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Buddhism and Constitutional Practice

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It was once said that the field of Buddhism and law was a 'missing discipline', a gaping hole in the academic study of religion and law in desperate need of scholarly shovel work.[1] Fortunately, this gap has begun to be filled. Yet, the cover has not been spread evenly. Of the many subfields within the study of Buddhism and law that have not received adequate attention, the subfield of Buddhism and constitutional law stands out as acutely overlooked – a hole within a hole. In the last few decades, there have been no more than a handful of studies that engage in a sustained, direct way with the question of how Buddhism informs constitutional practice and how constitutional institutions influence Buddhism.[2] The contributions made in this Special Issue, therefore, are especially important.

The need for studies of Buddhism and constitutional law in Southern Asia is not simply a matter of academic hole-filling. (Academia is, after all, an endlessly holey place.) There are more pragmatic and urgent reasons for such scholarship. In recent years, Buddhism has become increasingly intertwined with constitutional practice, perhaps more so than in any period before. In the last two decades, almost all Buddhist-majority countries in South and Southeast Asia have been involved in projects of constitutional reform and replacement, in which the status of Buddhism has been heavily debated and the role of Buddhist leaders has been prominent. In most of these places, constitution drafters and activists have made efforts to strengthen constitutional prerogatives for Buddhism – some successfully.[3] Combine these

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1. Rebecca R French, 'The Case of the Missing Discipline: Finding Buddhist Legal Studies' (2004) 52 Buffalo Law Review 52.

2. Among them: Yoneo Ishii, *Sangha, State, and Society* (University of Hawai'i Press 1986); Andrew Harding, 'Buddhism, Human Rights and Constitutional Reform in Thailand' (2007) 2 Asian Journal of Comparative Law 1; Richard W Whitecross, 'Buddhism and Constitutions in Bhutan' in Rebecca Redwood French and Mark Nathan (eds), *Buddhism and Law: An Introduction* (CUP 2014) 350; Darius Lee, 'Here There Be Dragons! Buddhist Constitutionalism in the Hidden Land of Bhutan' (2014) 15(1) Australian Journal of Asian Law Article No 2; Benjamin Schonthal, *Buddhism, Politics and the Limits of Law: The Pyrrhic Constitutionalism of Sri Lanka* (CUP 2016); Dian AH Shah, *Constitutions, Religion and Politics in Asia: Indonesia, Malaysia and Sri Lanka* (CUP 2017).

3. Take, for example, the revision of Thailand's constitution. As of two years ago, the Thai constitution (promulgated in 2007) pledged only a commitment to 'patronize and protect' Buddhism while promoting 'the good understanding and harmony' among all religions (art 79). Since April 2017, Thailand's new Constitution has eliminated reference to other religions and given the state strict responsibilities towards the majority faith. Beyond simply recognizing Buddhism special status in Thailand, the new Article 67 obligates the state to 'promote and support the education and dissemination of the *dhammic* principles of Theravada Buddhism', while also adding prohibiting the 'undermining of Buddhism in any form'.

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developments in constitution drafting with emergent cultures of Buddhist-interest litigation and legal activism,[4] and one gets a sense of a growing trend of visibly 'Buddhicized' constitutional cultures in South and Southeast Asia.

If one considers these cultures as a group, one might rightfully ask, 'How should we make sense of this?' Scholars have paradigms for thinking broadly about Islamic constitutionalism and secular constitutionalism. But, to date, scholars have not developed a similar body of literature concerning what could be called 'Buddhist constitutionalism'.[5] What sorts of imperatives, structures, and goals characterize these forms of constitutionalism? While Buddhism is not the only thing that defines the constitutional histories of Myanmar, Thailand, and Sri Lanka,[6] it does play a distinctive role.

To think about this distinctive role, and to join together some of the existing contributions mentioned above, I propose that we think about the intersections of Buddhism and constitutional practice by way of three questions, which can also be asked about religion and constitutional law in other jurisdictions: (1) How is the relationship between religious law and public law conceived?; (2) How is the relationship between religious authority and state-legal authority arranged?; and (3) How is the relationship between Buddhism and other religions imagined?

I. HOW IS THE RELATIONSHIP BETWEEN RELIGIOUS LAW AND PUBLIC LAW CONCEIVED?

In recent decades, comparative law scholars have developed a wide body of literature investigating the relationship between religious law and public law in Christian- and Muslim-majority jurisdictions.[7] To date, no equivalent body of scholarship has developed for Buddhist-majority contexts. For example, there are no scholarly debates within Buddhist legal studies that have a similar scope and depth to debates about *shariah* and public law.[8]

4. Benjamin Schonthal and Tom Ginsburg, 'Setting an Agenda for the Socio-Legal Study of Contemporary Buddhism' (2016) 3(1) Asian Journal of Law and Society 1; Benjamin Schonthal, 'Securing the Sasana through Law: Buddhist Constitutionalism and Buddhist-Interest Litigation in Sri Lanka' (2016) 50(6) Modern Asian Studies 1966.

5. Benjamin Schonthal, 'Formations of Buddhist Constitutionalism in South and Southeast Asia' (2017) 15(3) International Journal of Constitutional Law 2.

6. Indeed, one finds questions in all three cases a number of other influences common to the history of religion and law within southern Asia: influences of (direct and indirect) colonialization, nationalism, populist and elite politics, ideologies of communism and (neo)liberalism, and struggles to 'indigenize' Western legal traditions

7. See eg Brian Tierney, *Religion, Law, and the Growth of Constitutional Thought, 1150-1650* (CUP 1982); Harold J Berman, *Law and Revolution, the Formation of the Western Legal Tradition* (Harvard University Press 1983); Harold J Berman, *Law and Revolution, II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Harvard University Press 2006); Saïd Amir Arjomand, 'Islamic Constitutionalism' (2007) 3 Annual Review of Law and Social Science 115; Nathan J Brown, 'Egypt: Cacophony and Consensus in the Twenty-First Century' in Robert W Hefner (ed), *Shari'a Politics: Islamic Law and Society in the Modern World* (Indiana University Press 2011).

8. In addition to the works cited above, see Anver Emon, 'The Limits of Constitutionalism in the Muslim World: History and Identity in Islamic Law' in Sujit Choudhry (ed), *Constitutional Design for Divided Societies* (OUP 2008) 258; Hussein Agrama, 'Secularism, Sovereignty, Indeterminacy: Is Egypt a Secular

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Buddhism does not have a perfect equivalent to *shariah*. That is, Buddhist texts and authorities do not speak about the Buddha's teaching as though it were a comprehensive code of revealed injunctions, interpreted by a dedicated body of jurists, and incumbent equally upon all followers. Nevertheless, it does have very prominent ideas of law, both as a specific set of ecclesiastical laws to be followed by monks (*vinaya*) and as a general set of natural laws that the Buddha refers to in his teachings (*dhamma*). In fact, the word *dhamma* itself can mean both teaching and law, and in early South Asian textual and epigraphical sources, is also used to refer to the teachings of other groups. In this context, one ought to ask the question: In contemporary Buddhist-majority states, are there debates about *dhamma* and public law that parallel those concerning *shariah* and public law in Muslim-majority settings?

Eugénie Mérieau gives compelling examples of this type of debate in Thailand.[9] In her contribution, she describes how, from the 1960s to the present, Thai jurists argued that Buddhist doctrines of royal duties (*rājadhammā*) and religious kingship (*dhammarāja*) were, if not direct sources of the Thai constitutional law, at least conventions within it. In fact, Mérieau hints at broader trends in these arguments over the last 300 years. These trends amount to a story of decline and revival in the perceived intimacy of *dhamma* and public law: in the era of Palace Laws before the nineteenth century, Thai jurists took for granted the fact that royal decrees were based on the 'science of *dhamma*' (*dhammasattha*);[10] during the constitutional revolutions in the 1930s, this linkage of *dhamma* and public law declined due to the influence of republican thinkers who sought to modernize and secularize Thai law along European lines; since the 1960s, Mérieau shows, the linkage has been revived, with Thai jurists once again favoring strongly Buddhistic interpretations of royal power, administrative authority, and constitutional law.

In Mérieau's story, the fall and rise of what one might call *dhammic* public law is visible linguistically as well as jurisprudentially. *Dhamma* (Thai *tham*) has seen a revival as a core feature of legal language. Or, put a different way, *dhamma* could not be completely evacuated from public law discourse. As Mérieau shows, even Thai republican lawmakers did not sever completely Buddhism's links to public law, integrating, as they did, the term *dhamma* into Thai word for constitution, *rathathamanoon* (literally meaning, the *dhamma* of the *ratha* or state). As the project of *dhammic* public law gained traction in the 1960s and especially in the last three decades, the linguistic traces of *dhamma* have become even more pronounced, culminating in Thai translations of terms like good governance (*thamma-phibun*) and rule of law (*niti-tham*).

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or a Religious State' (2010) 52(3) Comparative Studies in Society and History 495; Clark B Lombardi, 'Constitutional Provisions Making Sharia "A" or "The" Chief Source of Legislation: Where Did They Come From? What Do They Mean? Do They Matter?' (2013) 28(3) American University International Law Review 733; Asifa Quraishi-Landes, 'Islamic Constitutionalism: Not Secular. Not Theocratic. Not Impossible.' (2015) 16 Rutgers Journal of Law and Religion 553.

9. Eugénie Mérieau, 'Buddhist Constitutionalism in Thailand: When *Rājadhammā* Supersedes the Constitution', this Special Issue, 283.

10. On this topic, see eg Chris Baker and Pasuk Phongpaichit (trs), *The Palace Law of Ayutthaya and the Thammasat: Law and Kingship in Siam* (Cornell University Press 2016).

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All of this is striking from the vantage point of Sri Lanka, where the jurisprudence and language of constitutional law have not suggested the idea that Buddhism is a source of public law in quite the same way. Although Buddhism is given a special place in Sri Lanka's constitution, and although monastic laws are validated in civil courts,[11] the technical lexicon of public law is not suffused with religiously resonant words. In Sri Lanka, Sinhala juristic terms such as good governance (*yahapalanaya*) or rights (*ayitivāsikam*) do not have a conspicuously Buddhist etymology. Instead, for most Sinhala speakers, these terms have the neologistic ring of technical back-translations from English terms. In fact, once one asks the question comparatively, one discovers that the language of public law in Sri Lanka appears surprisingly free of *dhammic* undertones, even in places that one would expect them, such as terms for justice (*yuktiya* or *sādhāraṇaya*). This is not to say that there is no overlap in the languages of ancient and modern law in Sri Lanka. (Terms used for constitution (*vyavasthāva*) or courts (*adhikaraṇa*) appear in much older texts, including monastic disciplinary codes such as *vinaya* and *katikavāta*.) Yet, these terms are neither exclusive to, nor especially suggestive of, the Buddha's teachings. Rather, they are endemic to a variety of legal traditions in ancient Southern Asia, and when used in the context of modern public law, have no religious associations.

One cannot attribute the absence of Buddhist terminology in Sri Lankan public law to the absence of *dhammic* or Buddhist jurisprudence. (Sri Lanka's colonial history and tri-lingual legal context have probably played a larger role in limiting the importation of Buddhist loan words into the vocabularies of public and administrative law.[12]) Nevertheless, when one compares Mérieau's portrait of Thailand with that of Sri Lanka, one sees that jurists, campaigners, and politicians have approached the project of Buddhicizing law in differing ways in each place. If Thai jurists have blended *dhamma* and public law at the level of elite legal theorizing, Sri Lankan campaigners seem to have done so far more at the level of political speeches and street protests – or, at least, according to the standard histories of Buddhism and politics that scholars have to go by. In these standard accounts, the nexus of religious and public law lies in the rhetoric of politicians (eg SWRD Bandaranaike or JR Jayawardene[13]), the activities of Buddhist groups (the JHU or Bodu Bala Sena[14]), and the legal activism apparent in

11. Benjamin Schonthal, 'The Legal Regulation of Buddhism in Contemporary Sri Lanka' in Rebecca French and Mark Nathan (eds), *Buddhism and Law: An Introduction* (CUP 2014); Janaka Ashin and Kate Crosby, 'Heresy and Monastic Malpractice in the Buddhist Court Cases (Vinicchaya) of Modern Burma (Myanmar)' (2017) 18(1) Contemporary Buddhism 199.

12. It must be recalled, as well, that constitutional law in these settings was not introduced as a replacement to royal law but to colonial laws, meaning that at the time of their inception, the links with dhammarāja ideals had already been broken.

13. See eg Donald Eugene Smith, *Religion and Politics in Burma* (Princeton University Press 1965, pbk repr 2015); Steven Kemper, *The Presence of the Past: Chronicles, Politics, and Culture in Sinhala Life* (Cornell University Press 1991); Josine van der Horst, *Who Is He, What Is He Doing: Religious Rhetoric and Performances in Sri Lanka during R. Premadasa's Presidency (1989-1993)* (VU University Press 1995); James Manor, *The Expedient Utopian: Bandaranaike and Ceylon* (CUP 2009).

14. Mahinda Deegalle, 'Politics of the Jathika Hela Urumaya Monks: Buddhism and Ethnicity in Contemporary Sri Lanka' (2004) 5(2) Contemporary Buddhism 83; Benjamin Schonthal and Matthew J Walton, 'The (New) Buddhist Nationalisms? Symmetries and Specificities in Sri Lanka and Myanmar' (2016) 17(1) Contemporary Buddhism 81.

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Buddhist-interest litigation.[15] In this respect, Mérieau's article offers an exciting avenue for exploration in Sri Lanka and Myanmar: What are the important examples of *dhammic* legal theorizing – or Buddhist jurisprudence – in those places?[16]

II. HOW IS THE RELATIONSHIP BETWEEN RELIGIOUS AUTHORITY AND STATE-LEGAL AUTHORITY CONCEIVED?

The relationship between Buddhism and constitutional practice plays out not just on a discursive level, but on an institutional level as well. Where the discursive relationship has developed by way of efforts to join Buddhist ideas with public law concepts, the institutional relationship has developed by way of efforts to manage (or avoid) conflicts between two groups of authorities that claim to act on behalf of Buddhism: state-legal authorities – including prime ministers, presidents, jurists, and (in the case of Thailand) monarchs – and Buddhist monks. Although conflicts between political and monastic authorities have a long history in the Buddhist world,[17] these conflicts have taken a particularly pointed form in the context of contemporary constitutional governance.[18]

Most constitutions in Southern Asia mandate that governments support Buddhism. Yet, traditionally, it is the monks, not governments, that are imagined to be the direct guardians and embodiments of the Buddha's teachings. So, how should governments interpret these constitutional mandates? How are state officials supposed to protect something over which Buddhist monks are supposed to have primary authority? This question is complicated even further by the fact that, in most of the Buddhist world, monks are not organized in a single, perfectly centralized and hierarchized ecclesiastical institution. So, in enacting constitutional duties to protect Buddhism, governments must wrestle both with a relative lack of religious credibility (in most contexts, they are not monks themselves) *and* with the lack of a perfect surrogate (eg a Buddhist Pope) who might exercise those constitutional duties on their behalf.

This conundrum of Buddhist authority provides an interesting point of comparison with constitutional practice in other parts of the world, one which Nyi Nyi Kyaw casts light on.[19] For Nyi Nyi Kyaw, the depth of this dilemma stems from an act of infelicitous constitutional borrowing. More precisely, it comes from attempts to take foreign models of church-state relations and apply them to Buddhist-majority contexts. In the case of Myanmar, this happens by way of an attempt to borrow Irish constitutional prerogatives for Catholicism as the model for newly-independent

15. Schonthal, 'Securing the Sasana through Law' (n 4).

16. One study that takes some steps in this direction for the study of Myanmar is Nick Cheesman, *Opposing the Rule of Law* (CUP 2015) 28–36.

17. Stanley Jeyaraja Tambiah, *World Conqueror and World Renouncer: A Study of Buddhism and Polity in Thailand against a Historical Background* (CUP 1976); RALH Gunawardena, *Robe and Plough: Monasticism and Economic Interest in Early Medieval Sri Lanka* (Arizona University Press 1979); Ian Harris (ed), *Buddhism and Politics in Twentieth-Century Asia* (Continuum 1999).

18. Schonthal, 'Formations of Buddhist Constitutionalism' (n 5) 714–15.

19. Nyi Nyi Kyaw, 'Religion of the State or Religion of the Nation? Religion and Textual and Contextual Constitutionalism in Buddhist Myanmar' (Religion and Constitutional Practices in Asia Conference, Colombo, 9-10 November 2017).

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Burma's constitutional prerogatives for Buddhism. In the context of this specific legal transplant, he asks the question: *To what, exactly*, were legal draftspersons giving a 'special position'? In other words, what does it mean to replace a tightly centralized and hierarchical institution ('the Catholic Church') with an abstract collective noun 'Buddhism'? Does this mean that constitutional protections for Buddhism in Southern Asia are something like the Concordats in which there is no equivalent of the Holy See?

When one proceeds from this line of questioning, one sees that the texts of ratified constitutions provide few answers. This is because, in most cases, the final language of written constitutions emerges not from a history of trying to clarify and solve these challenging questions, but from attempts to avoid them. The constitutional status of Buddhism in Myanmar, Sri Lanka, and Thailand (perhaps with the exception of the 2017 draft) remains purposively laconic, suggesting neither the priority of state over *sangha* nor that of the *sangha* over state. This is no coincidence. Rather, it reflects the intractability, in all three jurisdictions, of questions over whether monks or rulers ought to have the final say over Buddhist affairs.[20]

To answer the questions Nyi Nyi Kyaw poses, one must look not to the written constitutions themselves, but to (what might be called) constitutional statutes – sets of foundational, basic laws that structure the relationship between monks and rulers. In Thailand, one has the *Sangha Act* of 1962 (amended in 1991 and 2017); in Myanmar, there is the *Laws Relating to the Sangha Organisation* of 1990;[21] and in Sri Lanka, the *Buddhist Temporalities Act* of 1931 (amended in 1992 and 2013). It is in these laws, and similar ones in Cambodia and Laos, that one finds what one could call the *constitutional* organization of (Buddhist) 'church and state' in South and Southeast Asia.[22]

Although they are located outside of written constitutions *per se*, these statutory *grundnorm*-s (and their interpretations) provide the context against which one must understand written constitutional protections for Buddhism. So, if they are like Concordats, they are agreements between rulers and clerics in which the clerics are to be formally recognized (or appointed) by the rulers. In this way, then, the 'Buddhist Concordats' of Southern Asia remain more contrived and less workable than those of Europe because it is the government that ultimately controls what does and does not count as the 'Buddhist Church', and who is or is not the equivalent of a 'Buddhist Pope'.[23]

20. Schonthal, *Buddhism, Politics and the Limits of Law* (n 2) chs 4 and 6.

21. Tin Maung Maung Than, 'The "Sangha" and "Sasana" in Socialist Burma' (1988) 3(1) Sojourn: Journal of Social Issues in Southeast Asia 26; Tin Maung Maung Than, 'Sangha Reforms and the Renewal of Sasana in Myanmar' in Trevor Ling (ed), *Buddhist Trends in Southeast Asia* (Institute of Southeast Asian Studies 1993); Keiko Tosa, 'The Sangha and Political Acts: Secularization in a Theravada Buddhist Society' (2017) 44 (3-4) Internationales Asienforum 271.

22. For example, if one looks historically at the development of the Sangha Acts in Thailand over the last 100 years – from the royally promulgated versions to most recent ones – one sees gradual attempts on the part of the government to order, centralize, and control the monastic hierarchy of the country. Using these Acts, Thai governments have tried to manufacture a Buddhist Pope in the form of a national 'sangha king' (Pali sangharāja) who, in principle if not always in practice, can speak as the paramount authority for Buddhism.

23. For an amazing account of this fact in colonial Burma, see Alexey Kirichenko, 'The Thathanabaing Project: Monastic Hierarchies and Colonialism in Burma' in Thomas Borchert (ed), *Theravada Buddhism in Colonial Contexts* (Routledge 2018) ch 8.

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III. HOW IS THE RELATIONSHIP BETWEEN BUDDHISM AND OTHER RELIGIONS CONCEIVED?

The above discussion reveals something else about the links between Buddhism and constitutional practice in Southern Asia, to which Gehan Gunatilleke gives incisive expression in his contribution: Buddhist monks are not *normal* citizens or agents of law; they are exceptional in many senses.[24] Within legal regimes that give special status to Buddhism, Buddhist monks can make unique claims to authority, influence, and in some cases, impunity. Gunatilleke, following the work of Ayesha Zuhair, names this fact 'monastic exceptionalism', although he traces its roots to social norms rather than legal provisions. He is, of course, correct in so doing, and his interventions point to an important consideration, which Nyi Nyi Kyaw also suggests: the uniqueness of monks as legal agents comes not just from their unique status in written laws, but also from their privileged status in society-at-large. In other words, when it comes to the articulations of Buddhism and constitutional practice, social norms and legal norms are intertwined.

The exceptionalism of monks as agents and objects of law, raises another set of questions about the status (or exceptionalism) of Buddhism and Buddhists *vis-à-vis* other religious traditions and groups: In the same way that Buddhist monks are exceptional as agents of law, is *Buddhism* also exceptional as an object of law?

Underlying this question is a third dilemma embedded in the history of Buddhism and constitutional practice in Southern Asia. When it comes to religion, the modern constitutional regimes of Thailand, Myanmar, and Sri Lanka are viewed through at least two legal imaginaries. One legal imaginary is that of the liberal constitutional tradition, which presents constitutional law as a contract between citizens and governments, and which promises to citizens things such as freedoms, rights and equality. The other legal imaginary is drawn from what might be called *sāsana* histories, ie traditional Buddhist narratives recounting the dissemination and transmission of the Buddha's teachings over time.[25] In this second legal imaginary, modern constitutional states stand as the latest iterations in a centuries-long tradition of royal polities in which Buddhism is (or should be) specially protected. All three contributions gesture at the influence of this second tradition: Mérieau's work points to the official time of Thailand's constitution being Buddhist Era – the years calculated from the passing-away-*cum*-ultimate-awakening (*parinibbāna*) of the Buddha. Gunatilleke and Nyi Nyi Kyaw's articles point to the importance of Buddhist royal chronicles in the popular imagination and education.[26]

24. Gehan Gunatilleke, 'The Constitutional Practice of Ethno-Religious Violence in Sri Lanka', this Special Issue, 377–379.

25. Here I have in mind the genre of Buddhist literature called lineage texts (*vamsa*-s). See eg Jonathan S Walters, 'Buddhist History: The Sri Lankan Pāli Vamsas and Their Commentary' in Ronald B Inden et al (eds), *Querying the Medieval: Texts and the History of Practices in South Asia* (Oxford University Press 2000) 90.

26. For a recent example of the use of *sāsana* histories in Myanmar see Matthew J Walton, 'Religion and Violence in Myanmar' *Foreign Affairs* (New York, 6 November 2017), <www.foreignaffairs.com/articles/burma-myanmar/2017-11-06/religion-and-violence-myanmar> accessed 21 April 2018.

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Because constitutional practice in Southern Asia shows traces of both legal imaginaries, it treats Buddhism in two largely contradictory ways. On the one hand, constitutions render Buddhism through the lens of liberal constitutional thought, as something that is homologous to other religious traditions – *structurally* similar to Islam or Christianity, even if it is substantively unique. Buddhism in this view is commensurable with other religions as an object of law: like other faiths, it is imagined to consist of a discrete set of beliefs and practices, distinct from the 'secular' worlds of politics, economics, culture, etc.[27]

This view of Buddhism is not shared by the other legal imaginary that dominates the history of Buddhism and constitutional law in the region, one that is drawn from *sāsana* histories. In this imaginary, the Buddha's dispensation differs from other religious traditions not simply in its aesthetics or accouterments, but in its very structure and nature. To use a biological metaphor, the Buddhist tradition is not simply one species in a common genus (called 'religion'); it is another genus entirely. In fact, in lieu of using the word Buddhism, proponents of this viewpoint frequently favor the word *sāsana*. *Sāsana* is a term that appears frequently in Buddhist texts and refers to the total legacy of the Buddha, philosophically, institutionally, textually, and materially – including everything from values, to education, to imagery, to relics, and to temple property.[28] In this approach, *sāsana* is to religion as law is to constitutional law: it is larger and more complex; it is thought to have a much wider footprint in society.

One can see these conflicting views of Buddhism (and its relationship to other religions) in the context of debates over the language of constitutional law. For example, in the late 1970s, drafters of Sri Lanka's constitution insisted that the word *sāsana* be used rather than Buddh*ism* (in Sinhala: *buddha-āgama*) to describe the object of state protection. This, they hoped, would make clear that the majority tradition was different-in-kind from other traditions. They also hoped that this would expand the state's constitutional obligations to the majority tradition beyond the narrow set of things normally associated with 'religion' (eg rituals, beliefs) so as to encompass things like archaeological remains, Bodhi trees, artifacts, and manuscripts. Similar definitional debates have also taken place in Myanmar, where, as Nyi Nyi Kyaw recounts, monastic groups like MaBaTha have insisted on conceptual and legal distinction between *sāsana* and *batha* (rendered as 'religion').

As Gunatilleke and Nyi Nyi Kyaw show, these linguistic debates both reflect and enable conflicts among religious actors. To the extent that Buddhism is to be

27. On religion in the liberal imaginary, see Winnifred F Sullivan, *The Impossibility of Religious Freedom* (Princeton University Press 2005); Saba Mahmood, 'Secularism, Hermeneutics, and Empire: The Politics of Islamic Reformation' (2006) 18(2) Public Culture 323; Noah Salomon, 'The Ruse of Law: Legal Equality and the Problem of Citizenship in Multi-Religious Sudan' in Winnifred Fallers Sullivan, Robert A Yelle and Mateo Taussig-Rubbo (eds), *After Secular Law* (Stanford University Press 2011) 200; Elizabeth Shakman Hurd, *Beyond Religious Freedom* (Princeton University Press 2015).

28. *Sāsana* comes from the verbal root *śas*, meaning to instruct, and which, by extension, comes to stand in for everything that the Buddha instructed. On the *sāsana* and religion contrast see: Kitsiri Malalgoda, 'Concepts and Confrontations: A Case Study of Agama' in Michael Roberts (ed), *Sri Lanka Collective Identities Revisited* (Marga Institute Press 1997) 55; Alicia Marie Turner, *Saving Buddhism: The Impermanence of Religion in Colonial Burma* (University of Hawai'i Press 2014); John Ross Carter, 'A History of "Early Buddhism"' (1997) 13(3) Religious Studies 263.

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distinguished and privileged socially it comes to be distinguished and privileged linguistically, and vice-versa. As both authors show, the story of Buddhist and constitutional practice is a story that can be examined both in bottom-up and top-down terms, revealing equally the imprints of popular social moments and elite legal design.

IV. DEFINING THE STUDY OF BUDDHISM AND CONSTITUTIONAL PRACTICE

The dynamics of religion and constitutional practice that I describe above will have some analogues and resonances in other jurisdictions. One can find in other contexts vaguely similar debates about religious law and public law, religious and state-legal authority, and the status of the majority religion vis-à-vis other traditions. Moreover, it is important to acknowledge that Buddhism is just one, among many, important factors shaping constitutional cultures in Southern Asia. Others include direct and indirect colonialism, nationalism, powerful Left movements, royalty (and its absence), military regimes, and economic liberalization. Equally influential are the networks of legal borrowing that stretch across the region; and some of the jurists who helped shape legal culture in Sri Lanka, Myanmar, and Thailand also helped shape legal cultures in other parts of Asia, Africa, and Europe.[29]

Despite these caveats, I believe it is still possible – and indeed, important – to acknowledge that the intersections of religion and constitutional practice take distinctive forms in Buddhist-majority South and Southeast Asia when compared with other parts of the world. One can begin to close in on this distinctiveness by way of triangulating three types of questions: (1) questions about the intersections between Buddhist law and public law; (2) questions about relationships between the rulers and monks; and (3) questions about the perceived (in)commensurability of Buddhism and other religions.

Asking these questions directs scholars towards some important points of contrast between Buddhist constitutionalism and other religious or secular variants. Debates about the *dhammic* nature of public law in Buddhist-majority settings are different in nature and in scope to the debates about *shariah* and public law that one sees in Muslim-majority contexts. Legal attempts to balance Buddhist monastic authority and state authority have also produced special sets of challenges which are unique from, and perhaps more fraught than, those seen in Europe. Finally, differing legal imaginaries – taken from liberal constitutional traditions and *sāsana* histories – have generated opposing ways of thinking about the similarities of the Buddha's dispensation with other religions.

In asserting the distinctiveness of Buddhism, I do not mean to carve out a sheltered or exclusive niche in scholarship on constitutional law and religion for a small group of

29. Sujit Choudhry, *The Migration of Constitutional Ideas* (CUP 2006); Harshan Kumarasingham, *Constitution Maker: Selected Writings of Sir Ivor Jennings* (CUP 2014); Iza Hussin, 'Circulations of Law: Cosmopolitan Elites, Global Repertoires, Local Vernaculars' (2014) 32(4) Law and History Review 773.

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specialists. My intent is precisely the opposite: by starting to name the distinctive features of religion and constitutional practice in Buddhist-majority settings, I hope to integrate these jurisdictions more fully in ongoing discussions about religion and constitutional law. This is a jurist's trick (with its origins, perhaps appropriately, in Canon law): by highlighting a set of special features, I want to give to 'Buddhism and constitutional practice' an air of intellectual *personhood*, which, like its legal counterpart, will hopefully lend an aura of solidity and coherence (and therefore comparability) to a set of behaviours, debates, institutions, and ideals that have, to date, been underrepresented, if not missing altogether, in conversations on religion and comparative constitutional law.

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