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978-0-521-51579-5 - Buddhism and Law: An Introduction

Edited by Rebecca Redwood French and Mark A. Nathan

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## *Introducing Buddhism and Law*

*Rebecca Redwood French and Mark A. Nathan*

Some edited volumes are self-explanatory and others need a substantial introduction to the material; the latter is the case with this volume. While the title is intriguing, many readers will need a guidebook to explain much of what they are encountering here. And it is well worth the effort as the material is some of the most exciting and unorthodox both on legal systems and in Buddhist Studies. Therefore, the task of this introduction to the volume is to provide readers with a road map to define the object of study, and to offer ways to think about the field of Buddhism and Law.

This introduction is divided into three main sections: Buddhism, Law, and Buddhism and Law. The first, Buddhism, presents a brief account of the life of the Buddha before turning to an examination of *dharma*, a fundamental term in Buddhism that has long been translated as law. A discussion of Buddhist monasticism and some of the misconceptions that have surrounded the place of the monastic community in society comes next, followed by a consideration of the *Vinaya*, the canonical Buddhist law codes that have served to regulate the religious life of Buddhist monasteries. Buddhist traditions also possess a wealth of other legal texts and materials, most of which reflect attempts to devise supplementary rules and regulations that fit local conditions, and these are introduced last.

The second section, Law, is intended to show how Buddhism and Law might fit into the legal scholarly world, perhaps the most difficult connection for legal academics and scholars of Buddhism. This section begins with a definition of law that moves beyond a simple denotation of state regulations and permits a more expansive view of legal practices. In this section, three more ideas will be broached. The first is the concept that Buddhism, when viewed as an otherworldly religion, does not seem to have law. The second is a discussion of a strong, centralized state model of law that European and North American scholars might be working from, and the third is the idea of Legal Orientalism. Following this, four areas of legal academics are introduced: Religion and Law, Law and Society,

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Comparative Law, and Legal History. The central question for each of these discussions is how the new field of Buddhism and Law can be integrated into current legal perspectives.

The final section, Buddhism and Law, offers possible ways to think about the scope, distinctive characteristics, and possible directions for the field. Rather than defining Buddhism and Law at this early stage of its development, it offers observations drawn from the volume. The idea is to ask what the characteristics and scope of Buddhism and Law might be. The first observation is that the subject of Buddhism and Law is very diverse, as the papers in the volume demonstrate. Second, there are three geographic areas that are most pronounced in terms of their similarities: South and Southeast Asia, East Asia, and North Asia and the Himalayan region. These resemblances become quite apparent in Parts II, III, and IV. Finally, the broad range of possible future topics for research within Buddhism and Law is delineated.

## Buddhism

### *The Life of the Buddha*

Siddhārtha Gautama was born the son of a ruler in an area that is now southern Nepal and, according to the tradition, was raised in a life of princely luxury. Although the dates of his life are uncertain, a majority of scholars place his birth in the sixth century BCE. As it was foretold that his son was destined to become either a great king or a great religious teacher, it is said that Siddhārtha's father shielded him from any painful elements of life that might lead him along the latter path. However, the sacred biographies say that the prince eventually became curious about the world outside the walls of the palace and, leaving behind his wife and newborn child, studied under a number of teachers and experimented with different forms of ascetic practice that were common in India at the time, including some extreme austerities. Finding none of these methods efficacious, he finally sat down beneath a *pīpal* tree and determined not to move from the spot until he had achieved his goal. In the course of one evening, the canonical texts say he progressed through successive stages of meditative insight before arriving at a perfect understanding of the way things truly are, rather than how they might appear to the unenlightened<sup>1</sup> – that is,

<sup>1</sup> As Don Lopez has noted, “Accounts differ as to precisely what it was that he understood, and, indeed, Buddhist schools throughout history have looked back to this night to claim their particular view of reality to have been discovered by the prince.” Donald S. Lopez, Jr., *The Story of Buddhism* (New York: HarperCollins, 2001), 40.

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an understanding of causality and karma, impermanence and the absence of self, suffering and liberation. The Buddha's awakening that night and his subsequent teachings and discourses based on that experience are both referred to as dharma.<sup>2</sup>

The Buddha's teaching career began a few weeks after that event, we are told, and lasted some forty-five years. Over the course of that time, many people gathered around Śākyamuni, an honorific title meaning "the sage of the Śākyas," and the teachings called "turning the wheel of law" have continued to attract followers for 2,500 years. His first disciples were his five fellow ascetic practitioners. Significantly for the development of Buddhism as a religion and for the purposes of this volume, among those who became followers of the Buddha during his lifetime and thereafter, some left home to join the *saṅgha* (or *saṃgha*), while others remained householders and provided support for those who had "gone forth" into the religious life. At times the word *saṅgha* is used more inclusively to encompass both groups, but most often it refers to a community or an assembly of monks or nuns who, upon full ordination, take a vow to uphold the precepts and rules contained in the Buddhist law codes, which are called *Vinaya*. The basic dynamic at the heart of the link between the *saṅgha* and lay society has long been recognized as a type of reciprocal relationship. Laypeople earn karmic "merit" for themselves or loved ones by donating food, land, or other necessities and gifts to the *saṅgha*, while the monks and nuns serve as teachers of dharma and "fields of merit," especially through their observance of the *Vinaya*.

Buddhism emerged in a particular sociocultural, economic, and political context. In Chapter 1 of this volume, Kumkum Roy examines the archeological and textual evidence for a variety of changes and developments in commerce, agriculture, and politics taking place in northern India around the time of the Buddha. To understand how law developed within Buddhism in the early stages of the religion, Roy asserts, these contexts are important. She draws attention in particular to the increasingly common practice of textual codification during this period for things like grammar, rituals, and social norms. Citing the work of Patrick Olivelle, Roy notes that the Buddhist appropriation of dharma may have influenced the development of the Dharmaśāstras, a genre of Brahmanical literature that codified certain customary practices and became the basis for ancient Hindu

<sup>2</sup> Pāli, *dhamma*. Sanskrit and Pāli are the two classical languages of India in which the "word of the Buddha" (*buddhavacana*) was initially set down in writing. Sanskrit pronunciation of this and other Indian words – with the exception of *saṅgha* – will be used throughout this introduction and in most chapters. The authors in this volume who focus on Buddhism in South or Southeast Asia, where the Pāli-language Buddhist canon was adopted, prefer Pāli.

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law.<sup>3</sup> In turn, these texts and the social norms they expressed exerted influence on Buddhism, particularly the monastic codes. This type of interaction reminds us that the terms like *dharma* and *saṅgha* were not unique to Buddhism alone, but widely shared in religious, ethical, political, and legal discourses at the time of the Buddha.

### *Dharma as Law*

The word *dharma* has a broad range of meanings in the wider Indian social, religious, political, and legal discourses. It can signify the natural order of the universe and society as well as one's duty or ritual obligations within that order.<sup>4</sup> The nineteenth-century founders of Buddhist studies in Europe, notably Eugène Burnouf and Brian Hodgson, recognized that the word *dharma* had multiple meanings and was difficult to translate, but they considered "law" an acceptable or even preferred translation.<sup>5</sup> As T.H. Barrett briefly discusses in Chapter 11, the word *dharma* was also translated into Chinese more than a millennium ago as *fa*, one prominent meaning of which is unquestionably law. However, Barrett notes that despite this early choice, over the long term the connection between them becomes less clear. Similarly, as Frank Reynolds points out, "'Law' when it was used as a translation for Dharma, was used with cosmic, philosophical, and/or ethical connotations that were never associated – in any really intrinsic or crucial way – with legal systems or codes."<sup>6</sup> Although the term "Buddhist law" in this volume is used to refer to the monastic law codes, whereas "Buddhism and Law" alludes to the secular legal systems of communities that are Buddhist, it is still worthwhile to consider briefly "law" as *dharma*.

One attribute shared by *dharma* and law may be universality. The law of cause and effect and other central doctrines described as the Buddha's *dharma* can be applied to all people – and all sentient beings, for that

<sup>3</sup> For more on Hindu law, see the previous volume in this series, Timothy Lubin, Donald R. Davis, Jr., and Jayanth K. Krishnan (eds.), *Hinduism and Law: An Introduction* (Cambridge: Cambridge University Press, 2010).

<sup>4</sup> For more on the history and meaning of *dharma*, see the articles in Patrick Olivelle (ed.), *Dharma: Studies in Its Semantic, Cultural, and Religious History*, special issue of the *Journal of Indian Philosophy* 32 (2004). For more on the connection to law, see Robert Lingat and J. Duncan M. Derrett (trans.), *The Classical Law of India* (Berkeley: University of California Press, 1973), 3–17.

<sup>5</sup> See, for instance, Eugène Burnouf, *Introduction à l'histoire du Bouddhisme indien* (Paris: Imprimerie Royale, 1844), 37, n. 1, where he cites the definitions of *dharma* provided by Hodgson, discusses the problems of translating the word, and gives "law" as one of his preferences.

<sup>6</sup> Frank Reynolds, "Buddhism and Law – Preface," *Journal of the International Association of Buddhist Studies* 18.1 (1995), 3.

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matter – at all times. The conditioned nature of all things holds true no matter what a person’s station in life or what beliefs that person may hold. Moreover, dharma also possesses a prescriptive aspect in addition to its descriptive component, or as Rupert Gethin points out in Chapter 3, “The ‘law’ (*dharmā*) is what is right, and our behavior should conform to it.” In other words, the Buddha did not simply describe reality as seen from his enlightened vantage point; he also laid down a number of principles for correct moral and ethical conduct based on his perfect insight and profound wisdom. Karma Lekshe Tsomo in Chapter 19 links the “law” of karma and principle of cause and effect to Buddhist ethical prescriptions, noting some of the factors found in Buddhist commentaries on causality that were influential in Buddhist legal reasoning as well: “the nature of the action, the intention behind action, the agent of the action, the mindset of the agent, the object of the action, the *modus operandi*, and the factors or the circumstances surrounding the event.”

One final way in which dharma enters this discussion of Buddhist law is through Buddhist textual references to a *cakravartin*, a “wheel-turning” king, the Buddhist image of an ideal ruler. While a number of essays in this volume mention the historical example of Aśoka, who lived a century or two after the Buddha in India and is seen by later Buddhist traditions as the personification of a *cakravartin* king, Gethin explores the origins of this concept and its possible connections to law. Like so many other central concepts in Buddhism, this notion of a “wheel-turning” king was common to Brahmanism and Jainism too, but in Buddhist teachings, Gethin tells us, “where *cakravartin* kings are described as conquering and ruling the whole earth not by violence or by the sword, but by righteousness (*dharmā*), the wheel has also the connotation of ‘the wheel of truth’ (*dharmā-cakra*).” In numerous places throughout the Buddhist scriptures, the Buddha is depicted as interacting with contemporary kings, instructing them in dharma and sometimes giving them advice. Although the texts clearly contain scattered views on kingship grounded in Buddhist ethics and virtue, Gethin cautions against reading a Buddhist form of constitutional law into them, as some have done, and concludes that at a minimum, discussions of kingship and the ideal of a *cakravartin* “have been used by Buddhists to reflect on how a king should behave.”

*Buddhist Monasticism*

The relationship between those who leave home to become ordained monks and nuns and those who remain lay householders is central to an

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understanding of Buddhism as it spread throughout much of Asia. The establishment of a functioning and viable monastic community, which inevitably involved the establishment of monasteries and eventually the adoption of a monastic code to regulate the community, was an indispensable part of the transmission of Buddhism into new regions of Asia.<sup>7</sup> This basic distinction is also important for any consideration of Buddhism and Law for two closely connected reasons. The first relates to persistent presumptions about the degree of distance separating these two groups of Buddhist practitioners, while the second concerns the set of rules or precepts that function as a Buddhist law code for individual monks and nuns and for the saṅgha as a communal body or organization.

Although the monastic ideal within Buddhism, as portrayed in some canonical sources, was peripatetic, solitary, and austere, echoing perhaps the paradigmatic story of the Buddha leading up to his awakening, a more sedentary lifestyle clearly became the norm early in the history of the saṅgha involving tight-knit communities of settled religious practitioners. These monasteries in time grew to become quite large and complex institutions, as the example of the famous monastery and university at Nālandā located in the present-day Indian state of Bihar shows. Having been founded a century or so after the start of the Common Era, at its peak between the eighth and twelfth centuries, Nālandā housed several thousand monks (including some from faraway lands like China) and lay students, taught a wide range of subjects, hosted famous Buddhist teachers, and contained numerous buildings and elaborate structures. Equally large, wealthy, and sophisticated monastic institutions could be found playing prominent roles in society and politics wherever Buddhism became established in Asia. Monasteries functioned as corporate institutions that owned property, could engage in commerce and trade, entered into sophisticated financial arrangements, acted as centers of learning for monastic members and laypeople alike, and were regulated by a set of formal rules and punishments. In other words, to function socially as a communal organization, the saṅgha could not avoid interacting with, and having an influence on, the legal culture of the societies in which they became established.

One reason for the perceived disjuncture between saṅgha and society was the false assumption that Buddhist monasticism is marked by otherworldliness and the complete separation from society. The biases that

<sup>7</sup> Charles S. Prebish, "Varying the Vinaya: Creative Responses to Modernity," in Steven Heine and Charles S. Prebish (eds.), *Buddhism in the Modern World: Adaptations of an Ancient Tradition* (Oxford and New York: Oxford University Press, 2003), 45.

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Ruins of the Nālandā Monastic Complex, Bihar, India.

Western observers and generations of Buddhist scholars brought to bear on their conception of Buddhist monasticism, which was almost invariably compared to Christian forms of monasticism, certainly played a role.<sup>8</sup> This has begun to change, however, in the last few decades. Changes in our understanding of Buddhist monasticism were spurred by two important trends in Buddhist studies in recent decades. First, there was a turn away from the normative descriptions found in Buddhist scriptural texts and more focus on the lived tradition as it is practiced in Buddhist monasteries and temples throughout Asia. Many of the preconceptions concerning Buddhist monasticism have come under scrutiny from the 1970s as more anthropologists began to conduct field studies of Buddhist communities in Asia. There is now a greater awareness and sensitivity to the institutional realities of life in a Buddhist monastery, and less criticism of deviations or devaluations from the ideal religious life described in the *sūtras*.

<sup>8</sup> James Robson, "Introduction: 'Neither too far, nor too near': The Historical and Cultural Contexts of Buddhist Monasticism in Medieval China and Japan," in James A. Benn, Lori Meeks, and James Robson (eds.), *Buddhist Monasticism in East Asia: Places of Practice* (New York: Routledge, 2010), 1–3.

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The second trend that has begun to reshape our understanding of Buddhist monasticism is the increased scholarly attention being given to *Vinaya* materials. The *Vinaya* is a set of canonical law texts containing rules, descriptions, case studies, definitions and punishments, and some ancillary material that was used to regulate the saṅgha. The more scholars scrutinize the contents of the *Vinaya*, the more shibboleths previously held by Buddhist Studies scholars concerning the nature of Buddhist monasticism have faltered. Gregory Schopen has been a leading voice in this endeavor, and his body of work demonstrates that there is much the *Vinayas*, together with epigraphic evidence, can teach us about what we can know – and what we still do not know – about Buddhist monasticism in early India. In Chapter 5 of this volume, Schopen takes aim at the textual image of nuns as “hierarchically or ritually subservient to monks,” noting that if this were true, then it “had . . . no bearing on their legal or economic status: for the *Vinaya* nuns had equal legal rights of ownership and economic independence.” Schopen’s use of a variety of *Vinaya* materials to arrive at a more accurate picture of the lives of monks and nuns in ancient India, particularly their economic and legal capacities, has provided a necessary corrective to misperceptions of monastic life in Buddhism.

Just as the prevailing notions of Buddhist monasticism have been built on faulty assumptions about the degree of separation between saṅgha and lay society, so too have perceptions of Buddhism and law rested unsteadily on the incommensurability of monastic law and secular law. The monastic-lay distinction has been interpreted as severely limiting the conclusions that can be drawn about the relationship of Buddhism to law. Some might go so far as to suggest that it precludes even the possibility of studying Buddhism and Law, unless we are talking strictly about the *Vinaya* and the monastic setting. Most scholars of Buddhism recognize that the *Vinaya* is imbued with strongly legal characteristics and would agree that it can certainly be seen as a law code. Nevertheless, because this code and the legal practices or procedures associated with it are portrayed as peripheral to the life of the laity, it is often considered tangential to the wider social ethics and secular legal norms that bear on their daily lives. This perception has allowed Buddhism and Law to be dismissed for the most part by both legal academics engaged in the study of religion and law, as well as by Buddhist Studies scholars.

### *Vinaya as Law*

The *Vinaya* comprises one-third of the Buddhist canon and is the first of the three “baskets” (*piṭika*) to appear, followed by the discourses of the

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Buddha (Sūtra Piṭika) and scholastic treatises or commentarial literature – the “further dharma” (Abhidharma Piṭika). The use of the word *Vinaya* in singular form is quite common, especially when referring to it as part of a singular Buddhist canon, but this usage is merely conventional because, just as there are multiple canons, nearly a dozen *Vinayas* existed at one time. Six of these *Vinayas* have been preserved in a more or less complete form to the present day, and several more have survived only in fragments. Of the six that are extant, three are still in use today by monastic communities in Asia, and for simplicity they can be identified by the language of the Buddhist canon in which they are found: Pāli, Chinese, and Tibetan.<sup>9</sup>

The core of the *Vinaya* lays out rules for monks and nuns to uphold individually and for the order to follow collectively. The tradition credits the Buddha himself with the creation of these rules on a case-by-case basis, but we may never know which (if any) of the rules can actually be traced to the time of the Buddha. The extant *Vinayas* almost certainly went through a sustained period of development before arriving in the written form that we have them today.<sup>10</sup> Nevertheless, Petra Kieffer-Pülz observes in Chapter 2, “Scholars generally conclude that prescriptions preserved in all monastic legal codes had been enacted already at an early time, probably sometime after the demise of the Buddha.” The unresolved issues and problems surrounding the origin, dating, and development of the *Vinayas*, however, should not obscure the significant fact that in every *Vinaya* scholars have examined, the Buddha is depicted as the lawgiver. After hearing accounts from others and thoroughly investigating the “causes and conditions” surrounding a suspected transgression or moral lapse on the part of monks and nuns, the Buddha decided on cases as the highest spiritual and legal authority concerning what is good and true. On that basis, he is said to have created a substantial body of law for the community of monks and nuns, making Buddhist law in this sense quite unique among the major world religions. A process of accommodation or adaptation to the legal, political, and social environments is plainly evident in the

<sup>9</sup> The Pāli canon contains the *Theravāda-vinaya*, which is used in Sri Lanka and most of Southeast Asia. The *Dharmaguptaka-vinaya*, commonly known as the *Four-Part Vinaya*, became authoritative in the Chinese-language canon used throughout East Asia, but a number of *Vinayas* were known, studied, and preserved in Chinese. Lastly, the Tibetan canon has the *Mūlasarvāstivāda-vinaya* as the basis for its monastic law.

<sup>10</sup> Gregory Schopen has argued elsewhere that placing the *Vinayas* in their current form during or close to the Buddha’s life “would mean that Buddhist monasticism had little or no real history or development” and would contradict “what little we actually know about the various vinayas and the history of Buddhist monasticism.” See Gregory Schopen, “Deaths, Funerals, and the Division of Property in a Monastic Code,” in Donald S. Lopez, Jr. (ed.), *Buddhism in Practice* (Princeton, NJ: Princeton University Press, 1995), 475.

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development of *Vinayas*, yet the existence of a complex law code gave the saṅgha sophisticated legal tools necessary to engage with lay society, political systems, and secular law wherever it became established.

All versions of the *Vinaya* have a similar structure. The material is divided into two main parts: the *Sūtravibhaṅga*, which contains the core list of rules called the *Prātimokṣa* that individual monks and nuns vow to uphold on full ordination; and the *Skandhaka*, which lays out the organizational procedures to be followed by the monastic community as a whole. The number of rules in the *Prātimokṣa* range from 219 to 371 depending on the school and gender of the practitioner. Women were initially excluded from joining the saṅgha, we are told, but after several years the Buddha reluctantly agreed to admit them. He did so, however, only after handing down a set of eight rules that appears to establish the subordination of nuns individually and collectively to their brethren, and additional requirements. In her chapter, Tsomo discusses the establishment of a *bhikṣuṇī* saṅgha as portrayed in the canonical texts, and questions the historicity of these eight special rules and more importantly their necessity for nuns today. She spotlights the difficulties that contemporary women have in becoming fully ordained members of the saṅgha in many places, especially where the order of nuns was allowed to die out. The tension that she identifies between, on the one hand, the authority of laws and the weight of tradition and, on the other hand, social justice or gender equality in conformity with changing sociocultural norms is an issue all legal systems must confront.

#### *Other Buddhist Legal Texts*

When Buddhism spread to other parts of Asia, differences in local and regional conditions necessitated additional legal regulations at both the local and state levels. In India local rules were often developed at the level of individual monasteries, and according to Kieffer-Pülz, these additional temple ordinances (*kriyākāra*) were decided on by all members of a particular temple or monastery and promulgated within a single *vihāra* (monastic dwelling). While local temple ordinances in India are known mostly through references to them in canonical sources, examples of the ones used in Sri Lanka, where they are known as *vihāra-katikāvata*, are available in abundance.<sup>11</sup> Closely related legal texts called *sāsana-katikāvata*

<sup>11</sup> Ratnapala states that the word *katikāvata* and the Pāli word *katikāvatta* from which it was derived do not appear in the Pāli canon, but that *katikā*, which has the same meaning, is well attested the