case determines the venue of the trial. In this instance, the crime was committed by a member of the Army, so the local people were responsible for reporting the murder to the Cabinet in Lhasa which then assigned it to the Office of the Army. Because the Army held an ambiguous position in Tibetan society with its traditional rejection of war, its offices were located outside of the city and the central mandala of power.

How does the Tibetan secular court system with its multiple levels of court-offices and standardized process of appeal compare to the hierarchical layering of legal institutions in the West? There are few similarities between the two systems. For example, most cases in Tibet could be started at any level including the Cabinet. At each level, there were several different types of procedures and a variety of forums for a plaintiff to approach. Petitioners had to reach consensus with the other party and with the adjudicators in that forum before a suit was joined, or taken up by the forum. Suits could travel up and down in the system, that is, they could go to the local headman, then to the Cabinet in official government procedures, then out to conciliation with a lama, then down to a steward in a regional estate for decision, then back to the Cabinet for closure. But even when the Cabinet accepted a case that the parties had agreed to, the suit did not go forward without their consent and one of the parties could then start proceedings elsewhere. Flexibility, non-decay, overlapping jurisdiction, and consensus to forums and procedures are among the many elements which make the Tibetan legal system dissimilar from our own and which make navigation through its channels so interesting. Crimes of murder, as in this case, were the exception; they were routinely sent up through official channels of the Cabinet in Lhasa for referral out for trial at the appropriate upper level court, in this case the



*Most cases in Tibet...could be continually reopened. Individuals and circumstances were presumed to be radically unique...*

Office of the Army outside the city. However, even in murder cases, the forum could be contested and the court could not proceed without the appearance and participation of all parties to the trial. Tsewang Tamdin mentioned to me if they had refused to recognize his claim to the payments he would have objected to the venue.

#### MORAL NARRATIVES AND MYTHS

What did our narrator see as the relationship between Buddhism and a secular legal system? On the one hand, Tsewang Tamdin presented no clear division between the religious and political realms or between administration and law in his conversations. Indeed, he presented inviolable connections, such as fusion of the Buddha in the form of the Dalai Lama, with the state and the Buddhist religion. Thus, the overarching picture is one of a unified cosmos represented by the mandalic form of a government under the Buddha. On the other hand, he clearly differentiated between the moral law from the Vinaya (which outlined the Buddha's rules and procedures for the monastery) and the law codes of the secular state government (for use in the government courts). Thus, he saw them simultaneously as one and the same, and as entirely distinct.

When I asked Kungo Tamdin about the moral dimensions of this case, he responded in several ways. First, he said, murder was the most important of the Ten Non-Virtuous Acts and particularly consequential to one's karmic position when done in anger, as was the case here. Second, he stated that it was essential to make particular normative arguments in court. In this case, he had to argue that the two female petitioners were aware of the need to beneficially influence the future lives of the dead monks by performing the correct religious rituals and that this was their purpose in obtaining the money. Third, it was presumed that the judge officiating was considering the future life of the defendant when sanctioning. Indeed, in other cases like this one, the amputation of limbs or severing of tendons of the defendant was construed by the judges as the best punishment because it promoted prayer

in this life by eliminating all occupations except that of a prayer-wheel spinning mendicant. Fourth, for Tsewang Tamdin and the other parties to this case, the Buddha stood as an ideal, a constant referential standard in the court for right ways of action.

#### THE JURISPRUDENCE OF THE MIND

When I asked Tsewang Tamdin about the repertoire of concepts he used to frame his arguments in court that first day, he began with the caveat that Tibet had no legal concepts per se, only concepts from the Buddha. That said, he moved on in the course of our interviews to a variety of jurisprudential concepts pertinent in this case, such as the process of factoring by which all acts including murder were assessed with respect to the object, the motivation, the act and the completion of the act. The importance of a mental conscience, particularly one that recognized right conduct and moral self-regulation as the foundation of a moral society, was an essential characteristic to be established for any witness or party, proving that they were not, in the words of the law codes, "acting for their own benefit," that they were speaking honestly, that they were working to reharmonize themselves and the community and that they were acting responsibly for their household or community. A third point in this case was that *citation to precedent* carried no weight in Tibetan courts. Most cases in Tibet, Tsewang Tamdin explained, could be continually reopened, a feature he and others lauded. Individuals and circumstances were presumed to be radically unique, that is, not comparable to other persons or circumstances regardless of how apparently similar they were. Therefore, as a legal representative, he went into court without recourse to layers of previous interpretations. References at trial were made primarily to standards in the law codes and to factoring of the circumstances on the basis of the Buddhist principles.

Feeling more situated within the Tibetan context, let's return to the *Case of the Murdered Monks*. Kungo





*... ritualized procedures and documentary practices were the core of the Tibetan legal system...*

*Yet, they were never written down!*

Tsewang Tamden continues his story:

Then sometime later I was called to the court. The secretary brought the final decision document outside and read it in front of the court waiting room [to all of the participants]. I was then given a notice to come back the day after tomorrow.

On that day, the secretary of the court again read the decision and explained the court costs section and the payment of the *sTong* and all the many other payments required. Then the secretary asked all sides of the dispute to sign the decision document, including the army man/murderer and myself. So, at the bottom of the document, the murderer and I both signed and sealed the document. Then the secretary turned to the murderer and asked him for the *sTong* payment.

He offered it and the secretary took the *sTong* payment from the murderer. From this payment of 18 *rDo tshad*, the [Head] secretary then subtracted the court costs and the ink fees for the [drafting] secretaries and handed the rest to me. There were three copies made of the document and I received one. After that I left, so that I did not find out about the other punishments given to the murderer.

Then I went to see the two women who had asked me to represent them. I gave them all the remaining money and later they used it all for the funeral rites and for other religious rituals for the future lives of the monks. I then took an account from these women of what they had spent and the offerings that they made and sent the receipt for this to their home district. Usually, the *sTong* payment goes to the relatives, but this time the only people who knew the monks and claimed the payments were these two women, so it went to them. That was the end [of it].

Once again, we find ourselves faced with questions which bring us to face our own assumptions.

#### THE RITUALS OF THE GOLDEN YOKE INCLUDING LANGUAGE AND ROLES

What kinds of ritual processes were available in a case like this? There were at least four distinct types of ritualized legal processes in Tibet: (1) visiting an official at home, (2) an official court procedure (which had over forty-four intricate steps), (3) conciliation (which was a distinct area of procedure with its own history and vocabulary) and (4) other less formal rituals such as rolling dice, plunging your hand in hot oil or water, or visiting an oracle and swearing before a deity.

When the two women first visited our narrator, they used the first form of these ritual procedures and saw him at home. The actual trial before the Army court was an official court process (the second form mentioned above) which Tsewang described in only brief detail in this case. These ritualized procedures and documentary practices were the core of the Tibetan legal system throughout all the territories of the plateau. Yet, they were never written down!

What were the roles in the secular legal system and to whom were they available? What did legal representatives have to know to be skilled at their job? The courtroom personnel for an official trial like this consisted of at least two (usually three or more) judges, several clerks, a caretaker to announce the case, and often several helpers. Most offices in Tibet were staffed by at least one monk official and one lay official; in courts, these two officials were the judges. The lay official positions were filled by sons of nobles, sons of clerks for the larger families and sons of private land owners who encouraged their children to get an education. Monk official positions were filled with sons from the elite noble class and non-elite trainees of all social levels who had entered the monastery early and had proven to be particularly smart and skilled. The role of conciliator was available to any individual with wealth, religious devotion or good administration skills. Other less formal rituals—rolling dice, visiting an oracle and swearing before a deity—were arranged by a variety of specialized practitioners.



*Language plays a vital role in the structuring, processing and winning of law suits in Tibet.*

Language plays a vital role in the structuring, processing and winning of law suits in Tibet. Forensic skill was thought by Tibetans to be intimately related to Tibetan Buddhist monastic debate and particularly Buddhist reasoning styles. Many of the important legal representatives in Lhasa were either monks or individuals with some religious training. Because he was not monastically trained, Tsewang Tamdin emphasized the other important legal repertoire—knowledge of the law codes and the use of ancient proverbs and phrases, many of which derived from the ancient law codes.

Why was the murderer signing a final judicial document and proffering money in court? The concept of consent to forums was also applied, in Tibet, to consent to the actual decision made in a case. Tsewang Tamdin stated that as the representative of the community of the victims, he, the murderer and the other parties had to first listen to and then read the complete statement of the facts and the decision of the court. At that point, they were expected to state any objections to the decision which they might have. Then, given their consent and consensus, the parties, even those to a murder trial, were expected to sign the document to indicate their agreement to the final decision. Our narrator saw this process as natural and not requiring an explanation, so I will have to speculate about a few possible reasons for it. First, it insured the penetration of the individual mental conscience of a party, which was the true center of all decision-making and social control in Tibet. Second, for a society with very little sanctioning power, it provided some contractual (rather than penal) assurance that the decision would be followed. Third, it impressed upon the criminal the nature of his crime and the punishments which he would have to accept. The “initial whip” given by the guards when the defendant arrived was thought by Tibetans to be a punishment which impressed upon the criminal the severity of his or her acts and insured the mindfulness necessary to keep him or her from repeating the crime.

#### THE GRAMMAR OF THE LAW

What does this story tell us about the Tibetan law code? During other interviews, Tsewang Tamdin read and discussed sections of the Tibetan law codes with me as did other officials. However, most of my information for this response comes from collecting, compiling, translating and annotating these texts myself with a former Tibetan monk official, Kungo Thubten Sangye.

Two points about the law codes are important to mention at this juncture: the law codes did not contain any legal rules in the strong, formal, command-prescriptive sense that we use that term. It strikes me that it is quite possible that the Tibetan use of “weak rules,” if I may call them that, will be revelatory of how rules, particularly legal rules, work in general. A second point is that their law codes also did not contain any detailed rendering of the four types of ritual legal procedure mentioned above, arguably the most important aspect of Tibetan law. This is an astonishing finding considering our western notions of the centrality and power of legal procedures and law codes. Legal procedure could only be collected in Tibet through individual stories and case studies, not through the law codes.

But how is it, finally, that the two women from the monks’ village, laypeople from an outlying area without a formal education, not only know *about* the *sTong* victim compensation payments listed in the law codes but knew *how much* the payments should be, *who* should receive them and how one should go about *petitioning* for them during a trial? The *sTong* system, one of the most distinguishing features of the law codes, was a nine-part ranking system, by social and economic status, of all of the individuals in Tibetan society from the Dalai Lama, who ranked above the highest of the high, to hermaphrodites and beggars who ranked below the lowest of the low. Once the amount of the *sTong* was determined from the victim’s social level, it became the central figure from which other payments could be calculated, such as the degree of physical injury from the wound. *The Case of the Murdered Monks* demonstrates both the layperson’s



knowledge of the *sTong* system ranking and its actual operation and yet we are left with the question, how is it that the average illiterate layperson had such a detailed knowledge of information contained in the law codes? Tsewang Tamdin's answer was that much of the law codes were generally known because they were compilations of Tibetan customs.

This concludes our exegesis of the case. I would like to shift to a brief consideration of some of the concepts which I have been using for the case analysis to question the epistemological and other assumptions upon which these constructed categories of meaning are based.

Talal Asad in his latest book, *Genealogies of Religion*, posits that terms such as "religion," "ritual" and "secular," as they are currently employed in the literature, have become culture-specific, modern constructs. The liberal humanist principles of the Enlightenment changed the meaning of these constructs by positing a mobile, creative human actor who could actively engage in building a modern secular nation state. Thus, the modern understanding of these terms compresses and encodes several (foundational) assumptions such as the idea of self-constitution and self-choice, the strict division between the religious and secular spheres, autonomy, personal consciousness, agency, teleological narratives, progressive time and modern historicity. Given these encoded assumptions, the contemporary Christian understanding of religious ritual is as a symbolic repetitive act. The pre-modern Christian religious ritual, Asad argues, based on a different ontology and epistemology, was understood as a prescribed set of practices or performances which depended on individual discipline and ability to guide the initiate to the virtuous moral self. Asad's insights are clearly relevant to Buddhist religious ritual. Hence, the Buddhist religion of premodern times must be analyzed without the modern assumptions of protean transformation of self, the fractured world, decentered communities and the creative, individuated, autonomous actor.

A similar concern can be expressed about the modern use of the word "law," which covers a wide panoply of characteristics from generalized social control mechanisms in society, justice, forms of reasoning, fairness and rules, to bureaucratic institutions, professional decision-makers, courts and sanctions. Modern models of legal systems such as Luhmann and Tuebner's autopoiesis theory, which depicts law as a detached system of authoritative regulation with an "essentially self-referential system of communication that is cognitively open and normatively closed," are part of our own modern mythic constructs about the nature of institutions in complex

societies. While these models may be of some value to sociologists and scholars of modern legal systems, they provide very little guidance as to the nature of legal practice in pre-modern Buddhist countries.

How then should we go about understanding what we mean when we ask questions about the movement of "Buddhist law" across South Asia or the reception or development of "secular law" within a Buddhist country like Tibet? How can we avoid using terms that are already loaded with modern meaning? One approach is to begin with cases—circumstances which are temporally and socially contextualized. For example, in response to the question about "secular law" in Buddhist Tibet, it is possible to say that in the 1930s and 1940s, among individuals such as Tsewang Tamdin, the legal system was not separate or in any way in opposition to the worldview of the Buddha except perhaps to the extent that a judge appeared to violate a Buddhist value. Instead, there was the realm of society, wholly interpenetrated by and with the religion of the Buddha, and within this realm were a set of social institutions and practices demarcated as king laws. This area was in consonance with the Vinaya in that it was viewed as being based entirely on the Vinaya and it included Buddhist means of factoring and Buddhist forms of reasoning. But the king's laws were also definitely not "Buddhist law" in that they were not for monks, but for laypeople. They had a different historical development that was not considered part of the Tibetan religious canon. So, in the capital city of Lhasa, there was no real secular sphere, as the term "secular" is understood in modern, western societies.

This then is a single constructed picture of the relationship between the religious and secular legal spheres in Tibet in the 1940s. Building from many such cases, one can form this part of the *Tibetan Legal Cosmology*. How then does comparison take place? Buddhist law and king's law in pre-modern Tibet do not match the modern distinction between religious law and secular law but it might match quite well constructed cosmologies of law in other pre-modern Buddhist societies. Contrasting richly contextualized pictures, an exercise in comparative positionality, if you will, both allows for a thicker definition and representation of the material that we wish to compare, and presents a possible antidote to the paralyzing effects of a deconstructionist project which tends to relativize and delegitimize the large, comparative questions. □