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Commentary:
Law, Buddhism and Social Change:
A Conversation with the 14th Dalai Lama
September 20-21, 2006

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COMMENTARY

**Law, Buddhism, and Social Change:
A Conversation with the 14th Dalai Lama
September 20-21, 2006**

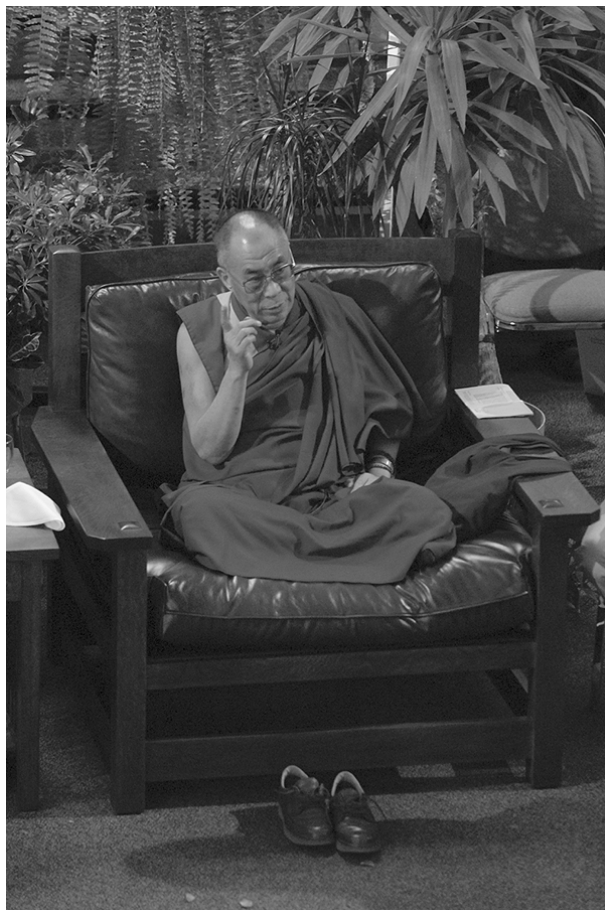


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COMMENTARY

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Photograph taken by Mark Mulville

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An Introduction to the Conference with the Dalai Lama on Law, Buddhism, and Social Change

REBECCA R. FRENCH†

An excited silence moved through the audience in the large open atrium of the Law Library as the Dalai Lama of Tibet slowly entered. This was the first time he had been asked to speak specifically on Law and his first visit to the State University of New York at Buffalo Law School. He stopped along the way to look at display cases filled with Tibetan legal documents,¹ laughed, read parts, and commented with pleasure before turning to greet several people in the audience by bending forward and exchanging white scarves. Once he entered the ring of chairs—a low, mirrored table covered with fresh rose petals had been placed in the center²—he slowly continued around, greeting the twenty conversants with a large smile, holding each person’s hand in both of his hands. I introduced him first to a Buddhist scholar who had been one of his monks, and then to philosophers, legal practitioners, Asian historians, a judge, scholars of American religion, legal anthropologists working in Buddhist societies, law professors, and experts

† Roger and Karen Jones Faculty Scholar and Professor, State University of New York, University at Buffalo Law School. It would have been impossible to have staged this event without the enormous help of Laura Mangan, Kunchok Youdon, Ilene Fleischmann, Jim Milles, Tim Conti, Karen Spencer, Terry McCormack, Martin McGee, Jay Hernandez, John Wild, Karen Drass, Jennifer Howland, the entire staff of the library and the law school who helped create this event, and of course, the financial and political support of Dean Nils Olsen and Lynn Mather, Director of the Baldy Center. The publisher was unable to accommodate all of the necessary Sanskrit and Pali diacritical marks for which we apologize to the authors.

1. This was the work of Karen Spencer, the archive librarian, who spent months arranging for the translation and display of legal documents.

2. The table was an art installment created by the Toronto-based artist Chrysanthe Stathacos, who came forward to greet him with a single white rose. He then placed the white rose on the table.

on Tibetan culture and society. When he completed the circle of sixteen, the exiled leader of the former country of Tibet and leader of the Tibetan-Government-in-Exile settled into a deep comfortable chair, took off his shoes, sat cross-legged and arranged his robes. Dean Nils Olsen got up to greet the Dalai Lama formally, followed by Lynn Mather, the Director of the Baldy Center for Law and Social Policy, and the conversation began.

I. PREPARATION

While the behind-the-scenes planning had taken several years, the year of active preparation for this moment was remarkable for those of us who were unaccustomed to large event planning for a speaker of international importance. For a full year at the University level, monthly and then bi-monthly meetings of thirty or forty administrators, academics and community members took place to iron out (some would say ad nauseum) the parking, security, event timing and organization, museum displays, programming, housing, ticketing, media and financial aspects of the Dalai Lama's three-day visit. At the law school level, the physical arrangement of the chairs in the library, including the placement of his chair, was rehearsed and changed several times; Tibetan documents were translated and put into display cases and also reproduced to serve as giant flags to hang from upper levels; the names, addresses and credentials of every person attending were sent to Homeland Security; lighting and recording specialists were called in; proper etiquette was discussed; postcard brochures with his picture were designed and key locks were changed to increase security. The Office of Tibet in New York, which sent a large contingent to handle the visit at Buffalo, commented that it was the smoothest university visit they had ever experienced.

II. PARTICIPANTS

At the academic end, participants in the Law School Conference began to coordinate almost a year ahead as well. We determined that a wide range of academic disciplines plus practitioners would be a challenge to coordinate, but ultimately broaden, the range of interests

that could be included. Local participants were chosen: a judge named *George Hezel* who also runs the Law School's Affordable Housing Clinic; a well-respected practitioner from downtown Buffalo, *Jim Magavern*, who had served on many city commissions; two young philosophy professors, new to the University, *Ken Ehrenberg* in Philosophy and Law and *Ken Shockley* in Philosophy and Education; and three professors from the Law School: *Betty Mensch*, a reknown expert in the area of Religion and Law, particularly early colonial America and Christian theology; *David Engel*, a specialist in Law and Society known for his work on disabilities, community legal structures and Thailand; and myself, also an anthropologist who has worked on the legal system of Tibet and Buddhist legal systems in general.

During May and the summer months, we met in my living room or on Jim Magavern's commodious front porch. We drank wine or lemonade, ate crackers with cheese and argued points about law, governance, philosophy and Buddhism. Should we bring up abortion? Is the Dalai Lama's idea of compassion really any different from the ideas of Jesus Christ? Readings were circulated, travel arrangements were made and the participants began the process of gathering ideas that could be formulated into questions designed to focus the conversation. It was a process of mutual education, of recognizing a hundred wrong approaches, of figuring out the better questions to ask. All along, we kept the out-of-towners abreast of our latest thoughts and they in turn sent in their responses. Two months beforehand, the list of questions for the Dalai Lama was sent to the Office of Tibet and circulated to the scholars who chose one or more to highlight during the conversation. These questions are set forth in Appendix A.

A few days before the conference, other members began to arrive such as the two historians who came from long distances: *Tim Brook*, head of the Institute of Asian Research and St. John's College at the University of British Columbia who specializes in Chinese History and *Leslie Gunawardana*, a world famous expert in the early history of Buddhist Ceylon and former Vice-Chancellor of Peradeniya University in Sri Lanka. The Buddhist scholars also began to appear: *Frank Reynolds*, emeritus Professor of the History of Religious & Buddhist Studies in the Divinity School and in South Asian Languages & Civilizations at the

University of Chicago; *Vesna Wallace*, a Sanskrit and Pali expert at the University of Santa Barbara who also does annual fieldwork in Mongolia; and *George Dreyfus*, the first Westerner to receive the highest educational degree, the Geshe degree, in Tibetan Buddhism and a Professor of Religion at Williams College.

Our guests were housed with spouses or relatives in the local Marriot Inn, a spot we all suspected was also the secret site for the Tibetan entourage as there were rumors that one entire floor had been rented out. A law student shepherded all of our academic guests from place to place in a mini-van as they attended other activities such as an Interfaith Celebration, the Dalai Lama's public talk in the UB stadium and group dinners.

The last of the conversants to arrive were two legal anthropologists who work in Tibetan-speaking areas, *Fernanda Pirie*, a member of the Research Staff of the Oxford Centre for Socio-Legal Studies who works in Ladakh and *Richard Whitecross*, a Fellow in Social Anthropology at the University of Edinburgh who works in Bhutan, and two others, *Lobsang Shastri*, the Chief Librarian of the Manuscript Department at the Library of Tibetan Works and Archives, Dharamsala, India, who had worked with me during my fieldwork and *Winni Sullivan*, a lawyer and formerly a Dean at the University of Chicago Divinity School who will soon come to the Law School in Buffalo as the Director of the Law and Religion Program; her specialty is modern American law and religion.

III. THE ARTICLES IN THIS COMMENTARY SECTION

This Commentary section has several parts. The first piece, entitled "The Dalai Lama Speaks on Law," is an explanation of some of the key ideas expressed by the Tibetan leader. This piece is meant to clarify and organize his thoughts, to condense and then chronicle his central points. If a text without condensation is desired at this point, you will find a complete edited version of the audio recording of the two-hour conversation in Appendix B.

Following this exegetical exercise are seven delightful short commentaries written by some of the participants on their reactions to, or thoughts after, the Dalai Lama's discussion, presented in alphabetical order. The first piece,

by Ken Ehrenberg, begins by differentiating Non-Ideal models of behavior guidance (admitting the possibility of imperfection and limitations in human actions) from Ideal models (pushing toward the ideal through training and attitude). He then applies this distinction to Law and Buddhism, pointing out the problems that might arise in a secular democratic state that has natural compassion as a substantive universal value.

David Engel, in the next commentary, takes us from American legal philosophy to a city in northwest Thailand where he has been researching for over thirty-two years. Injured parties there find the invocation of rights in a lawsuit to be a moral failure, emphasizing instead karmic explanations, selflessness and forgiveness. This is similar to responses by very religious individuals in the US. However, as he points out, the Dalai Lama's position at the conference was that law should be used by virtuous people to obtain justice through a restrained process consistent with religious practice.

Leslie Gunawardana uses the early history of Buddhist Sri Lanka to turn Engel's ideas on their head. Instead of discovering a complete absence of early lawsuits by Buddhist monks and nuns because of their vows and karma, he suggests that litigation had actually become a serious problem even within the early community of nuns. The negative comments in the Buddhist canon on "lawsuitmakers," the use of monks as judicial decision-makers in royal courts and the increase in cases between laymen and the monastic community are all chronicled. Buddhist commentators in Sri Lanka generally opposed going to court and using penal measures because they result in bad karma but kings who advocated nonviolence were often deposed, a point that Gunawardana brings up in the transcript. Indeed, he argues that recourse to litigation was one of the more effective means for women to protect themselves from marauders in the community.

The fourth paper in this set of commentaries, the one by Jim Magavern, a local practitioner, asks a broad ranging question: what did the Dalai Lama actually say about Law and can we use it in our legal practice? The Dalai Lama definitely advocated for universal compassion as a secular principle. Magavern provides an excellent short review of the ideas of the Dalai Lama that follow from this principle in a succinct three-page format. This is an excellent guide

to the key points in the transcript.

A philosopher, Ken Shockley, focuses on the central issue of how universal compassion is to be instilled in the individual and how the implied reform of individual motivation might occur. A Buddhist legal institution cannot judge the actual internal motivation of an individual; it can only force another person to *behave* as if she were someone with good motivations, not actually to *have* good motivations. Shockley reasons that the Dalai Lama emphasized education and reform of law curriculum because he wants to create lawyers who have internalized these norms and therefore will strive for a compassionate society.

Vesna Wallace moves, as Leslie Gunawardana did, to the early period of Buddhism in South Asia for her comment. She provides a brief overview of the various sources available in Pali and Sanskrit that describe the origin of the Buddhist monastic “code”, the *Vinaya*, and how the rules appear to evolve from the actual experiences of the community as it was formed. Guidelines for the laity can be drawn from many different sources and she cites two examples. She concludes that these sources remain a very rich vein of material on Law and its relationship to Buddhism.

The seventh and final paper in this set of commentaries is by the legal anthropologist, Richard Whitecross, who has worked extensively in Buddhist Bhutan following the development of that country’s judiciary and constitution. From 1950 to the 1980’s, the country sought to import foreign laws that would help with development. In 1991, however, a change took place and the judiciary turned inward in an attempt to integrate the legal system with Buddhism described as “Bhutanese culture.” The description of this return to Buddhist ideas in law is fascinating.

IV. THE QUESTIONS AND TRANSCRIPT

Following these commentaries are two Appendices. The first is the result of the already described efforts to formulate questions to be addressed to the Dalai Lama. The final set, which is reproduced as Appendix A, was distributed to all of the participants, interested audience

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members and to Tashi Wangdi, Head of the Office of Tibet in New York, to be given to the speaker. There follows Appendix B, a complete edited transcript of the event. It was originally transcribed from the oral recording by Kunchok Youdon, a PhD candidate in Political Science at UB. I then re-edited the final version several times.

My hope is that this collection of papers will help a wider audience to experience the Dalai Lama and his concepts about Law.

The Dalai Lama Speaks on Law

REBECCA R. FRENCH†

When the Dalai Lama spoke on September 20, 2006 in the Law Library of the State University of New York at Buffalo, his comments were an exciting, fresh insight into the nature of the law and legal processes. I remember leaving the room in his wake thinking that American law needed serious rethinking. Nevertheless, when talking to people later and re-reading the transcript, I found that many people did not recognize the innovative nature of his pronouncements. Why was this? When I began looking for reasons, I first discovered difficulties in our manner of asking and ordering the questions. There were several tangential discussions that occurred along the way and, of course, some misunderstandings. Sometimes we missed the central point of the Dalai Lama's responses. At other spots, it seemed that the impact of his thoughts remained hidden inside what was presumed to be a religious answer to a legal question. The resulting lack of clarity was more than just the typical irritation that comes with reading the printed transcript of an oral interchange.

This commentary is my attempt to make the radical meaning of his words available to others. When I sat down to work on the transcript, I found myself responding to, arguing with, and adding silently to everything that was said. As I reread his comments, listened to his talk endlessly on tape, and watched the DVD that came out a few months later, I began to compile a simple, ordered list of his comments that might answer certain key jurisprudential questions: How does he conceptualize the nature of law? How does he think a good lawyer should act? What did he say, if anything, about the way legal rules

† Roger and Karen Jones Faculty Scholar and Professor, State University of New York, University at Buffalo Law School. I would like to thank Jack Schlegel and Johanna Oreskovic for their contributions. This Article could not have been brought to completion without the very thoughtful insights of Betty Mensch. I dedicate it to my late father, James Mott French.

should be formulated? This commentary is the result of that effort. I have divided it into four subheadings: The Nature and Purpose of Law, Morality and the Legal System: Dirty Law, Religion and Law in Democracy, and Punishment and Violence.

After organizing and paraphrasing what I thought was important from the transcript, I began to add my own responses. Choosing how to comment on the selections was challenging. My assumption has been that the legal reader will know much more about legal terms than about the basic foundational concepts in Buddhism that provide the springboard for much of what the Dalai Lama said. My comments, therefore, have highlighted comparisons to Western jurisprudence while also supplying both Buddhist foundational concepts, and for illustration, examples from the operation of one Buddhist legal system, the Tibetan legal system pre-1960. I have only been able to cover a few subjects; his discussion of constitutions and free speech could easily be the basis of a separate article.

I. THE NATURE AND PURPOSE OF LAW

A. *Nature of Law*

*Law exists for the protection of the people. Why do we protect people? Compassion. That's my view.*¹

Most modern definitions of law in the West do not use the terms protection or compassion, and so this formulation by the Dalai Lama will surprise many. As he presents it, the first and foremost responsibility of the legal system is to procure and protect the happiness and well-being of the social body. While similar notions have been familiar to natural law traditionalism, now legal scholars and philosophers usually view law in terms of authority and rules. These terms are variously described as commands, backed by the threat of sanction, from a sovereign to whom people have the habit of obedience;² as a set of legal norms

1. App. B, *infra* p. 722.

2. See MARK TEBBIT, PHILOSOPHY OF LAW 20 (2d ed. 2005) (discussing John Austin's theory of sovereignty).

that must be obeyed;³ as a system of primary and secondary rules;⁴ as an interpretive endeavor for judges who are looking for goodness of fit and just solutions;⁵ and as the positing of socially acceptable rules combined with the actual practices of courts, law offices and police stations. None of these typical definitions includes the idea of protection of the populace through compassion.

This statement of orientation is not just the sign of a spiritual leader's temporal naiveté. As head of a state in exile, the Dalai Lama is familiar with the complexities of political life in a modern global economy. By refocusing the legal lens on the protection of the people, the Dalai Lama is asking that we see law as an instrument to promote, nurture, support, and assist human beings in their spiritual as well as temporal lives.

1. *Compassion.* Compassion (*karuna*) in Buddhism has a particular meaning central to the thinking of the Dalai Lama in the area of law. In Buddhism, particularly Mahayana Buddhism, compassion is a central focus, an all-consuming endeavor that is meant to become the most important attitude of each person. The rude, villainous boss, the unhappy whiner, the truly evil criminal are all as entitled to compassion as are family members and our most likable friends. Each person is expected to work at seeing every human being in his or her life with compassion.

Compassion is a function of understanding the objective metaphysics of Buddhism. When a Buddhist looks at the world, she sees suffering: all living beings are enmeshed in an inescapable web of causal relations with no known beginning or end. Within that cosmic web humans will experience happiness but also repeated loss and disappointment because of their attachments to the transient satisfactions of this impermanent world, especially including their attachment to the illusion of their own selfhood. The only escape from *samsara*, the endless cycles of rebirth, is the path of equanimity leading to enlightenment. From a deep comprehension of this

3. See HANS KELSEN, *PURE THEORY OF LAW* 71 (Max Knight trans., Lawbook Exchange 2002) (1967).

4. See H.L.A. HART, *THE CONCEPT OF LAW* 79-99 (2d ed. 1994).

5. RONALD DWORKIN, *LAW'S EMPIRE* (1986).

metaphysical reality, true compassion will naturally arise for our fellow creatures to whom we are bound in this vast web of interconnection.

2. *Active Participation.* The Buddhist is expected not just to practice non-harming (*ahimsa*), but to be an active participant in helping other people in their suffering. The Jataka tales, stories of the previous lives of the Buddha illustrating the perfections (*paramita*), are filled with exemplary acts of compassion in which the Buddha constantly helps others even to his own detriment (in one, he gives up his own body so that others who are starving might eat).

Meditations in Tibetan Buddhism have been developed to cultivate compassion for others; a Mahayana Buddhist is expected to think of the situation of others before her own. While compassion is the wish that others not suffer or feel disquiet, love in the Buddhist context (*maitri*) is the wish that others be happy and the desire to make them happy. Another essential aspect of the active practice of compassion is wisdom (*prajna*), the ability to correctly discern any object and to understand the nature of reality.

B. *Lawyers*

*It is common sense that we should promote and pay more attention to the value of compassion and affection and a sense of care in the society through education. Then, I think, once we create that kind of society, then every person whether a lawyer, a religious person, a politician, an engineer, a scientist, an educator, that person will come from a society that is more compassionate and all the different professions will be humanized. . . . It depends on the individual. Individuals need sincere motivations, compassionate motivations, they need knowledge, a realistic outlook, and accordingly a realistic approach motivated by compassion.*⁶

In Western philosophical terms, the Dalai Lama's description comes closest to the position of "virtue ethics." One can emphasize consequences and punishments at law, or rules designed to protect individual autonomy; or, as here, one can emphasize the substantive virtues and moral

6. App. B, *infra* pp. 727-28, 730.

requirements of a whole social system. Most Western legal systems currently emphasize the first two of these positions. In choosing the third, the Dalai Lama is placing virtue first. While there is no term for ethics in the Buddhist canon, a Buddhist notion of ethics is close to the idea of moral discipline (*sila*). The Dalai Lama starts with the idea that the basic building block of a good society, the essential first step, is training each person to have a good moral character based in moral discipline. A sense of responsibility and a sense of service based on compassion and respect for others must be inculcated into children as part of their early socialization and later instilled during the professional training of adults. The goal is to create virtuous actors who will then use their shared wisdom to frame and carry out law. Thus, according to the Dalai Lama, a virtuous legal system depends upon virtuous lawyers and citizens; legal prohibitions alone, no matter how perfectly they reflect Buddhist doctrine, cannot by imposition create a virtuous society.

In a famous text, the *Sigalovada-sutra*, the Buddha first presents the problems that arise from unethical behavior such as gambling, drinking, leaving home, cheating, and idleness. He then describes his vision for the social relationships necessary for a good society. They especially include the respectful relationships that should characterize the important pairs that make up society: students and teachers, husbands and wives, parents and children, friends, and employers and employees.

It is generally thought that the Buddha also outlined a set of five precepts to help the lay practitioner to develop his ethical virtue (*panca-silani*). Those precepts are: (1) non-injury including no killing of animals, (2) avoidance of theft and cheating, (3) avoidance of sexual misconduct, (4) no lying or untruthful speech, and (5) no consumption of intoxicants. These five precepts form the backbone of the legal system in every Buddhist state throughout history. The contrasting positive virtues to be cultivated are kindness and compassion, giving and non-greed, contentment in marriage and life, truthfulness and dependability, and present awareness and mindful conduct.

1. *Motivation*. The term motivation (*cetana*) is a key element in the Dalai Lama's method, and it includes the motive for an act, the immediate intention to do the act to

fulfill the motive, and the actual thought that occurs during the action. For example, if a donor disrespectfully gives an unwanted object even to a grateful recipient, the result is bad karma for the donor. If a donor gratefully and generously gives something that he cannot spare, the gift, no matter how small, results in great karmic fruitfulness. To give with compassion, respectfully, at the appropriate time, with no reluctance in the heart and without harming others is to give with good motivation. The same motivation should inform the practice of law.

2. *Service to others.* The Dalai Lama is also emphasizing that socialization and moral training lie at the core of legal training and practice. He is professing a need for lawyers to act with sincere and compassionate motivation, to discern the true nature of every situation, and to use their knowledge, self-discipline, and sense of responsibility in service to others. Their motivation toward their clients is best when it is pure service: respectful, generous, appropriate, and without reluctance.

C. *Legal Decisions*

What about a situation in which a single father or a single mother is the only caretaker of some young children? Then, that parent is convicted of a serious crime, worthy of the death penalty. According to the law, that person has done something very wrong, but if you carry out the death sentence, the children will have no one to care for them. Then, you need compassion.⁷

The Dalai Lama is asking us here to do something that we usually don't do in our legal system: namely, take into account a larger context that includes family structure and neighborhood. He is pointing out that the process of allocating punishment must include providing good parents for the children since providing good parents for a child may have more social value over time than eliminating the parents from society.

The Dalai Lama's emphasis on costs and consequence may appear similar to the approach known in the West as

7. App. B, *infra* p. 726; see also *infra* p. 732 (the Dalai Lama discusses the normal trajectory of a legal decision-making process).

Utilitarianism. Roughly stated, utilitarianism asks whether an act or rule will increase or decrease the general well-being, or, in other words, the happiness in society. This approach would appear to be similar to the process here described by the Dalai Lama. Utilitarians judge actions or rules by their potential to maximize good consequences and minimize bad consequences. This is a concept familiar in Western legal reasoning, encapsulated in terms such as “social welfare” and “the greater good.” However, I wonder if this is the actual meaning of the Dalai Lama’s words in the context of Buddhist presuppositions. Buddhist actions are not right simply because they lead to good consequences for a large number of people; they must be right in and of themselves.

1. *Conditioned Arising*. At the heart of Buddhist theory is the idea of Conditioned Arising (also called dependent origination, *pratitya-samutpada*). This is the principle that all mental and physical phenomena arise, move through a set of stages, and then degrade and fragment. This inevitable process can only be broken by following the steps outlined by the Buddha to achieve enlightenment. As a result of reincarnation, over and over, moving through birth to aging and on to death and then to birth again, everything is constantly changing and impermanent (*anitya*). All families, communities, environments and legal systems are also continually changing and impermanent.

2. *Interdependence*. While continually changing, each of us has also been born so many times in the past, hundreds of thousands of times, that in our past lives we have had familial and legal ties to literally every person we encounter on a daily basis (that is, we have been everyone’s mother, brother, sister, father and son). As each of us has lived more than a thousand lives—as insects, hell beings, animals, and human beings—so each of us has also had a myriad of social and legal relationships with the persons with whom we now interact as lovers, instructors, waiters, bosses, infant daughters, sworn enemies, servants, and strangers. Buddhism, then, emphasizes interconnection, interdependence, and inter-being. The idea that everyone and everything *has been* affected by, *is now* affected by, and *will be* affecting every other person and thing as we continually change and reincarnate. One way to think

about it is as a *large net of social interdependence*. The *Avatamsaka-sutra* describes it as an endless net with a diamond at every knot; it is said that each person and animal in the net is a jewel that shines and reflects off other jewels in hundreds of different ways.

Arguably, mindful, compassionate regard for every jewel in the net is not reducible to the instrumentalist measure of fungible units called for by utilitarians. Similarly, true happiness for a Buddhist is achieved through the path toward enlightenment, not through the more worldly satisfactions that tend to be included in a Western utilitarian calculus.

D. *The Interpretation of Rules*

The Buddha did not formulate the 253 monastic rules for a fully ordained monk all at one time. It was an organic process. Initially, a set of rules was established and as new circumstances revealed certain problems, then that situation was addressed, and another rule was added. So, organically, the lists of rules grew. And in some cases, rules were created, but later as a result of some other situation, it had to be rewritten with later, new additions. This organic process suggests that one has to be very realistic about the needs of the situation in the context and adapt the code according to this.⁸

The Buddha is said to have taught and lectured for approximately forty-five years during which he decided, and then revised, many of the rules for the religious community he was creating. Therefore, the development of rules for a social body is an “organic” process that evolves and changes with circumstances. The original rules for a community, recorded from oral memory in the *Vinaya* at a later date, are over two thousand years old and considered sacrosanct in the Buddhist community.

The Dalai Lama is making three points about these rules: first, the Buddha, the originator of these rules, personally developed them over a long period of time, adjusting and revising them with the changes in the actual community. Second, he is said to have developed them

8. App. B, *infra* p. 730.

casuistically from cases that were presented to him one by one, and third, while the rules were written down and codified in the *Vinaya*, they still need to be understood in the current context and interpreted in light of those circumstances.⁹ So, while obeying the original rules, lawyers need to be sensitive to context and adapt legal rules to changing conditions.

II. MORALITY AND THE LEGAL SYSTEM: DIRTY LAW

A. Immoral Laws and Lawyers

*Some lawyers try to prove that a person who did a crime, did not do the crime, or they try to prove that someone innocent is a criminal. When such things happen, it is dirty law. Exploitation in the economy through lying, that is also dirty. Using religion in the wrong way creates dirty religion. . . . Whether any human action or activity, will have a positive and constructive effect or not, depends on the actor's motivation.*¹⁰

The concept of “dirty law” is powerful. The Dalai Lama uses it to explain what happens when legal power is employed for purposes other than the truth. A person acting out of revenge, for example, should not be operating in our legal system. The emphasis on personal motivation is a constant element throughout Buddhist law. When lawyers act out of negative motivations such as greed, anger, hatred, personal interests, or fear, the law that they practice becomes dirty. Examples of dirty law are exploiting others, hiding the truth, acting for personal advancement, dealing corruptly, hurting others, and only trying to win; people who commit a crime and then try to avoid punishment, and people who try to prove an innocent person committed a crime, are also engaging in dirty law.

9. In terms of legal theory, the Dalai Lama is adopting the more sophisticated hermeneutic stance that interpretations are attempts to contextualize laws rather than a search for the one correct answer. This is another surprising position presented in his talk. The Dalai Lama is distinctly rejecting legal formalism.

10. App. B, *infra* p. 727.

1. *The Root Afflictions.* Dirty law comes directly from the root afflictions. In Buddhist philosophy, the six root afflictions (*klesas*) are the mental and emotional states that constitute the basis of all conflicts between parties and therefore cause all lawsuits. The six are: (1) ignorance and delusion, (2) desire, greed and attachment, (3) anger and hatred, (4) pride and arrogance, (5) doubting the truth, and (6) false views that arise from delusions, such as clinging to the illusion of self, to the idea that all phenomena are permanent, and the belief that there is no karma. The first three of these are the most important, often termed the three poisons—ignorance (*moha*), desire (*raga*), and anger (*dvesa*). After these basic afflictions there is another set of twenty secondary afflictions, each with its own base root in the six. For example, holding a grudge and jealousy are both derived from the poison of anger. Of these three, Tibetans think that anger is the worst because we lose control of our minds when we are angry. Acts done under the influence of these negative mental states produce bad karma.

Note that this concept of dirty law would completely reorient our victim rights movement, or at least those aspects based on revenge, which is a negative motivation.¹¹ This concept also implies that a society based on aggressive competition such as ours is promoting mental agitation concerning an object of desire and jealousy of others, both secondary *klesas* that will lead to conflicts and mental disquiet. Also, the desire to make money as the sole object in a lawsuit would be “dirty.”

2. *Truthfulness and Honesty.* In Tibetan law prior to 1960, the terms that were used in the legal system were truth and honesty, so that “dirty” as used here was the term “untruth.” Truth meant several things: the fact that both sides had agreed to a set of facts or factual consonance; fairness in procedure; fair judging; fair treatment; and fair results. Truth was used to describe personal standards for honesty, integrity, and sincerity. When a person was charged arbitrarily and not given an opportunity to present

11. See Rebecca French, *Interdependence and Victim Compensation: Views from Buddhist Tibet and Post-9/11 United States*, in FAITH AND LAW: HOW RELIGIOUS TRADITIONS FROM CALVINISM TO ISLAM VIEW AMERICAN LAW (Robert Cochran ed., forthcoming).

her case, Tibetans would say that truth had not been done in her case.¹² A person who gets away with something illegal is an untruthful, a dirty person. If we have a legal system now that allows for bad motivations in actors without correction, we are producing dirty law that needs revision.

B. *Moral versus Legal Reasoning*

*In principle, from the Buddhist point of view, one needs to be sensitive to the individual contexts so, sometimes you have contexts where the benefit to the individual has to be weighed against the wider implications of the actual society, the wider community. Also one has to take into account the damaging effects of a particular cause of action as opposed to the benefits the individual will reap. Or the benefits to the community have to be weighed against the damage to the individual. The main point is not to confine your evaluation purely to a single situation but rather look at its broader implications.*¹³

This was one of the most compelling and difficult areas of discussion. A question was posed by a legal practitioner who gave the Dalai Lama a classic ethical problem in the law: what should he do in a conflict between individual morality and larger societal rules? Western philosophy has wrestled with this issue in several forms, including theories of civil disobedience and natural law.

The Dalai Lama responded that a larger set of rules that had been formulated for lawyers, such as the Model Code of Professional Responsibility, could definitely take precedence if it protects the community in general. If the rule that binds the lawyer has been developed to protect the community, the lawyer will have to refrain from doing what he feels ethically compelled to do and follow a rule that has already balanced the damaging effects for the individual against the benefits to society. Here, the idea of protection of the society is emphasized again. The position of the Dalai Lama is perhaps surprising for some because it appears to

12. See REBECCA REDWOOD FRENCH, *THE GOLDEN YOKE: THE LEGAL COSMOLOGY OF BUDDHIST TIBET* 137-38 (1995).

13. App. B, *infra* p. 731. He also discussed the critical debating skills and training in logic of the monks as a form of reasoning. See *infra* p. 727.

contradict the strong emphasis in Buddhism on individual morality; here, process or system values seem to supersede an ethics of individual substantive virtue.

C. *Tolerance*

*There is a concept called misplaced toleration or misplaced forbearance. When a politician is pursuing selfish ends and has a damaging effect on the whole community as a whole and people continue to tolerate that, that will be characterized as a misplaced tolerance or toleration. Compassion can be misplaced, and also forbearance.*¹⁴

The Dalai Lama is taking a strong stand for seeking out the truth and correcting damaging situations. Tolerance—in the sense of learning to coexist, avoiding bigotry, and allowing variation—is based on good motivation and compassion for others. By contrast, indifferent toleration of another's pain and hardship is not. If one is granting permission to a person or group to injure one's community without cause, or ignoring those afflicted by trouble or pain then one is misplacing tolerance.

1. *Victim Rights.* At law, having compassion (*karuna*) or tolerance for actions based on negative emotions is misplaced compassion. For example, having compassion for the victim of a crime who is filled with hatred for the perpetrator is misplaced compassion. Having compassion for both the perpetrator and the victim as human beings is true compassion. This does not mean that the perpetrator should not be punished, but that the punishment should be designed to help the perpetrator improve her life. Similarly, the victim should not respond with revenge, but be given the tools to rebuild her life and community ties after the crime.

2. *Victim Compensation.* The Tibetan legal system prior to 1960 had an extensive system for victim compensation which helped the victim, neighbors, employers, relatives, the local religious community, and the greater community to absorb and respond to a criminal act.

14. App. B, *infra* pp. 734-35.

Compensation was distributed at the end of a criminal trial to many parties not considered important in the American system. For example, in cases where death resulted, the widow received many payments based on her income loss, her grief, loss of marriage, food requirements for the family, funeral expenses, and offerings for her temple. The employer and landlord were compensated. Children received maintenance payments and food as well, and the widow's in-laws received a "sorry payment" for their loss. The basic concept was to set things right financially, emotionally, cosmologically, and spiritually, so that the tear in the community could be repaired rapidly. In contrast, American forms of victim compensation rarely encompass the wider range of harm to the family and community.¹⁵

D. *Material Well-Being in Society*

*Economic motivation is very powerful and we cannot expect people not to be personally motivated by economic gain. Also without money, there is no progress. Even Buddhist monks who are aiming for Nirvana in their day-to-day life, they need money. And I think from the Buddhist viewpoint, is really a matter of balance. . . . But to just think only about money and forget other sort of values, this is a mistake. So, individuals and human society need money and material facilities and at the same time they also need some internal values. . . . Ultimately, compassion, serving others, helping others, is in my own interest. I am part of this. Even with the life of a hermit, I am part of humanity. If all of humanity faces some serious problems, even a hermit will suffer so it makes sense to think of the well-being of others. If society is happy, I will be happy and get the maximum benefits. So to develop compassion is ultimately in the best interest of oneself.*¹⁶

When he escaped from the Chinese invasion of Tibet to India in 1959, the young Dalai Lama was faced with the enormous problem of feeding, housing, and providing work for the tens of thousands of Tibetan refugees who followed him into exile. As a consequence, he is fully aware of the importance of material and physical well-being and has

15. See *supra* note 11 for a more extended discussion of these ideas.

16. App. B, *infra* pp. 733-34.

devoted much of his life to procuring adequate material support for Tibetans. He has often pointed out that material security is an important basis for all societies because one cannot expect a good society or legal system without economic health for the population. And he is also following directly the teachings of the Buddha. In the *Digha Nikaya*, the Buddha comments that a society must be free of poverty to be harmonious, just as it requires regular and frequent assemblies, harmonious meetings, and honoring elders, women, and religious figures.¹⁷

The Dalai Lama's next point is profound: promoting the well-being of others is ultimately in one's own self interest. Within our web of moral and physical interconnection, it is impossible to live a good life unless the people around you are also experiencing a good life. Your life will be affected in myriad ways if a percentage of the population is poor, discontented, and suffering. If society is functioning well, you will be happy and get the maximum benefits from society. Therefore, you must think of the welfare of others. In this way, compassion for others is always ultimately in one's own best interest.

III. RELIGION AND LAW IN A DEMOCRACY

A. *Union or Separation of Religion and Law*

Religion is related to the individual, democracy is related to society. I now firmly believe that the institutions of religion and the institutions of secular society should be separate.... The Buddhist monastic community has very democratic principles. There is an explicit statement that the authority should not be rested in the single individual or person but rather in the community of monks. . . . When a monastic rite is performed such as an ordination, one monk stands up and first informs the congregation such and such rite is being performed today, are you in agreement? And then later on, he reconfirms that there is an agreement for the conducting of this particular monastic rite. So, this suggests that there is a

17. See DIALOGUES OF THE BUDDHA (T.W. Rhys Davids trans., 1899), reprinted in 2 SACRED BOOKS OF THE BUDDHISTS 74-75 (F. Max Müller ed., 1956).

*democratic principle underlying the monastic institutions.*¹⁸

The US model of the separation of church and state has been adopted by the Dalai Lama as both an ideal for the good of society and as a suitable model for Tibetan society itself. This is an important move for a religious leader, and he has made this statement unequivocally in public before. After he first escaped from the Chinese troops on the plateau, he was involved in drafting the first Government-in-Exile constitution. Because the exiles were planning on a rapid return to the plateau of Tibet, the preamble stated that the government should be developed according to both the principles of Buddhism and the principles of democracy. For the second constitution thirty years later, the Dalai Lama advocated the separation of church and state in a secular democracy.¹⁹

The Tibetan understanding of democracy is rooted in the egalitarian politics of the original Buddhist monastery. The Buddha himself decided that the community of monks should be egalitarian. Although many were hoping to replace him as the leader of the movement when he died, instead he announced that all followers must put their trust not in another leader but in three things: the Buddha, the community of monks (*sangha*), and the teachings of the Buddha (*dharma*). Buddhists have interpreted the Buddha's decision as trying to avoid hierarchical institutional development and a succession of leaders similar to the much later development of the position of Pope in Catholicism. As a consequence, a central ideal in a Buddhist monastery is that no one monk should be more important than any other, although actual practice may vary greatly from the ideal.

B. *Religious Actors in the Law*

*Monks should disassociate themselves from party politics.
The involvement with a national struggle is a different kind*

18. App. B, *infra* pp. 728-29.

19. The Tibetan refugee population has not been altogether pleased with his pronouncements as they want him to retain an important role. In this talk at Buffalo, His Holiness described his current position in the government as one of "semi-retirement."

of politics. In the Tibetan case, national freedom is very much related to the preservation of Buddha Dharma as well as freedom and individual liberty. So, I consider my service in the Tibetan national freedom struggle to be part of my practice of Buddha dharma; it is serving others by practicing and implementing compassion. But I will never touch party politics. . . . There is great damage when a lama joins one political party because some of his followers, even some members of his own monastery, may have a different view of that political party. This creates great difficulties and complications, and I feel, great damage to the image of Buddha dharma. . . . In a very poorly educated community with no history of democratic practice or elections, the people rely more and more on the lama. So, I think a good lama really serves a community, and bad lama exploits it.²⁰

As a prince, the Buddha was born to great wealth and political power in his small kingdom in what is now Northern India. He was trained to govern, to run an administration, discern political arguments and make decisions. After he married and had a son, he chose to leave behind his personal and political commitments, to reject the power and wealth that they entailed, and to lead the life of a wandering ascetic. There are several scenes in the description of his leave-taking that are poignant: giving up his jewelry and clothing, cutting his hair, and taking on a simple robe. This part of the story of the Buddha indicates the removal of the religious seeker from political strategizing, confrontation, and decision making. This is the kind of party politics that the Dalai Lama is addressing in his warning that monks should not be involved in politics.

Representing Tibet on the global stage, on the other hand, he sees as representing the form of Buddhism that was cradled on the plateau for more than thirteen hundred years. For the Dalai Lama, the Tibetan struggle for freedom is a commitment to preserving and advancing Buddhism, a religion that has been under siege for many years with the advent of communism and dictatorship in several countries throughout Asia.

His distinction between two types of politics is connected to the idea of motivation. If a political official is purely motivated to help others achieve a better education,

20. App. B, *infra* pp. 721, 723-24.

or reduce taxes, then he or she has a compassionate motivation as a leader. If his service is necessary under these circumstances, a monk can engage in politics. However, advocacy by a monk for a political position that will bring power and wealth to him or his group only is not good. Actions based on negative motivations—a leader’s ego, desire, greed, opposition to others—are bad. Therefore, as the Dalai Lama explains, representing a group for its benefit is good, while party politics is bad.

C. *Moral Training for Lawyers*

On a human level, there is a foundation of basic human good qualities that are universal, that everybody has, east or west or south or north. I think on that level, the values and the appreciation for these values are also the same. For example, a Tibetan community may also be a Buddhist community, which would make it a special environment. . . . It is not necessary that the training be Buddhist. That is too narrow. As I mentioned earlier, it is on a human level.²¹

The Dalai Lama appears to be taking the natural law position that some moral values are universal, that is, rooted in the very nature of being human. By using the phrase “basic good human qualities,” the Dalai Lama is also reaffirming the position that all human beings are basically good.

Not surprisingly, some commentators suggest that Aristotelian ethics are the closest to Buddhism within the Western philosophical tradition. Aristotle introduced *eudaimon* as the highest end of human life, a flourishing of human potential rooted in a well schooled moral discipline designed to perfect the natural human virtues. A good act is not good just because it has a beneficial effect on others; it is good because it reflects good character and is consistent with the highest ends of human life. Both Aristotelian ethics and Buddhist ethics “aim at human perfection by developing a person’s knowledge and character....”²²

21. App. B, *infra* pp. 720, 727.

22. PETER HARVEY, AN INTRODUCTION TO BUDDHIST ETHICS 50 (2000).

D. *Karma*

The concept of karma depends very much upon one's individual understanding. If one's understanding of karma is quite good, then the concept of self-discipline will arise on the basis of respecting karma. However, sometimes people use karma as an excuse. When people use it as excuse for inaction, they say "this is my karma."²³

In Buddhism, right choices result in good karma while an illegal or immoral act results in bad karma. The cause of an illegal act committed by a human being can be either received karma from a previous life or an intentional choice made during this lifetime. The punishment of an illegal act in this life might occur either in this life or in a future life.

In this passage, the Dalai Lama is challenging the way in which karma is understood in most Buddhist legal systems by contrasting simple versus deep understandings of karma. A deep understanding of the action of karma is very difficult because it involves knowing everything that has affected, and will be affected by a particular act. Very few people have a deep understanding of karma; such understanding would involve perceiving what aspects of one's life are due to karmic effects and therefore deserve acceptance and what aspects can be changed. This would also require a full knowledge of all previous rebirths, the karmic weight of all actions taken in this life and the good or bad qualities and results of those actions. As a consequence, it is unlikely that an individual will know enough about his karma to make a decision such as whether or not to bring a lawsuit on the basis of karma. In that case, karma is just being used as a rationale not to move forward.

1. *Fatalism and Karma.* Furthermore, the Buddha made a point to distinguish between fatalism (*niyati*) and karma. Fatalism, in his view, is the belief that people have no capacity to create their own destiny, that they do not have freedom of choice, and that everything that has happened to them is due to fate. A correct understanding of karma, on the other hand, includes the role of personal choice and does not presume that every event results from

23. App. B, *infra* p. 732.

fate alone.

Nevertheless, despite the Dalai Lama's caution, in many Buddhist legal systems, karma can play the following roles: (1) it can act as a rationale for non-accusation or (2) non-punishment by the decision maker, (3) it can inhibit a victim from taking legal action, (4) expand that response, or (5) be the reason that the criminal receives that particular punishment.

2. *Impermanence*. Karma is based on another essential idea in Buddhism, impermanence (*anitya*). As we have seen, for Buddhists the world is not static but constantly changing. Humans want to hold on to sensory pleasures, wealth, power, love, and good ideas, but these will all change just as negative aspects of life continue to change. Endless transformations are the norm, not permanent institutions and relationships. A lawyer's karma, then, works throughout this transmigration and rebirth, this continual cycling of birth and death. A legal decision is just one moment in a ceaselessly shifting universe that provides no respite from its own internal engine of karmic consequences. If any part of a legal action is derived from a negative motivation such as anger or greed, then at least part of the effect will be bad karma. Engaging in purposeful conflict by promoting the position of one client against another, therefore, must be done with good and compassionate motivations in order for the lawyer's actions to result in good karma and a better rebirth in the next life.

IV. PUNISHMENT AND VIOLENCE

A. *Punishment of Criminals*

The Buddha's teaching is that you must punish not out of feelings of revenge or hatred but out of compassion. In some cases, unless you provide a harsh treatment, that [criminal] will continue harmful activities which are actually harmful to himself or herself. Therefore, out of a sense of concern, [the judge] orders a [punishment] to stop [the criminal from] doing that kind of action. So, it looks similar but essentially there are big differences: one wrathful action is taken out of genuine compassion, one out of hatred. When the [punishment] is out of hatred and revenge, it is totally negative. . . . People will be more restrained in their behavior

*if they know what the legal consequences will be if they do certain things.*²⁴

Here the Dalai Lama is directly following the teachings of the Buddha. The first goal must be to provide a sufficient living for everyone in the society in order to prevent poverty which is a breeding ground for crime. The second step is to create a legal system in which the punishments are based on compassion and a desire to help the criminal to forgo future criminal actions. The third step is to create punishments that are clear to the society and, for the serious offenders, harsh.

As we have seen in part II.D above, the material well-being of the entire society is essential. In the fifth section of the *Digha-nikaya* in the Buddhist canon, the Buddha states that the origin of most crime and violence in a society is inequality of resources. No matter how severe, no punishment will stop crime that is caused by hunger and poverty. Therefore, the Buddha states, the best way to eliminate crime is to build a healthy economy and assist people in providing for their own security. Farmers should be given seeds and fertilizer, small merchants should have loans, those who cannot work need retirement funds, and the poor should be exempted from taxes. The Buddha ends by pointing out that people should be free to pick their own jobs. It is also important to note that financial well-being is required for learning and disseminating the teachings of the Buddha (*dharma*).

1. *Philosophy of Punishment.* Several sociologists have advanced the notion that punishment programs are indicators of the moral life of a society. Émile Durkheim characterized punishment as “a moral phenomenon operating within the circuits of the moral life, as well as carrying out more mundane social and penal functions.”²⁵ Western philosophical reflections on punishment provide four basic rationales each connected to its own moral perspective and its own form of treatment, namely retribution, deterrence, incapacitation, and rehabilitation.

24. App. B, *infra* pp. 726, 732.

25. DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY 24 (1990) (discussing Émile Durkheim's social theories).

Retributive justice allows for a punishment that is proportionately equal to the severity of the criminal act, a form of *lex talionis* or “measure for measure.” A more recent approach to retribution states that the punishment should be proportional to the unfair advantage gained by the criminal. If retribution however, chiefly involves the motivation to harm another it would not be generally acceptable in Buddhism. Deterrence theory focuses on preventing the defendant from any future criminal acts, and incapacitation, thought by some to be a subset of deterrence, removes the offender from society so that he will be unable to commit crimes. In the above quote, the Dalai Lama is using the language of deterrence for serious offenders. Several Buddhist societies practice deterrence but few have had the desire or the facilities to incapacitate on the scale practiced in the U.S.

2. *Rehabilitation.* Rehabilitation, the rationale for punishment closest to the ideals of the Buddha, and mentioned in other contexts by the Dalai Lama, is a treatment theory in which human beings are viewed as capable of change and restoration to society. In the past fifty years there has been a definite move away from rehabilitation and toward the other three approaches, with the exception of faith-based prison rehabilitation programs. If the motivation behind such faith-based programs is to prevent further illegal actions and turn the offender to religious practice and moral discipline, their approach would be similar in nature to the Tibetan goal that criminals need to turn to the *dharma* and seek enlightenment. A recent entry into the field of punishment, restorative justice, emphasizes cooperation between victim and offender in repairing the harm that has occurred to both. Given the emphasis on compassion, this is very similar to the position of the Dalai Lama and the aforementioned victim compensation system in Tibet pre-1960, discussed in part II.C.2.

B. *Death Penalty*

I think the death sentence, also cutting of limbs, should be prohibited. I am one of the signatories to the Amnesty International Movement to put an end to the death penalty. As I mentioned earlier, the Thirteenth Dalai Lama abolished

*it. That was as act of compassion.*²⁶

The first Buddhist King (*chakravartin*) was Asoka, head of the Mauryan empire (reign: 268-232 BCE) and a convert to the religion after years of bloody warfare. His legacy provides a strong example of a religiously disciplined Buddhist political leader. The principle of *ahimsa*, or non-injury, was central to his philosophy, and some scholars think that he stopped the practice of torture, released prisoners, and abolished the death penalty. To disseminate his philosophy, he set up carved stone edicts all over the subcontinent, many of which are still standing. In his "Sixth Rock Edict" he stated, "No task is more important to me than promoting the welfare of all the people. Such work as I accomplish contributes to discharging the debt I owe to all living creatures to make them happy in this world and to help them attain heaven in the next."²⁷

The history of the relationship between Buddhism and the death penalty varies by country. For example, in the Koryo period of Korean history (935-1392 CE), Buddhism flourished and Buddhist monks were successful in having the death penalty abolished. Currently Korea, Japan, Burma, and Thailand have the death penalty. There are ninety people on death row in Japan.

C. Use of Violence

*Theoretically speaking, violence is a method. Whether the use of this method can be justified or not depends entirely on the [individual actor's] motivation and research [into the circumstances]. This was true in the Buddha's own life; in a story about a previous life, he implemented violence in order to bring greater benefit to a greater number of people and to save their lives.*²⁸

Given Buddhist principles of non-violence, this statement by the Dalai Lama may seem surprising. The very first precept of the Buddhist Monastic Code is a

26. App. B, *infra* pp. 722-23.

27. THE EDICTS OF ASOKA 38 (N.A. Nikam & Richard McKeon eds., N.A. Nikam & Richard McKeon trans., 1966).

28. App. B, *infra* p. 726.

restriction on injuring or killing others; killing a human results in permanent expulsion from the order whereas killing an animal requires expiation. Non-injury and non-violence to others (*ahimsa*) is therefore a key value, and the first precept, of right-livelihood. The reasoning is that violence breeds more violence. By calming the mind, one can institute the practice of non-violence and compassion for other sentient beings. The Dalai Lama is famous for his rigorous position against war with any group, even the Chinese. Based also on sections of the Buddhist canon such as the *Samyuttanikaya*, it is safe to say that the Buddha and the Dalai Lama are strongly against individual violence of any kind and support the principles of non-violence and peace. The Buddhist justification for the state's violent punishment of criminals is left open here.

The story that the Dalai Lama is recounting here comes from the *Upaya-kaushalya Sutra*, a Mahayana Buddhist text that's name literally means 'skillful means.' Traveling on a ship with many others, the Buddha was a merchant with wares to sell in a new country. Due to his omniscience, the merchant was able to discern that a thief on the boat was planning to kill the captain an act which would lead to the death of everyone on the boat. Before the thief could take action, the merchant stabbed him with a knife and killed him to save the lives of everyone on the boat. While this is an act of extreme violence, here again the special qualities of the Buddha, such as a deep understanding of karma and the future, allowed him to know the best thing to do. In other words, murder is justified because it is *the Buddha* acting. As explained in the section on karma above,²⁹ it is very unlikely that any one of us, as unenlightened individuals, would know the future and therefore, the correct actions to take in the present. It is only with omniscient foresight that the merchant was able to turn an act of violence into an act of compassion.

Presumably most officials who impose violent punishment in the name of the state are not fully enlightened. Perhaps their actions can be justified by their compassionate motivation to contribute to the welfare of both society and the criminal herself. Interestingly, this justification is an early version of the many that have been

29. See Part III.D.

advanced in the West, as a Christianized culture, similarly, has struggled to explain in religious terms the always problematic legitimacy of legal coercion.

CONCLUSION

The Dalai Lama's visit began a multi-disciplinary conversation on Buddhism and law that will undoubtedly expand and grow in the coming years. His ideas are an important and needed catalyst for rethinking the modern legal systems within which we currently function. In summing up his visit, several essential points can be made about his approach and its relationship to other areas and disciplines.

To begin, the Dalai Lama often represents the original ideas of the Buddha when he presents his views on law. While this point may not be surprising, it is fundamental to his thinking; he processes every question through an internally constructed set of values and ideas from the original Tripitaka canon, from Mahayana and Vajrayana Buddhist texts and commentaries, and from his own esoteric teachings as the head of a major group of Tibetan Buddhists. When the Dalai Lama gives an example, it is from the sutras or the Jataka tales or the monastic code, *Vinaya*, or from the practices of monastic communities. In this sense, he is a religious representative who cites religious texts for many of his ideas about law.

Second, the Dalai Lama is also speaking through a background and a cosmology that is Buddhist, and by this, I mean, a set of concepts such as conditioned arising, interdependence, root afflictions, monastic forms of egalitarianism, right livelihood, samsara, dukkha, nirvana, karma, impermanence, mental equanimity, and non-violence. Although explained cursorily in the text, those concepts are only part of a larger integrated philosophical and religious system that has its own dynamic hermeneutic. As a result, it is common for people from cultures other than Tibet to grasp what he is saying from a position within their own cultural rubric. While this is precisely what he hopes for—that his message will strike a chord with others—it does not mean that a scholarly comprehension of his ideas has taken place. Understanding fully how his interpretation comes out of its Tibetan

Buddhist and historical background is a larger endeavor for another venue.

Third, the Dalai Lama is from a culture that had its own legal system prior to 1960 and many of his remarks, although not highlighted in the choices for discussion here, reflect the Tibetan legal system prior to the Chinese takeover. There are numerous examples of these carryovers from what was a Buddhism-inspired legal system.³⁰ Only a few of the entries above indicated some of these influences, the section on truthfulness and honesty, *see supra* part II.A.2, victim compensation, *see supra* part II.C.2, and karma in Tibetan law, *see supra* part III.D.

Fourth, the Tibetan Government-in-Exile located in Dharamsala, India and headed by the Dalai Lama is a fully functioning, constitutionally structured body of over 100,000 refugees. The community has diligently recreated in India every major cultural, social and political institution of Tibetan society to preserve and also to reconstitute itself for an eventual return to the Tibetan plateau. A large part of this process has been the construction of a modern democratic state within another state, a government-in-exile with its own schools, judiciary, territorial reservations, religious institutions, parliament, cabinet, industries, welfare, and health systems. As the leader of the Tibetans, the Dalai Lama has listened, learned and implemented significant political changes through constitutional reform for over forty-five years. This article did not highlight the constitutional dimensions of his work discussed during the conference and presented in Appendix B, but they are significant. Many of his comments, therefore, are based on the actual experience of developing a modern, functioning democratic state-within-a-state from a quasi-medieval theocratic base. Therefore, the Dalai Lama's conception of law is now Western as well as specifically Buddhist and Tibetan.

What then is the model of law that the Dalai Lama presents? The Dalai Lama was quite definite on several points:

1. *Protection and Compassion as the Basis of a Legal System.* This was a central theme throughout the talk and

30. *See* FRENCH, *supra* note 12.

it comports with his general view on the role and position of any human in society. Treating others with compassion is essential to the functioning of society and a central requirement in Buddhism. Writ large, this requirement means that the legal system is an instrument of compassion that provides for the protection of the people through law. Compassion in Buddhism implies an active focus on relieving the suffering of others.

2. *Dirty Law.* The Dalai Lama was also clear about “dirty law”—any legal actions derived from bad motivations. Acting out of revenge, hatred, a desire to hurt someone else, fear, or greed, for example, would result in actions that are dirty. These motivations contaminate the whole legal process.

3. *Moral Character of the Lawyer.* Lawyers need sound ethical training in the moral values which, according to the Dalai Lama, are shared by all cultures and religions. Families, schools and society need to train each child to have a good character. This social discipline is more important than the specific content of law. After legal training, lawyers should be able to approach each case with good motivation, knowledge, self-discipline, and a sense of responsibility.

4. *Misplaced Tolerance.* Similarly, it is bad to allow a negative situation to exist without taking action to oppose it. One possible interpretation is that the Dalai Lama is questioning directly the modern liberal state’s tolerance for the inequities and immoralities it allows in the name of democracy, capitalism and tolerance. To allow a segment of the population to be poor and uneducated or to be disproportionately incarcerated is misplaced tolerance. Here, he is implicitly questioning the legal distinctions between commission and omission, and the whole tradition of “negative” liberty, by stating that we must actively participate in changing these circumstances.

5. *Material Well-Being for the Population.* Although it should not be a sole end in itself, sufficient wealth for all to live a reasonable life should be a goal for all societies.

6. *Constitutional rights such as Freedom of Speech and Separation of Religion and State.* The Dalai Lama is a

strong advocate of constitutionalism, democracy, church/state separation, and human rights, including freedom of speech. While this part of his talk was not reviewed in the above pages, the transcript in Appendix B makes this commitment clear. He stated in this conference that monks should dissociate themselves from party politics. On the other hand, he viewed his role as the representative of the Tibetan people not as a form of party politics, but as advocacy for the benefit of a community, justified by compassionate motivation.

These points of emphasis will of course suggest Western corollaries. If wrenched from its context in Buddhist metaphysics, compassion as applied by the legal system may be hard to imagine in the West except as some form of utilitarianism. As a standard it would then rest uneasily with the precise ethical rules and disciplines which the Dalai Lama believes should shape all of human life, including the legal system. This emphasis on substantive virtue, which seems at least somewhat akin to the tradition of medieval Catholic Aristotelianism, suggests, to the Western mind, a model of society that could be difficult to sustain without shared moral values combined with both a shared religious narrative and a relatively authoritarian social structure.

Theorists of the early medieval Catholic model sought to subsume difference, ease contradiction, and blend diversity into a single all-embracing unity. That unity was shattered by the pluralism unleashed during the Reformation, and by the Enlightenment's emphasis on individual autonomy. The Tibetans, remarkably, seem to have absorbed some of the legal results of that shattering (for example, church/state separation, constitutionalism, and a conception of individual rights) without having passed through centuries of struggle and also without surrendering their commitment to disciplined virtue in individual and social life. Their approach is serenely pragmatic: add what works, remove what doesn't.

In this process, the Dalai Lama has served as an exemplary figure, a "natural aristocrat" in the older Aristotelian terminology. His life has been a model of the compassionate and open approach that he has advocated, and his praxis an exercise in moral/political virtuosity. Of course, modern Madisonian constitutionalism is a concession to the fact that virtue too often dissolves into

faction and the appearance of natural aristocrats is perhaps not as certain and predictable as we might hope. However, we have before us the example of a refugee community which was brutally uprooted and suddenly cast adrift in a modern Westernized world, but which nevertheless retains a flourishing and resilient identity even while adapting to dramatic change. Its success is worth our study.

The Ideal and Non-Ideal in Behavior Guidance: Reflections on Law and Buddhism in Conversation with the Dalai Lama

KENNETH M. EHRENBERG†

In a perfect society, where everyone is governed by the principles of compassion, where everyone sees everyone else's interests as having at least as much value as one's own, where everyone has mastered desire so that it no longer causes avoidable suffering, there would be as little need for law as there would be for the concept of justice.¹ But of course we don't live in a perfect society (far from it). So we need systems of behavior guidance to help us to do as best as we can by one another. Hence there is no perfect legal system because each must accommodate the different imperfections of various individuals and cultures. Clearly the Dalai Lama is aware of this and his remarks should be interpreted with this in mind.

Even admitting the need for systems to guide our interpersonal and social behavior, however, there are different forms these systems can take. Some systems seem to recognize and incorporate our imperfections and limitations. These seem to admit the impossibility of the task of perfecting society and seek rather to minimize the damage our imperfections do. Other systems seem to concentrate more on closing the distance between our

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1. See DAVID HUME, AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS 84-85 (Tom L. Beauchamp ed., Oxford University Press 1999) (1751) (arguing that, as a value, justice does not arise where people treat each other as dear as themselves). While it might be true that we still might have coordination problems that require solutions, it is not clear that we would need a legal system to do so. A mutually recognized authority might be enough to accomplish this without the need for a legal system to support it. See generally Leslie Green, *Law Co-Ordination and the Common Good*, 3 OXFORD J. LEGAL STUD. 299 (1983).

condition and perfection as much as possible, treating our limitations as surmountable given the right training and attitude. I will call these systems “ideal” in that they concentrate on the ideal situation and on inculcating in us behavior that is designed to get us as close as possible to that ideal. I will call the former kinds of systems “non-ideal” in that they seem to treat our limitations as unavoidable but minimizable.

It would be far too easy to associate the ideal form of behavior guidance with Buddhism and the non-ideal with law. We might be able to imagine systems that are completely ideal or non-ideal, but since these descriptions are meant to explain forms of behavior guidance, we are likely to find elements of both in any given system. Furthermore, the systems themselves are likely to intertwine and interact, as they can and do with Buddhism and law, law and etiquette, monastic law and secular law, Buddhism and local religions, custom and religion, custom and law, etc.

Take the example of morality. Clearly morality is reflected in some way in both Buddhism and law.² But morality itself has aspects of both ideal and non-ideal forms of behavior guidance. This is what Fuller calls the “morality of aspiration” and the “morality of duty.”³ The morality of duty operates by setting basic standards of behavior that people ought to meet as they are seen as the minimum requirements for reasonably harmonious living.⁴ The morality of aspiration is seen in terms of “the fullest realization of human powers,” as the imperative to excel as much as possible in all endeavors, realizing all of one’s potential.⁵ There is no sharp distinction between these forms of morality; they represent, rather, attitudes or types of positions we can take with regard to morality’s operation

2. The reflection in law is admitted even by the most ardent legal positivists. *E.g.*, H.L.A. HART, *THE CONCEPT OF LAW* 193 (2d ed. 1994); Joseph Raz, *About Morality and the Nature of Law*, 48 *AM. J. JURIS.* 1, 3 (2003). Of course, they deny that there is any necessary connection between law and morality (as opposed to reflection of one in the other).

3. LON FULLER, *THE MORALITY OF LAW* 5 (rev. ed. 1977). Fuller cites a variety of mid-century theorists (including Hart) to support this distinction. *See id.* at 5 n.2.

4. *See id.* at 6.

5. *Id.* at 5.

in guiding behavior.⁶ But we do have a tendency to use one or the other as we get farther from the middle of a spectrum between them.⁷ Hence we will tend to treat actions that seem to threaten the social fabric more basically as violations of duty, and actions that lessen our individual or collective ability to achieve our ideals and pursue perfection as regrettable wastes or character flaws.

Both of these styles of morality are represented in both Buddhism and law. In Western secular democracies, we are more accustomed to seeing the law as a system that basically operates according to the morality of duty, and Buddhism and other religious ethical systems as systems that operate according to the morality of aspiration.⁸ However, legal systems have their own forms of excellence toward which they are supposed to encourage people, and Buddhism has its basic rules (especially in the monastic traditions).

Problems arise when these two forms of behavioral guidance fall into tension as a result of disputes over our conceptions of the ideal. In religious circles, this can result in a schism. In the legal arena, it is can result in civil war. So in the Western secular legal tradition, we prefer our legal systems to stick to the non-ideal, to remain silent on conceptions of the good or of the ideal, to focus on the morality of duty.⁹ However, a strange thing happens on the way to eliminating the ideal: rather than getting eliminated, it becomes internalized as the ideal of the rule of law, the “internal morality” of aspiration for legal systems.¹⁰ We idealize the procedures of the law and its operation, striving to make our “government of laws and not of men.”¹¹

6. *See id.* at 9.

7. *See id.* at 10.

8. *But cf. id.* at 5-6 (giving the Ten Commandments, and the Old Testament more generally, as examples of moralities of duty).

9. This is truer of modern Western legal systems and those based on them, than it is of more traditionally bound systems or legal systems in communities bound together by a common ideal they wish reflected in their law. If the risks of dissention are low due to the entrenchment of the ideology or the coercion of the people, then the law can be seen more easily as a tool for pursuing perfection.

10. *See FULLER, supra* note 3 at 41.

11. MASS. CONST. pt. I, art. XXX.

This means that we adopt and elevate procedures by which to guide our behavior and settle our disputes. Those procedures do not separate citizens based on their beliefs or what they hope to accomplish in life. The need for an internal, procedural ideal is magnified the more diverse society becomes and the more citizens have differing views of the good. In such circumstances, the fewer procedural norms a legal system has in place, the more prone that legal system will be to failures of the “internal” legal principles such as those against retroactivity or requiring that laws be clear.¹²

To take it one step further, a secular democratic legal system would, from the point of view of the ideal theory, reinforce and even inculcate pernicious patterns of behavior and misguided systems of belief. The ideal theory doesn’t accommodate fundamental ignorance and disagreement, it corrects them.¹³ The non-ideal rule of law accommodates fundamental ignorance and disagreement insofar as it does not impinge on the pursuits of others. Once you endorse (as does the Dalai Lama) a secular democratic legal system and the notion of the rule of law that comes with it, then you magnify the tension between the ideal theory that claims universal principles as its basis and the non-ideal need to accommodate both the imperfections and differences in opinion.

Buddhist practice is perfectionist, based on an ideal of the attainment of enlightenment and nirvana through practices that must be correctly motivated on the basis of universal values such as compassion.¹⁴ As a universal value, natural compassion can make a claim to substantive inclusion in a legal system, but the more a legal system

12. Fuller cites eight principles as the internal moral principles of law: the need for general rules, the need to publicize, the need for prospectivity, the need for the rules to be understandable, the need for the rules not to contradict one another, the need for the rules not to require the impossible of those at whom they are directed, the need for the rules to be relatively stable, and the need for the rules as they are publicized to match with how they are actually administered. See FULLER, *supra* note 3, at 39.

13. While disagreement and debate are very much a part of many religious traditions, especially Tibetan Buddhism, these disagreements take place in the context of a commonality of purpose and a monastic legal framework that prevents them from leading to strife and disharmony.

14. It is still an ideal theory even if it counsels us to avoid goal-directedness in the pursuit of enlightenment.

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endorses this value (and especially a particular method of its protection and promotion), the more substantive norms creep into the legal system, which risks alienating and disadvantaging those who disagree. Even if we say that, as a universal value, one cannot help but value compassion, people can still disagree fundamentally on the means of its pursuit. If the law does not make space for those disagreements, those in the minority or not in power will be disenfranchised and marginalized. Naturally, a legal system founded upon the principle of compassion would still treat those who resist that system compassionately. However, that compassionate treatment cannot rise to the level of inclusion in a system with which one has a fundamental disagreement. Disagreement, disenfranchisement, and marginalization, without an understructure of commonality and unity of purpose, are likely to lead to resentment, dissatisfaction, and strife. Hence the legal system itself, by its operation, runs the risk of undermining the very detachment and compassion Buddhism counsels.

Of course this is not to say that Buddhist law is oxymoronic. Rather, recognition of the tension between what Buddhism counsels and how secular democratic law operates can help to remind legal practitioners and citizens to reinforce their compassion in the face of legal failure or exclusion.

Religiosity and the Invocation of Law in the Conversation with the Dalai Lama

DAVID M. ENGEL†

The Dalai Lama's visit to UB Law School carried genuine symbolic importance. In this colorful and crowded event, one of the foremost religious leaders of our era sat in a law library with a group of legal specialists to talk about constitutionalism and the rule of law. A person some view as sacred calmly and thoughtfully discussed the central features of a legal framework that could limit his own authority within the Tibetan polity.

Those of us who participated in the conversation with the Dalai Lama felt acutely aware that his efforts run counter to much of today's discourse about law and religion. Religious devotees, policymakers, and members of the general public typically perceive secular legality in tension with or even in opposition to religion. For example, Carol Greenhouse, in her classic study of a predominantly Southern Baptist community in Georgia, described a shared understanding that overt conflict and the invocation of law were to be avoided because they threatened the integrity of the society as a whole. Prayer offered a preferred approach to the problem of dispute resolution. Members of this community viewed religion and law as mutually exclusive, and they assumed that the truly religious person would reject law even when he or she suffered a wrong.¹

I have encountered a similar perspective in my own community-based research on injuries and the use of tort law, both in the United States and in Thailand. In a rural Midwestern American community, ministers, priests, and members of their congregations expressed the view that religious people do not sue when injured, because the

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1. See CAROL J. GREENHOUSE, *PRAYING FOR JUSTICE: FAITH, ORDER, AND COMMUNITY IN AN AMERICAN TOWN* (1989).

invocation of law is inconsistent with religious teachings.² Some personal injury lawyers also believe this to be true. An American Trial Lawyers Association (ATLA) manual cautions that prospective jurors should be screened for their religious views during *voir dire*, since a devout juror is likely to believe that the plaintiff's misfortune represents the will of God. Such jurors, it is said, tend to condemn personal injury litigation because they think it violates fundamental religious precepts.³

In predominantly Buddhist Thailand, interviewees perceived a similar tension between secular law and their religious belief. Ordinary people who suffered injuries thought that the pursuit of a legal remedy would merely compound the bad karma that produced the injury in the first place. A devout Buddhist, in their view, should focus her attention on meritorious action in response to an injury and should forgive the injurer rather than aggressively pursue compensation.⁴ The Thai interviewees' actions were consistent with their words. None of them invoked the law after suffering serious injury caused by the careless behavior of another, and few of them in their injury narratives even hinted that their mishap might be characterized as a legal violation.

The injured people I interviewed in Buddhist Thailand referred to their belief in karma to explain why they seldom took any action—judicial or extra-judicial—against their injurers, even in cases where they clearly felt that the injurer had wronged them and they had suffered a serious loss as a result. In their view, the root cause of the injury was their own improper behavior earlier in this life or in a prior life. Accordingly, the proper solution to an injury was to perform meritorious acts, to manifest a generous and

2. See DAVID M. ENGEL, *The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 LAW & SOC'Y REV. 551, 571 (1984) (“[One minister] argued that external problems such as personal injuries were secondary to primary questions of religious faith. He told me, ‘[I]f we first of all get first things straightened out and that is our relationship with God and is our help from God, all of these other things will fall into order.’”).

3. See David A. Wenner, *Jury Bias*, in ATLA'S LITIGATING TORT CASES § 35.23 (2003).

4. See DAVID M. ENGEL, *Globalization and the Decline of Legal Consciousness: Torts, Ghosts, and Karma in Thailand*, 30 LAW & SOC. INQUIRY 469 (2005).

compassionate spirit, to reject an attachment to material rewards, and to forgive the injurer. Pursuit of compensation would merely result in continued suffering in this life or in future lives.

Although my research has focused on injuries, the same karmic explanations and emphasis on selflessness and forgiveness rather than an embrace of the law appear applicable in many other conflict situations. Interviewees described a broad range of rights violations for which they believed the appropriate response to be law avoidance. It is safe to say that ordinary people in Thailand very often view Buddhism and law in oppositional terms. The invocation of rights is problematic for them and represents a moral failure, just as it did for Greenhouse's Southern Baptists. People who assert rights are selfish and egotistical, and their aggressive response will surely cause more trouble down the road. The law of karma is, in their view, at odds with—and superior to—the law of the state.

When the Dalai Lama addressed this issue in our conversation, he seemed to express only a qualified support for the individual who responds to wrongdoing with self-restraint rather than by invoking rights. He did agree that it would be best to “exercise one's self-discipline and compassion.” Many disputes can be resolved without resort to the law and, he added jokingly, lawyers could be put out of business by this kind of virtuous and disciplined response to wrongdoing.

Yet the Dalai Lama also seemed concerned to reserve a space for legal recourse in his vision of a Buddhist society governed by the rule of law. The law of karma, he observed, should be respected and Buddhist discipline should be valued, but “sometimes people use karma as a way of excuse.” This, he implied, is improper. Karma should not rationalize inaction or passivity when one's rights are violated. The Dalai Lama appeared to disapprove of the perspective adopted by nearly all of my interviewees, both American and Thai. He did not agree with them that the assertion of rights is necessarily a rejection of religious values. He implied that they were mistaken in their belief that pursuit of a legal remedy will invariably produce bad karma and lead to further suffering. He appeared to suggest that law could properly be used by virtuous people if they were unable to obtain justice through a more restrained and conciliatory process of negotiation.

The Dalai Lama did not explain how a victim of wrongdoing could be certain that he or she had reached the point when self-abnegation should give way to legal mobilization. Yet he clearly viewed law as an extension of religious practice and not as a contradiction of it. His position in this regard is entirely consistent with his effort to emphasize the rule of law in his Buddhist polity. Yet the devil is, quite literally, in the details. It is plausible to understand him to mean that an undisciplined and premature resort to law would indeed be a violation of Buddhist teaching. Compassion and self-restraint are fundamental values, and disputants should understand that many conflicts are the result of delusion and attachment. In the society he envisions, however, the assertion of rights does have a place and does not in every instance indicate greed, egotism, and attachment. The role of rights and the desirability of legal recourse in a Buddhist polity remain somewhat uncertain in his vision. When does the attempt to protect individual interests through secular law contradict the pursuit of selflessness and piety and when might it actually advance religious goals? The Dalai Lama was not willing to provide easy answers to one of the most challenging dilemmas of our age.

“Necessary Evil”: The Growth of a System of Judicial Courts and the Responses it Evoked among the Buddhist Monastic Community in Ancient Sri Lanka

R.A.L.H. GUNAWARDANA†

The initial steps toward the growth of a system of judicial administration can be seen very early in the history of Sri Lanka and, by the second and third centuries of the Christian era, regular functioning courts could be found even at urban centers located at considerable distance from the capital of the kingdom at Anuradhapura. The income from fines levied at such courts was available for disposal by the ruler. The commentaries on the Theravāda Canon written in Pāli in the fifth century and later, which are based on works written in the local language at an earlier time, reveal the prevailing atmosphere of a propensity for litigation that caused some concern among the commentators. It is most interesting to note that the Vinaya Commentary, the *Samantapāsādikā*, refers to a category of people called *aṭṭakāraṅkā*, literally “lawsuit-makers,” who, “owing to their acute pride, intense hatred and predilection to cause discord,” tended to get involved in litigation.¹ The commentators sought to discourage this practice among members of the monastic community. It is perhaps significant that the discussion on “lawsuit-making” occurs in the Bhikkhunī-vibhanga section of the *Samantapāsādikā* rather than in the earlier exegesis on the Bhikkhunī-vibhanga. Though at the end of the passage the author of the commentary states that the observations should apply to the monks as well, it leaves the impression that litigation had become a serious problem even within

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1. 4 SAMANTAPASADIKĀ: BUDDHAGHOSA’S COMMENTARY ON THE VINAYA PĪṬAKA, 906 (J. Takakusu & M. Nagai eds., 1967).

the community of nuns.

Institutional provisions had been long prevalent for the adjudication of complaints concerning transgressions of disciplines and disputes among fellow members of the monastic community. The ecclesiastical courts that heard such cases were guided by the monastic disciplinary codes preserved in the Vinaya and their interpretations transmitted in the Theravada tradition. There is at least one instance in an investigation in an ecclesiastical court where a monk is given the authority by the ruler to “hear any case in the kingdom.”² Godattha, the learned monk in question, had delivered a judgment on a matter involving the determination of the monetary value of a stolen object. It was this decision that attracted the admiration of Bhatika Tissa (140-164 CE). Such recruitment of talented monks to work in royal courts would have had a beneficial effect because they brought with them the experience gathered in ecclesiastical courts for the development of the emerging system of judicial administration under royal direction.

It is clear from the commentarial literature that new types of disputes had begun to demand attention. Some of these disputes were between laymen and the monastic community. A good number of them involved matters relating to property. Evidently, these commentators were living at a time when petty theft and violation of monastic property rights were rife, providing opportunities and generating motivation for “lawsuit-making.” Such acts led at times to violent incidents between monks and the laymen. One commentator counsels that a monk who finds an intruder felling trees on monastic property not seize the offender’s axe and break its cutting edge by dashing it on rocks. If indeed he has already done so by the time he recalls this advice, he is requested to have the axe repaired and to return it to the owner.³ Presumably, to a greater extent than the monks, the nuns were considered to be easy prey for aggressive action by laymen. Men who maintained themselves by theft and even common village youth would enter the property of nunneries to remove the produce, cut

2. 2 SAMANTAPASADIKĀ: BUDDHAGHOSA’S COMMENTARY ON THE VINAYA PĪṬAKA, 306-07 (J. Takakusu & M. Nagai eds., 1927).

3. See *Samantapasadika*, *supra* note 1, at 910.

down trees, and forcibly carry away equipment.⁴ It is not entirely difficult to understand that while some monks resisted aggression by resort to force, it was the nuns who had to seek recourse through legal action more often. Recourse to litigation would have been one of the practical means available to women under such circumstances.

However, recourse to the system of courts did not prove to be a simple way out of the predicament. It would seem that, from the point of view of the commentators, the judicial process performed two functions: it provided protection to people and property, and punished offenders. In their advice to the nuns, the commentators recognized the need for nuns to avail themselves of the first function, but at the same time they were eager to prevent the nuns from being associated with the punitive aspect of the judicial process. It had been long realized by Buddhist thinkers that punitive action associated with the judicial process could involve resorting to violent acts that would cause physical injury. Even if a few monks like Godattha were working within this system, it is difficult to assess to what extent they were able to influence its focus on punishment. A Sri Lankan ruler known as Vohārika Tissa, or “Tissa, the Lawyer” (209-231 CE), had made an attempt to develop a penal code which did away with punishments that caused physical injury to the convicted offender.⁵ Sirisanghabodhi (251-253 CE) was another ruler who attempted to follow the nonviolent path in the administration of justice.⁶ As would be expected, such attempts were, on the whole, unsuccessful experiments. Kings espousing the cause of nonviolence were easily deposed. They were, at best, ineffectual rulers. However, concerns expressed by Buddhists about the penal system proved to be durable. We find some writers, such as the twelfth-century author of the Sinhala text *Karmavibhāga*, arguing that all violent acts, including even the implementation of judicial punishments involving physical injury, were evil deeds which were to be

4. *See id.* at 908.

5. *See MAHĀVAMSA* 36:8 (Wilhelm Geiger trans., 1958).

6. The *Mahāvamsa* presents Sirisanghabodhi as a ruler who was reluctant to punish malefactors. This king was easily removed from power due to his hesitation about using military force against rebels. *See id.* at 80:1, 91:2.

meticulously avoided by the good Buddhist.⁷

Penal measures, even the nonviolent ones, caused loss to the convicted offenders: hence, it was argued that as a result, bad *kamma* would accrue to the person who initiated a complaint at a court of law. If the accused were to be found guilty, the person initiating the judicial process would be instrumental in causing injury or loss to another, even if the penalty imposed were justified in terms of the law. Further, involvement in litigation would arouse disaffection among the laity. The advice tendered to Buddhist monastic *sangha*, in this particular case the nuns, appears to have been formulated after serious consideration of all these aspects.

The nuns were permitted to request of the judicial officials (*vohārike*) that they be provided with protection and that property taken from them be restored, but it was essential to ensure that complaints were not directed against any particular individual and were of an unspecific or general nature (*anodissācikkhanā*).⁸ If the judicial officials were to investigate such an unspecific complaint, and then proceed to apprehend the culprits and punish them, even to the extent of confiscating everything they possessed, the nun would not bear any responsibility or be guilty of an ecclesiastical offense. Similarly, if the judicial officials were to announce by the beat of a drum that those who perpetrate such and such deeds at the nunnery would be punished in such and such a manner, and then apprehend offenders and punish them, the nun would bear no responsibility. However, under no circumstances was the nun to initiate a lawsuit, by herself or through an intermediary such as a functionary attached to the nunnery. Even if judicial officials had come to see her, she would commit an offense if she were to make a complaint to them, either personally or through a functionary, with a view to initiating a lawsuit. Nuns were also not allowed to reveal the identities of criminals, even if questioned by judicial officials. They were instead instructed to say: "It is

7. See *Karmavibhāga* (Sa-skyā manuscript No. XXXVII) (R.A.L.H. Gunawardana ed., forthcoming).

8. See *Samantapasādika*, *supra* note 1, at 909 ("kevalamhi mayam rakkham yācāma, tam no detha avahaṭṭa-bhandaṅca āharāpethāti vattabham. evam anodissācikkhanā hoti, sā vaṭṭati.").

not proper for us to say who did it. You yourselves will come to know.”⁹ However, if the judges told the nun that she did not have to say anything because they themselves knew all about it and then proceeded to give their verdict, she was not guilty of having committed any ecclesiastical offense. Only the person who initiated the process would be responsible.¹⁰ In other words, emphasis was on encouraging nuns not to make a specific complaint against another person.

If a nun decided to file a lawsuit and approached the judicial officials, she committed an offense at each step. The first complaint involved a preliminary offense in the *dukkata* category; the second involved an offense of the “grave” (*thullaccaya*) category; and at the conclusion of the judicial proceedings (*aṭṭapariyosāne*), she was guilty of an offense of the *sanghādisesa* category, involving suspension from the order, whatever the result of the lawsuit was.¹¹ The gravity of the offense that the nun committed through involvement in the judicial process was not related to the justifiability of her suit in terms of the prevailing law. For if the person against whom she filed the suit were to be found guilty and punished at any level higher than a fine of five *māsakas*,¹² in ecclesiastical terms the nun was considered guilty of having committed the most grievous type of offense, the *pārājikā*, involving the penalty of expulsion from the order. The only exception to the rule was a situation in which a nun unwittingly found herself involved in a lawsuit that had gone on for quite some time earlier.

The rule prescribing expulsion from the order for involvement in a successful lawsuit in which the other party had been punished above a certain limit does not appear in the *Vinaya Piṭaka* and seems to have been a Sri Lankan innovation.¹³ Thus losses caused on someone through the judicial process were considered to be on par with theft. In the *Vinaya* it was theft of an object worth more than five *māsakas* that brought expulsion from the

9. *Id.*

10. *See id.* at 908.

11. *See id.* at 906-07.

12. Five *māsakas* amounted to a fourth of a *kahāpana* in value.

13. Even in the later *Parivāra* section, the penalty was *sanghādisesa*. *See* 5 VINAYA PIṬAKA 72, 83 (1883).

order on an offending monk. Considered purely from a layman's point of view, these provisions would appear illogical, since the more justified the nun's complaint in terms of the law, and the more grievous the offense giving rise to the complaint, the guiltier she was in the eyes of the Vinaya. On the other hand, from the commentator's point of view, judicial punishment was a form of violence and, as such, it was abhorrent; and the graver the violence, the greater the gravity of the responsibility of those involved in that process.

The gradation of ecclesiastical offenses involving association with the judicial process was perhaps designed to encourage one who had filed a lawsuit to withdraw it at an early stage. The prescription of such a grave course of action as expulsion from the order perhaps reflects a situation in which litigation had become a serious problem within the community of nuns in ancient Sri Lanka. It may also be pointed out that the underlying assumption of the commentator was that access to courts was easy. The scenarios outlined by him involved situations of nuns going to courts, the judicial officials visiting the nunnery to collect information, and announcements being made to ensure protection for the nunnery. They carry the implication that by this time a regular system of judicial courts with a penal code, designed to provide security for person and property, had emerged.¹⁴

14. This paper draws on material presented in an earlier contribution by the author. See R.A.L.H. Gunawardana, *Subtile Silks of Ferreous Firmness: Buddhist Nuns in Ancient and Early Medieval Sri Lanka and their Role in the Propagation of Buddhism*, 14 SRI LANKA J. HUMAN. 1990 (1988).

Universal Compassion and the Lawyer's Duty

JAMES L. MAGAVERN†

The question of greatest interest to me in the conversation with His Holiness the Dalai Lama was what we as lawyers and citizens can learn from a great spiritual leader of our time and from the ancient and highly developed religious and philosophical tradition he represents. More particularly, to what extent and in what ways can we bring the principle of universal compassion to bear on the workings of our legal system here in the United States? And especially, are we not legally and ethically bound by special obligations to particular people, communities and organizations arising from the roles and relationships in which we find ourselves, even when those obligations may require action inconsistent with the principle of universal and impartial compassion as directly applied to the situation at hand? For example, does His Holiness recognize a special obligation on his own part to the Tibetan people, a special obligation of parent to child, citizen to nation and local community, elected legislator to constituency, member to church and congregation, officer or employee to charitable, civic or business organization, or attorney to client? And are such special obligations justified implicitly in a fundamental moral value of loyalty, or merely instrumentally, as incidents of institutional arrangements considered conducive to the general welfare in the long run?

In certain of his comments, His Holiness seemed to suggest that, at least ideally, our actions should be guided by direct and impartial application of the principle of universal compassion, without regard to any such special obligation. Although he identified himself first as a human being, second as a Tibetan, and only third as a Buddhist, he justified his service in the Tibetan struggle for national freedom in terms of preservation of Buddha Dharma and

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implementation of compassion, presumably universal compassion. As to lawyers, he characterized as “dirty law” an effort by a lawyer to prove that a client did not commit a crime when the lawyer knows the client is guilty. American lawyers would agree that they cannot properly present evidence known to be false, but not that they should not strive to get a guilty client acquitted by invoking failures of proof, applicable privileges, exclusionary rules of evidence, etc. Interestingly, His Holiness remarked that monks are trained in debate to be able to prove that something not the case is the case and vice versa. When a lawyer is torn between legal rules and what she feels to be her moral duty in a particular case, his Holiness said at one point, she should “weigh the benefits to the individual against the wider implications of the action for the community and society.”

Despite these remarks, though, His Holiness made clear his belief that in an imperfect world we must be guided by specific rules and principles of law that may require action we might consider inconsistent with the fundamental principle of universal compassion if applied directly to the particular case. He firmly advocated separation of religious and political institutions. Although universal compassion is a fundamental principle of Buddhism, His Holiness advocated it as a secular principle, derived from characteristics of human nature. He commented that the Buddha did not formulate a fully ordained monastic legal system, that the rules of the monastic system evolved in an organic process in response to problems revealed by new circumstances, that the rules must be adapted realistically to the needs of the situation, and—of particular relevance to the present discussion—that the Buddha did not address the problem of how to manage society. His Holiness accepted the need for harsh punishment and violence when necessary to protect others, provided that the motive is not revenge or hatred, but compassion. Asked about the ethical dilemma faced by a lawyer when the duty of confidentiality to client conflicts with the urging of compassion to the victim’s family, His Holiness advocated consideration of the broader social implications as weighed against individual concerns, but deferred to legal experts and the legal system to provide the answer.

Thus, I believe, His Holiness sees universal compassion

as a secular principle having direct application in the creation of laws, but not necessarily in their application. He referred repeatedly to the gap between rich and poor. In the spirit of universal compassion, we should strive to narrow that gap by changing our laws of taxation, employment relations, public health and environmental justice, public education, and social services. In that endeavor, lawyers, as citizens or as representatives of altruistic citizen organizations, can contribute expertise in the workings of legal institutions and in the drafting of laws responsive to the needs and characteristics of society in that time and place. In the administration of law, universal compassion should no doubt influence many discretionary decisions. Nevertheless, even if laws are designed to serve the cause of human dignity and welfare in the long run, the legal system will necessarily incorporate rules that produce harsh results in particular cases, and it will impose special obligations requiring people to act at times in contradiction to the ideal of impartial compassion. As lawyers and as individual human beings, we necessarily act within an existing social and legal order and our own web of relationships. Legally, and ethically as well, we must respect special obligations arising out of those relationships.

Internal Motivations, External Coercion, and Educating for Happiness

KENNETH SHOCKLEY†

I. CHARACTER AND INSTITUTIONS

The overarching theme of the recent three-day visit of His Holiness the Fourteenth Dalai Lama of Tibet to the campus of the University at Buffalo was “Promoting Peace across Borders through Education.” While the value of education is obvious, I believe for His Holiness there is an important theoretical reason why education, properly construed, is the only way one can affect change. The values His Holiness expresses, both as a Buddhist and as an advocate of a universal ethic, commit him to bringing about social change not through modifying behavior, but through encouraging the reform of individual motivation.

We should start by looking at the way in which His Holiness responded to questions about law and institutions during the final session of his visit to Buffalo, the conference on Law, Buddhism, and Social Change. He tended to answer by appealing to individuals—their character and their happiness—and not, in general, to particular social structures that would bring about that happiness. One exception to this tendency involved education: during the conference he appealed to the law faculty to reform their curriculum to infuse compassion in their students; during his public address he appealed to educators to instill compassion in their students. But there was little otherwise in terms of ways we *should* modify our behavior. Rather he tended to appeal to the value of compassionate nature, the alleviation of suffering, and, crucially, the reformation of our motivations. Motivation

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reform is essential to the alleviation of suffering and right action.

Intuitively, the connection between education and the reform of motivation is clear. With increased education, of certain forms, one would expect individuals to be more sensitive to the suffering of others. But there is an important point of moral psychology that underlies this seeming platitude that carries a philosophically significant lesson, a point that might easily be overlooked because of the intuitive clarity of his general theme: peace through education.

The point of moral psychology is found in a potential tension between diverse motivations: those found in common construals of law, and those found in Buddhist notions of personal development. More particularly, the motivation elements of the pursuit of happiness seem at tension with the motivation elements tied to law. Law motivates right action through external constraint, Buddhism through the universal drive for the alleviation of suffering. Put another way, law operates by means of external norms; Buddhism (and any religious traditions focused on perfection of character) operates by means of internal norms.

In His Holiness's response to questions about law and institutional design we can see a way of dealing with this incongruity: education. But, again, the appeal to education is not a mere platitude; there is a profound conceptual matter which underlies education as a way of dealing with this tension. Education of a particular form provides the best way to resolve this tension—and this mode of resolution does not depend on the particular appeals His Holiness made to education, but rather on the way someone who advocates an ethic of personal perfection must treat norms that operate through social reinforcement. The tension between law and internal norms has an effect on the nature and purpose of what I suggest would be characteristically Buddhist law.

II. INTERNAL MOTIVATION AND LEGAL COERCION

To draw out this tension let me expand on some rudimentary points about Buddhism (about which I claim no expertise) and law. It is clear that Buddhist teaching

focuses on individual development—and we can see that in His Holiness’s recurring focus on motivation in answer to the widest range of questions. The concern should be with our own character, the foundation for our motivation. Recall the story of the monk concerned that he could lose his sense of compassion for his jailers because of their abuse. The concern was not with a wrong done, but with his own capacity for compassion, the motivation with which the monk thought, acted, and lived. The point, in summary, is this: motivation emphasized in Buddhist teaching is an internal motivation. Right motivation is something that moves one to act appropriately from within one’s own character.

We can see the tie to happiness as a motivator. Happiness moves us to act, as should the release of suffering—and both move us to act from within; we do not need external social, legal, or political pressures to move us to act in accordance with our own happiness. Happiness and cessation of happiness are thought by many to be universal values (as John Stuart Mill pointed out in *Utilitarianism*, with a slightly different conception of happiness in mind¹), even if they are not universally instantiated in every act of every human. At least His Holiness referred to these as universal human values,² and not values particular to those with a Buddhist viewpoint. The lesson we will conclude with then holds as long as these values *require* internal motivation, and are not specific to a Buddhist viewpoint. However I think the difficulty of characterizing Buddhist law makes this requirement particular salient.

If we characterize a Buddhist as someone who maintains the elimination of suffering as their motivation, it follows that one is only a Buddhist if one is motivated in the *right* way. And so, it would seem, one cannot be forced to have this motivation; of course one can be forced to behave in a certain way, and, perhaps eventually become habitualized to a certain way of behaving (and perhaps even come to take on a motivation of some form—I will address this below). But one cannot be forced to have a motivation unless one accepts that motivation as one’s

1. See JOHN STUART MILL, *UTILITARIANISM* (1861).

2. See HIS HOLINESS THE DALAI LAMA, *ETHICS FOR A NEW MILLENNIUM* (2001).

own—even if this is under some level of duress (but recall the story of the monk and his jailors). The point might be put this way: you cannot be forced to *be* a Buddhist, although you can be forced to behave like one; if motivation matters, one cannot be compelled. Right motivation, motivation for the alleviation of suffering, cannot be impressed from without, unless one already adopts it as a value. Sloganistically: *Right motivation can't be forced, it must be endorsed.*

Now, shift to what we have referred to as the “King’s Law” (as opposed to monastic law). We might haggle over whether the king’s law is to be understood as *essentially* coercive, or even that its function involves the modification of behavior (for it might be that law is the justification of the use of force, for example), but it *is* the case that it is an external source of behavior guidance. And this is the feature of law relevant for my point.

Whether they take the form of prohibitions, injunctions, or permissions, they are externally sourced. Laws coordinate by sanctioning cooperative *behavior*—internal motivation is a secondary concern. In short, legal norms are external: they commonly operate by providing incentives to refrain from performing certain actions. The point, as Mill pointed out, is that the sanction of law is social, that is, its motivational force is external.

III. BALANCING INTERNAL MOTIVATION AND EXTERNAL NORMS

So what would be the focus of law (as a set of norms) if it is to reflect the appropriately *internal* motivation so central to Buddhism? It must be designed so as to promote individual happiness—but that is too easy and too quick. It must be designed so as to operate on one’s dispositional states, such that one is disposed to be motivated properly. It must be designed to change hearts and minds, not merely behavior.

So, if a law (let us refer to that law as a norm for now to avoid complexities surrounding the contrast between law in action and law as codified) is to be designed in such a way, a way appropriate to the internalist norms of personal development and motivation reformation, it must be *internally endorsed, not externally enforced.* Importantly,

this norm will not work to promote the values it is supposed to instill unless one endorses it.

In the case of external norms, one need not care about the norm or be motivated appropriately for the scope of that norm to apply; while I might not care about social sanction, the norms of social behavior will still be applied to me. But how can we formulate norms that will encourage this, that is, facilitate right motivation in the right way, rather than *enforce* behavior that leads to happiness in a manner entirely inconsistent with the internal focus of Buddhist norms? More simply, how can we formulate norms that capture the essentially internal motivation of Buddhist norms? Notice how odd it would be to say “to *make people strive* for their own happiness” rather than, more appropriately, “to *encourage* happiness.”

This form of *encouragement* looks like the justification for a social institution or policy, not a justification for coercively restricting or condoning behavior. And if laws are to manifest the internalist norms so central to an ethic of personal perfection, they should not operate by focusing on behavior. This contrast foreshadows the sort of law capable of manifesting the right sort of norm.

What remains, I suppose, is to consider how one might internalize these happiness-norms, how we might overcome this internal/external norms divide. How might we institutionalize norms encouraging happiness such that we use external norms, in some fashion, to promote a certain form of motivation.

This might seem a bit silly: clearly we internalize external norms all the time—this method is as old as parents “training” children to behave, as old as the carrot-and-the-stick model of encouragement. Social programming is one form; learning conventions is another. Once we come to adopt certain values as “the way things ought to be done,” these norms motivate internally. Social pressures are powerful mechanisms in this transference, but social pressures operate in (at least) two very different ways.

One mode by which social pressures enact the adoption of social norms is through simple behaviorism: behavioral conditioning. But that looks very much like taking people as mere means to a social end. While this might be acceptable on occasion, His Holiness pointed out the importance of respect during both his opening comments to this

conference and during his public address. The individual coerced is not treated in a manner befitting of an agent worthy of respect, or in a manner consistent with an ethic of personal perfection. This sort of unmitigated social engineering operates on a very different mode than what would seem appropriate for Buddhist (or any other) quest for personal development, development from within. Fortunately, there is an alternative mode. Education, as exploration, investigation, and the elimination of ignorance constitutes a means of internalizing happiness norms, norms of personal perfection that seem less problematic. And this will bring us back to the central theme of His Holiness's visit.

IV. EDUCATION

If we educate (inculcate rather than indoctrinate) people to seek happiness—and indeed here we should think in terms of Aristotle's *eudaimonia*³ rather than the happiness of the hedonists—then they will likely come to hold these happiness norms on their own.⁴ Mistakes will still be made, due to our ignorance, and so there will still be a need for some form of law. But inculcating the drive for happiness is one way of internalizing these laws, and thereby making them bind.

Values might be inculcated not by enforcement and coercion, but through encouraging discussion, exploration, and open discourse. If individuals are encouraged to come of their own accord to embrace norms of happiness then we avoid the problems of external norms and coercion.

This may sound a little idealistic, but this seems the way we instill norms into people when we are at our best, and when they are at their best. Ideally, one does not refrain from murder because one is concerned about the punishment (at least generally), but because one sees the law as reflecting the general moral norm (shared, from within) that murder is simply wrong.

Now we can see the importance of education, conceptually, in the idea of social change. Education,

3. See Aristotle, *Nicomachean Ethics*, in 2 THE COMPLETE WORKS OF ARISTOTLE, at 1729 (Jonathan Barnes ed., W. D. Ross trans., 1984).

4. See JOHN STUART MILL, ON LIBERTY (1859).

understood quite broadly, provides the only real avenue by which we can encourage individuals to pursue an ethic of personal perfection without running afoul of that very ethic. Education, understood as the free and open investigation of subjects of interest (that is, free of dogmatism and ideological constraint) is nothing more than a means of individuals coming to adopt (i.e., internalize) certain views. When those views constitute norms of right conduct, in internalizing those norms individuals adopt right motivation. Education, then, properly construed, allows for the inculcation of an ethic of personal perfection without running afoul of the norms of that very ethic.

So how does this connect with the questions motivating this discussion? In particular, how does a Buddhist point of view add to current debates over the role of law in society? And how should the government try to make society better through law?

The answer is in seeing law, or at least the part of law capable of instantiating the sort of norms appropriate for an ethic of personal perfection, as a means of developing institutional structures, not generating prohibitions, injunctions, and permissions. By developing structures which encourage individuals to investigate and deliberate with one another about their shared values and concerns, that is, by developing educational structures, law is capable of encouraging individuals to pursue personal perfection. And it is capable of doing so without running afoul of concerns about external motivation or coercion. By developing the right sort of institutional structures, we educate for happiness.

More law of the encouraging sort may well lead to less law of the prohibition/permission sort, if we are fortunate. At least this is a reasonable hope. And here we see a lesson, perhaps, that our own legal system might take from an ethics of personal perfection. If we focus our efforts on the development of institutions, educational and otherwise, we would do well to foster opportunities for deliberative exploration.

Even with this change of focus there will still need to be law of the more coercive variety, of course. Not everyone will pursue a life of right motivation, and even those who do may need guidance in the coordination of their pursuits with the pursuits of others. But I would expect a change of

focus from coercion to encouragement would have a profound effect on the law.

V. THE CATCH

However, there is a catch. While anyone, regardless of their personal values and convictions, can see the value of coordination, the value of personal perfection of the kind we are considering may not be so universal. While the justification for the coercive power of law can be made (arguably, at least) for the sake of coordination and social well-being, it is not so clear how a parallel argument might take place for an ethic of personal perfection. Coordination provides a value-neutral justification for the value of law. If law is to promote a substantive set of values, like those associated with an ethic of personal perfection, it does not seem at all clear that individuals would endorse that law unless they already endorsed the value that law would encourage. One might take the institutional structures designed to encourage others to pursue an ethic of personal perfection to be in the best interest of those being subjected to those laws. But in being subjected against the values they have, such laws flirt with a dubious form of coercion. In the particular case of Buddhist Law, the endorsement of educational policies would not be easily justified unless the populace already endorsed Buddhistic ideals.

Some Notes on the Buddha As a Law Giver

VESNA WALLACE†

The original Buddhist texts in Pāli and Sanskrit provide an excellent resource for beginning to construct an envisioned image of the Buddha's approach to law and legal processes. This paper is a brief comment on a few of the important texts with respect to the Buddha's pronouncements on law, particularly secular law, that might be useful for lawyers.

The Vinaya, one of the three divisions of the Buddhist canon, does not directly correspond to our contemporary concept of a legal code, since it was not composed in the form of a code. Nevertheless, it contains certain features and characteristics of substantive and procedural laws. The Theravādin version of the Vinaya also contains the reports of Buddha's adjudication regarding what is right and what is wrong in a given situation and what is conducive or non-conducive to the welfare of the monastic community (*sangha*) and its relation to the laity. In most cases, when certain facts are brought to the Buddha's attention, he lays down a rule *ex post facto*. Each of his injunctions, prohibitions, or permissions is placed into a particular contextual situation and is illustrated by a story that describes the situation. Thus, the rules seem to come into existence out of the practical experience of the monastic community and its relationship with the rest of society.¹

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1. In the *Bhaddāli Sutta* (*Majjhima Nikāya*, Bhikkhu Vagga), the Buddha explains his principle for laying down the rules for *sangha* only in the circumstances that require an expansion of rules: When people are morally deteriorating and when the true *Dharma* is disappearing, then there are more training rules. The Teacher does not lay down the training rules for disciples until a case arises that requires the promulgation of an appropriate training rule; but when the things that are the basis for taints become manifest in the *sangha*, then the Teacher lays down the training rule for disciples in order to ward off those taints. See also the entry "Law" in 6 ENCYCLOPAEDIA OF BUDDHISM, fascicle 2 (Gov't Sri Lanka 1999).

With the development of the Vinaya, the monastic community became an independent, self-governing body. It gave to the monastic community legitimacy in relation to the state and it guaranteed its right to existence and its own way of life. In the ancient India, the king's duty was to protect religious organizations from disruption and to prevent infringement of their internal rules, without regard for his personal religious preferences. In this sense, the Vinaya can be seen as a body of conventional laws (*samaya*) of the Buddhist monastic community at large. But it is also the body of laws regulating monastic life, whose purpose was to facilitate the unity (*samaggatta*) of the *sangha* with the members functioning as a corporate organ (*sangha-kamma*).

The *sangha-kamma* was characterized by (1) a system of joint deliberation; (2) equality of all its members in the decision making on matters of common interest; and (3) rule of majority. Its functioning in a valid manner, i.e., in a full assembly, was seen as a safeguard against the deterioration of the *sangha*. Any decision that was made by way of a *sangha-kamma* became *res judicata*, and an attempt to raise the matter all over again was seen as an offense under the Patimokkha code.

After the death of the Buddha, there was no locus of authority to serve as a source of law in the *sangha*. The elders could instruct and advise, but only the *sangha* as a corporate body could by agreement make a law. Only the *sangha* as a corporate body could by agreement make a law. The process of converting the existing regulations into laws binding on the *sangha* was inspired by a legal fiction, using the Vinaya as a guide. The Vinaya is filled with lists of the different kinds of *sanga-kammas*, the two types of *sāsana*, the four deeds that are not to be done (*cattari akaranīyāni*), rules for settling disputes, the four types of litigation (*adhikarana*), the three methods of "rising up" from an offense already committed (*apatti-vutthana*), the five forms of punishment (*kamma*), the additional two types of penalty, as well as many other institutional rules and regulations useful as legal guidelines.

The Mūlasarvastivādin Vinaya is another rich source for the study of the monastic law of the Mainstream Buddhism in India, which still waits to be extensively studied.

Moreover, there are sources that provide guidelines for the laity. For example, the *Sigālovāda Sutta* presents the duties of laypeople to abstain from killing, stealing, lying, and sexual misconduct, and not to act under the influence of bias, ill will, fear, and delusion. It prohibits indulgence in liquor and gambling, and staying out late at night. It enumerates the duties (*karaniya*) pertaining to the relationships between children and parents, teachers and pupils, husbands and wives, employer and employees.

Likewise, the Sanskrit text, *Daśacakra-ksītigarbhanāma-mahāyānasūtra* deals with punitive measures and begins by reminding us that punishments in a secular legal system should be imposed out of compassion and not out of anger or out of a desire for revenge. To be proper, the punishment should only be imposed on the real offender. To be timely, it must be done at a time and in a situation in which the judge is capable of sentencing the offender and the offender is able to receive it. To be purposeful, it must be a punishment that rehabilitates the offender and helps him to improve his actions. As to the nature of the punishment, it should be gentle and not harsh; it is best if the criminal is given a warning, and execution and impalement are strictly prohibited. Finally, the text states that the punishment should be amiable and compassionate. The criminal should be treated in the same way as a child being punished by a parent.

In addition, several other texts describe the distribution of wealth, property, war, inspiring architecture, taxes, and the requirements of the market, to name just some of the topics. In short, the original Pāli and Sanskrit texts provide a wealth of information waiting to be mined by lawyers on the original Indian Buddhist views about law and the Buddha as a law giver.

Separation of Religion and Law?: Buddhism, Secularism and the Constitution of Bhutan

RICHARD W. WHITECROSS†

As a legal anthropologist and a socio-legal researcher, I was particularly interested to hear His Holiness discuss the relationship between Buddhism and law. The study of law and Buddhism is in its infancy, and there are difficult questions to address. For example, we need to critically evaluate what Buddhist law might be and what we are attempting to achieve with the study of law and Buddhism. And a related issue, of course, is what we mean by “Buddhism.”

When I originally began to conceive my doctoral research on law in the Buddhist state of Bhutan in the mid-1990s, I wanted to examine the role of Buddhism in contemporary Bhutanese law. Bhutan is the last independent Himalayan Buddhist state. Its political history is separate from that of Tibet from the seventeenth century onwards. Zhabdrung Ngawang Namgyal, who unified Bhutan, implemented his personal vision of Bhutan as a religious state, with secular and temporal rule combined much more intimately than in the government of the Dalai Lamas. Although British missions passed through Bhutan to Tibet in the late eighteenth century and British colonial forces defeated the Bhutanese in the 1860s, Bhutan was never colonized and British influence was minimal. In theory, Bhutan was a theocracy until the early twentieth century, and the monarchy, established in 1907, is descended from a major fifteenth century Bhutanese Buddhist saint, Pema Lingpa.

During my fieldwork, I was fortunate to meet and interview several major reincarnates in Bhutan; however, they rarely discussed the relationship between law and Buddhism, except perhaps to stress the importance of

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“discipline” and moral behavior. Among the laity, my main informants, the emphasis was on a vocabulary of moral conduct with their legal cases treated as removed directly from religious values. Yet, when I suggested to Bhutanese that Buddhism was not important to the emerging laws and legal system, this was vigorously denied and I was informed that Buddhism was at the core of the laws. Examining the emergence of the modern legal system and laws passed by the National Assembly established in 1953, it is clear that from the 1950s to 1980s as the state sought to develop the country, laws were mainly imported. In the following period, from approximately 1991 onwards, there has been a conscious engagement by the judiciary and the emerging cadre of legally educated lawyers to integrate the laws with a broader understanding of Bhutanese values. The core of these values, often referred to as “Bhutanese culture,” lie in Buddhism—or more specifically, in the teachings and rituals of the two main schools of Himalayan Buddhism that dominate Bhutan. These are in the west, the state sponsored Druk Kagyu, and in the central valleys and the east, the Nyingma. Therefore, any study of law and Buddhism has first to recognize that Buddhism is not comprised of a unified set of values, and often displays variations by locality; each area therefore has its local version of “Buddhism.”

In Bhutan, and elsewhere in the Buddhist regions of the Himalaya, there is a ritual drama performed annually at major festivals. Derived from one of the volumes comprising the *Liberation on Hearing in the Bardo*, commonly known in the West as the *Tibetan Book of the Dead*, it depicts a court presided over by Yama Dharmaraja, the Lord of the Dead.¹ Yama personifies the process of impartial judgment of a person’s deeds when he or she dies. He is accompanied by White God and Black Demon, and his minister of justice, Ox-Headed Raksha. As the drama unfolds a hunter and a householder are brought before Yama. Black Demon, referred to as the “bad conscience,” is the prosecutor, and White God, the “good conscience,” acts as the defense. The hunter’s misdeeds are recorded and he is condemned to the hell realms, while the virtuous actions

1. For an excellent and accessible translation, see THE TIBETAN BOOK OF THE DEAD 320-41 (Graham Coleman & Thupten Jinpa eds., Gyurme Dorje trans., 2005).

of the housekeeper allow him to be lead to a pure realm. Watching this unfolding drama in the crowded courtyard of a *dzong* (fortress-monastery), I was struck how for many people this ritual drama is more than entertainment. Speaking to an elderly Bhutanese woman, she spoke of the judgment of Yama in relation to her own life and actions.

Generally, the administrative quarters of the *dzongs* in which the courts are located are free from decoration. French notes that in central Tibet, “on the whole, legal spaces were free of decoration, religious objects, altars or pictures. Tibetans stated upon entering they knew these rooms were not religious in nature. When empty of their actors, legal spaces looked like the interior of any administrative office.”² This was true in Bhutan as well until ten years ago. From the mid-1990s onward, the imagery of this ritual drama has been drawn upon by the Royal Court of Justice of Bhutan. Masks representing Yama, Black Demon and White God hang above the judge’s dais in courtrooms. Unlike the courtrooms described by French in Tibet, the courtrooms of the High Court of Justice in Thimphu, the capital of Bhutan, are elaborately decorated drawing heavily on Buddhist iconography and symbolism. A clue to these recent changes was provided in a statement by the Chief Justice. In an interview, the Chief Justice expressed his concern that ordinary Bhutanese did not respect laws which did not reflect wider social and cultural practices. Lyonpo Sonam Tobgye stated that “laws are always strong only when they have social sanction and religious sanctity.”³ This recent move to incorporate a range of iconographical features taken from religious culture and architecture illustrates a conscious desire to secure the foundation of the contemporary Bhutanese legal system by a variety of means to Bhutanese Buddhist values.

Bhutan has traditionally viewed itself as a Buddhist country, indeed as a *beyul* or “hidden land” preserving the *buddhadharma*. Yet, the constitutional drafting committee, chaired by the Chief Justice, chose not to make Buddhism the official religion of Bhutan. In a move quite unlike that of the drafters of the Sri Lankan constitution of 1971, who

2. REBECCA REDWOOD FRENCH, *THE GOLDEN YOKE: THE LEGAL COSMOLOGY OF BUDDHIST TIBET* 150 (1995).

3. *The Influence of Buddhism on the Bhutanese Trial System*, KUENSEL, Dec. 6, 2003.

made Buddhism the state religion of Sri Lanka, Buddhism was described as the “spiritual heritage” of Bhutan.⁴ At the start of the public consultation process in 2005, concern was expressed by ordinary Bhutanese who felt that Buddhism should be declared the official religion of the country. However, the Chief Justice firmly said that there was no need for Buddhism to be declared the state religion and that it was important that religion be kept separate from secular matters. The draft constitution removes the state-sponsored Central Monk Body from any formal role in the new legislature.⁵ At present, the Central Monk Body has representation in the National Assembly and on the Royal Advisory Council. In February 2007, it was announced that all monks, nuns, and *gomchen* (lay practitioners) who receive state support will not be permitted to vote in the elections on the grounds that religion and politics should be separated.⁶

The approach apparently being adopted by the Bhutanese authorities appears to reflect the Dalai Lama’s comments at this conference, and his emphasis on the separation of religion and politics. Both during the discussion and on rereading the transcript, I am aware of a series of as yet unanswered questions. The discussion of secularism was especially puzzling because I wanted to ask, to clarify, what His Holiness understood “secularism” to mean. I had encountered similar problems during fieldwork and I want to flag the importance of not merely accepting familiar terms at face value. Similarly, the Bhutanese constitution refers to Bhutan as a secular state—in what sense? Secularism does not have the same meaning in South Asia, especially in India, as it does in the West.

In Bhutan, the state-produced educational materials for history, civic studies, and Dzongkha (the national language) are filled with stories of Buddhist saints and religious figures. Illustrations depict monks performing ceremonies

4. DRAFT CONSTITUTION OF BHUTAN art. 3(1) (second version, August 2005), available at www.constitution.bt.

5. Article 3(3) of the draft constitution sets out the relationship between the state and the Central Monk Body. Further references throughout the draft constitution stresses the separation of state and religion. For further details, see *The Constitution of the Kingdom of Bhutan*, www.constitution.bt (last visited June 2, 2007).

6. *Lay monks can vote*, BHUTAN OBSERVER, Feb. 2, 2007.

in private houses, while the texts describe the establishment of the Druk Kagyu in Bhutan and the unification of Bhutan by the Zhabdrung Ngawang Namgyal in the seventeenth century. The intertwining of religion and state, of religion and daily life, is inescapable. Of course, it is true that the Central Monk Body never sought to control the royal government, and one could argue, as some educated Bhutanese do, that the Bhutanese state can be described as secular even prior to the establishment of the monarchy.⁷ However, the separation of secular and temporal authority was historically blurred by the nature of the polity established by the Zhabdrung. Even in the twenty-first century, there have been moves towards the sacralization of the monarch, who is specifically described in the draft constitution as “Buddhist” and the embodiment of the Dual System.⁸

The role of law, especially as a tool of governance, and to varying extents as a tool of modernization and development, in countries such as Bhutan, is significantly different from the seventeenth or even early twentieth century. As the study of law and Buddhism develops, comparisons will make for ever richer lines of inquiry and I was personally encouraged by the enthusiasm for the project displayed by His Holiness, the Dalai Lama. An important, indeed essential task will be engaging religious teachers and developing the dialogue started in Buffalo further.

7. Based on private discussions with Bhutanese.

8. See DRAFT CONSTITUTION OF BHUTAN art. 2(2) (second version, August 2005), available at www.constitution.bt.

APPENDIX A

Eight Possible Questions to Address to the Dalai Lama

Drafted August 8th, 2006, revised August 17th, 2006 by
the Concepts Committee

The central area of interest for this conference on “Law, Buddhism, and Social Change” is the application of Buddhist philosophy to political and legal problems and questions. In talking to the Dalai Lama, we would like to discern what practical and theoretical insights we can receive from him with respect to these issues.

The conference will be divided into two days. On the first day we will spend two or more hours with the Dalai Lama putting a number of questions to him and following up with his answers. After those two hours there will be time for informal discussion among the participants. The second day will consist of a more formal discussion and expansion upon the discussion of the first day.

We therefore provisionally envision each participant to have two distinct but related tasks: the formulation of questions to pose to the Dalai Lama and the provisional development of a subject for discussion the second day. While these need not be directly dependent upon one another, it is likely that some adoption of subject matter by each participant will make for a cohesive conference.

To aid in the completion of these tasks we have brainstormed eight ideas and topic areas, which participants are encouraged to further hone and develop.

I. DEMOCRACY AND ATTACHMENT

Let’s imagine that you and the current government have the opportunity to return to the Tibetan plateau and create a new democratic government. What will be the role

of Buddhism in the new democracy?

Does a Buddhist democracy assume that the legal system should be infused with the precepts of Buddhism? How do morally substantive concepts fit with a procedural legal and political system?

Would law protect property interests? How is such a legal system justified with the Buddhist philosophical position of non-attachment? In a Buddhist democracy, what role should law play in protecting individual property interests?

How does the Buddhist idea of avoiding attachment and the democratic commitment to the rule of law help in the problem of whether to return ancestral property to its original owners or leave it in the hands of the current owners?

Some citizens may advocate an unfettered capitalist individualist system as the best way to move the political community forward. This means the pursuit of individual ends. Does this create a tension in Buddhist values between attachment and non-attachment to materialism?

II. ECONOMIC DEVELOPMENT AND POVERTY

Again, locating this question in the Government-in-Exile's return to the plateau to create a new government, what will be the role of law in economic development?

How will law in a democratic Tibet grapple with traditional Tibetan differences in class and social status? To what extent should law be used affirmatively to break down these differences?

Many political and legal systems including our own allow for economic inequality in a housing, education, and income. Will the new Tibet use the legal system to reduce these inequalities or are they an inevitable result of economic development?

Is there a Buddhist-infused notion of the appropriate use of taxation and welfare to reduce poverty? Does Buddhism give you a unique perspective on these issues?

III. CONSTITUTION AS SOCIAL ORDER

Your government has drafted at least two constitutions

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and used those documents to construct a social order. Do you see any problems or tensions between substantive Buddhist ideals and procedural constitutional ideals?

For example, there has been a constitutional crisis in Thailand this year, 2006, because of corruption at the highest levels of government. Many have called for the King to intervene but this would not be using constitutional process. When is it appropriate for a religious leader to intervene in the constitutional process?

The Thai King chose not to intervene but gave an informal lecture to the top judges that they are going to have to make some tough decisions about the nature of the state and they should look to good moral character. What do you think of this approach?

IV. KARMIC CONSEQUENCES OF LEGAL DECISIONS

We have a question dealing with the role of judges in a new democratic Tibet. Let's assume, as we do in Western courts, that when a judge decides a case, it advances the rule of law and the democratic goals of the society although it might produce pain and harm for some individuals.

In a democratic Tibet will judges face a tension between their identity as a judge and their identity as a Buddhist?

When a judge makes a decision, what are the implications for the karma of the parties and what are the implications for the karma of the judge? Is karma an appropriate consideration for a legal institution?

What about good people doing good actions that violate the law? What about a situation in which an enlightened person is trying to alleviate the suffering of others and needs to break the law to do so?

What if this same good person is beating a child to burn off the child's karma from a previous life? In a trial commenced by the child's parents, do you allow in evidence of karma as a defense in a secular legal system informed by Buddhism?

V. LIMITS OF LEGAL CONSTRAINTS

Let's again imagine that you and the current government have the opportunity to return to the Tibetan

plateau and create a new government. Some people view unlimited freedom of expression as an essential democratic freedom, while others find some expressions excessive and destructive to society. One example is violence and pornography on television.

To what extent should government and the legal system limit the material on television?

Should the law protect these expressions even if they conflict with Buddhist ideals?

More generally, do you view law as a valuable instrument to discourage immorality and encourage Right Attitude and Right Action?

VI. PUNISHMENT AND REHABILITATION

Western societies have been engaged in a debate about the purpose of punishment: is it to deter such actions in the future, to provide retribution, or to rehabilitate the offender? Buddhist legal systems might promote different agendas such as encouraging the future enlightenment of the individual or curing someone of desire and greed.

What is the Buddhist theory of punishment and rehabilitation?

Taking one example, a person is caught stealing a diamond ring to make himself rich. This is a clear situation of bad motivation and action. How should this be handled in terms of punishment?

VII. CONSENSUS IN THE LEGAL SYSTEM

One of the benefits of the Tibetan legal system pre-1960 was the emphasis on consensus by the parties to the forum, by the judge, to the finality of the decision itself. This approach is quite different from one with a clear winner or loser.

Is there a way in a democratic legal system to preserve the virtues of consensus while still adhering to the rule of law?

Connected to this are the ideas of catharsis of the parties and reconnecting the interdependence of the groups. In Tibet's previous legal system, extensive victim compensation, religious rituals, and a wide variety of

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forums for settlement of disputes accomplished these goals. Will these be present in a newly created legal system?

To what extent is this consensus model transferable to Western culture? How would we institute it?

VIII. CORRUPTION, CONSCIENCE, AND THE LIMITS OF LAW

One of the great plagues of governments around the world has been corruption and bribery.

What is the Buddhist idea of how to stop corruption and bribery in government?

In America, many laws designed to prevent corruption and bribery have failed. What problems would you expect to encounter in a new Tibet? To what extent and how can corruption be restrained by law?

APPENDIX B
TRANSCRIPT†
**Law, Buddhism, and Social Change: A
Conversation with the Dalai Lama
September 20-21, 2006**

Participants:¹

TIMOTHY BROOK
GEORGE DREYFUS
KENNETH EHRENBERG
DAVID ENGEL
REBECCA FRENCH
LESLIE GUNAWARDANA
GEORGE HEZEL
HIS HOLINESS THE DALAI LAMA
JAMES MAGAVERN
ELIZABETH MENSCH
FERNANDA PIRIE
FRANK REYNOLDS
LOBSANG SHASTRI
KENNETH SHOCKLEY
WINNIFRED SULLIVAN
VESNA WALLACE
RICHARD WHITECROSS

INTRODUCTIONS: Dean Nils Olsen welcomes the Dalai Lama and then Lynn Mather of the Baldy Center for Law and Social Policy greets him. Rebecca French introduces him to the participants one by one. His Holiness

† Transcribed by Kunchok Youdon, copyedited by Rebecca French and Joe Schneider.

1. For a full review of the background of the participants, see *An Introduction to the Conference with the Dalai Lama on Law, Buddhism, and Social Change*, *supra* at 640-42.

the Dalai Lama shakes hands with each of them.

....

REBECCA FRENCH: We want to talk today about the relationship between Buddhists and law and political problems. You've said that you identify yourself first as a human being, second as a Tibetan, and third as a Buddhist. We want to ask you about the conflicts and tensions between those three in terms of politics and laws.

HIS HOLINESS THE DALAI LAMA: No conflict! (he laughs and so does the audience) On a human level, there is a foundation of basic human good qualities that are universal, that everybody has, east or west or south or north. I think on that level, the values and the appreciation for these values are also the same. For example, a Tibetan community may also be a Buddhist community, which would make it a special environment. So under those circumstances, it would have its own certain features and special characteristics, but these would naturally be based on basic human values. So, because we all share these principles, there is no contradiction in identifying as a human being, a Tibetan, and then a Buddhist. Furthermore, as a Buddhist monk and a Tibetan, it is important to note that Buddhist ideas and Buddhist principles have pervaded the Tibetan community at least since Buddhism flourished in Tibet. Whether each individual Tibetan knew Buddhism or not, the whole atmosphere or way of life was pervaded by these ideas and principles.

GEORGE DREYFUS: Do you feel, for example, that as a Buddhist monk, it is proper for you to be a political leader? I think that's what the question is trying to ask.

HIS HOLINESS THE DALAI LAMA: A political leader in what sense?

GEORGE DREYFUS: In the Tibetan context.

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HIS HOLINESS THE DALAI LAMA: You see, some lamas, from Ladakh, up to Mon and Arunchal, are very active politicians involved in party politics, but I disagree with that. Monks should disassociate themselves from party politics. The involvement with a national struggle is a different kind of politics. In the Tibetan case, national freedom is very much related to the preservation of Buddha Dharma as well as freedom and individual liberty. So, I consider my service in the Tibetan national freedom struggle to be part of my practice of Buddha Dharma; it is serving others by practicing and implementing compassion. But I will never touch party politics.

To illustrate how these two types of politics can overlap, I was once in Thailand, and the king hosted a lunch. The king asked me, as the Dalai Lama, a Buddhist monk and at the same time the head of the government, how I view the death sentence. The thirteenth Dalai Lama abolished the death sentence. For me, at least, this was no problem, and of course since I became a refugee, balancing these roles has become much less difficult. It is unfortunate that during the Fifth, Eighth, and Thirteenth Dalai Lamas, there was some questionable warfare. I do not know if it was a Dalai Lama ruling then, it could have been a Regent. I heard that after the Thirteenth Dalai Lama passed away, there were two Regents, one monk and one lay person, and then unfortunately there is one case of taking an eye from one of the Tibetan ministers. I think this was mainly due to personal hatred, and it was very unfortunate. That person, actually I think, was a very, very favorite lay official of the Thirteenth Dalai Lama who visited Europe, England and also Germany with the first batch of Tibetan students who went to England. So, when the decision was made according to their law, I don't know the two regents. One monk Reting Rinpoche later became my teacher. He refused, saying "I am a monk, I cannot sign that." He handed it back to the lay Regent. This is what I heard, it sounds good.

REBECCA FRENCH: So, Buddhist monks should not be involved in politics. One of the things that Leslie and I have been talking about for long time is the situation in Sri Lanka.

LESLIE GUNAWARDANA: First of all, let me say how privileged I feel and how happy I am to participate in this conversation with you. I was deeply impressed by the statement you made yesterday about the need to combine compassion with the judicial process. Combining compassion with the administration of justice has been a major problem in human history. Of course, significant progress has been made during the last two centuries, but if one were to look for the *basic* differences between justice administered a thousand years ago and today, in certain respects the difference does not appear to amount to much—we do not appear to have progressed very far in radically breaking away from “an eye for eye” or “tooth for tooth” type of situation. The stark contrast between the Buddhist ideals and the judicial system in its actual practice attracted the attention of Buddhists in Sri Lanka very early in its history. During the first three centuries of the Christian era two Sri Lankan rulers made attempts to develop a penal system that they sought to combine with compassion. It was described as a penal system based on *ahimsa*. It was a very attractive concept for the Buddhists but, at the same time, a very difficult concept to implement. It is rather interesting, yet disappointing, to note that the two rulers who tried to implement such a system were in fact deposed and lost their thrones. Even today, Buddhists have this enormous problem of developing a more humane and less violent penal system that does not impose penalties such as depriving offenders of their lives or causing any other physical injury. I would like to know how far you have progressed in Tibet in trying to implement principles of *ahimsa* through developing a penal system in accord with Buddhist ideals?

HIS HOLINESS THE DALAI LAMA: In all human activities, whether or not the word compassion is explicitly mentioned as a part of the process, compassion seems to be taken for granted. Take the basic example of parents’ care for their children. Nobody explicitly points out the role of compassion there, but it is taken for granted that it is part of that process. Naturally, whether it is mentioned or not, I think happiness both in the family and in society is based on compassion. This too people take for granted. Law exists for the protection of the people. Why do we protect people? Compassion. That’s my view. I think the death sentence,

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also cutting of limbs, should be prohibited. I am one of the signatories of the Amnesty International Movement to put an end to the death penalty. Also, as I mentioned earlier, the Thirteenth Dalai Lama abolished it. That was an act of compassion.

REBECCA FRENCH: So again, would you agree that monks should not be in politics?

HIS HOLINESS THE DALAI LAMA: I think so.

REBECCA FRENCH: Do you think so, Leslie?

LESLIE GUNAWARDANA: It is very difficult to say.

HIS HOLINESS THE DALAI LAMA: I know. Politics, what does that mean? In the late '40s or early '50s, when Kushu Bakula joined the Congress Party, the nature of his involvement seemed to have more to do with a kind of a national struggle—service to the Ladakhi people. I think that was appropriate. Then eventually, there were more Ladakhi politicians, which led to a political rivalry. Then I think, Bakula Rinpoche should resign. Because then he is no longer serving the Ladakh community but rather the interest of the individual politician. There is great damage when a lama joins one political party because some of his followers, even some members of his own monastery, may have a different view of that political party. This creates great difficulties and complications, and I feel, great damage to the image of Buddha dharma. Therefore, particularly in these areas, democracy appears not to be very mature. After each election even family members are sometimes divided. So under these circumstances, I suggest, monks—not only lama but all monks—should avoid party politics.

GEORGE DREYFUS: The question of the role of lamas in various parts, like Kham or Amdo, is a really important question. In Tibetan society in particular, lamas are still to a certain extent leaders. What do you think is the proper role of monks in politics and civil society?

HIS HOLINESS THE DALAI LAMA: I think it is similar to Ladakh. In a very poorly educated community with no history of democratic practice or elections, the people rely more and more on the lama. So, I think a good lama really serves a community, and bad lama exploits it. In the future this will change, because public education will be improved. Administration, I think, is something different. But party politics I think should be handled by lay people.

FRANK REYNOLDS: Let's go back to your distinction between two kinds of politics, one national movement and the other, party politics. It is my understanding that you and those with whom you worked have actually developed constitutions that try to adjudicate this problem. They seem to be in the middle. In other words, have you played a role in the construction of the constitution that will regulate the political system? If you have, does that mean that you, a monk, have participated although you don't believe monks should participate? Also, I am more broadly interested in the constitution that has arisen and it's Tibetan character. Is the current constitution, or the constitutions that have been formed distinctly Tibetan or distinctly Buddhist?

HIS HOLINESS THE DALAI LAMA: In the draft constitution for the future of Tibet, which we adopted in 1963, both, the principle of Buddha Dharma and also the principle of democracy are mentioned. The preamble of the constitution states that the text is based on the combination of Buddha Dharma and democratic principles. When the constitution was being drafted, at one point, I insisted that the Dalai Lama's power could be abolished by two-thirds of majority of the people's assembly. In 1962, we circulated the essence of the draft constitution; there I mentioned this clause on the power of the Dalai Lama. So in that early draft, there was a sentence that I insisted upon that said, based upon new reality and circumstances, the position and power of the Dalai Lama needs to be adapted and changed. But the people and communities outside, the refugee community, very much disagreed. They believed we should keep the Dalai Lama with absolute power. So, in the finalized draft of the constitution, I insisted this should be included. As to the rest of the points, I don't know. I am not an expert.

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FRANK REYNOLDS: Could I ask if these experts really took seriously ancient pre-modern Tibetan law? In the western tradition, in American and British law, we have a long tradition of Christian ideas being taken into the legal system both explicitly and implicitly. I am just wondering if your experts really consulted ancient Tibetan texts—maybe read Rebecca's book—and tried in specific ways to make this a distinctively Tibetan constitution from this culture.

HIS HOLINESS THE DALAI LAMA: In 1991, a new charter was drafted and adopted and is now being implemented in the refugee community. The previous constitution was more of an idea for the future of Tibet; the second one we are actually now implementing. Accordingly elections are now taking place. The members of the drafting committee could come here and give you more information, but I am ignorant. I am not clear whether they really consulted the texts.

Of course we are in entirely different circumstances here as a refugee community because it is not our country. Also in previous years, there was no idea of democracy in my generation. Around 1952, when we were still in Tibet, we started reforms, and set up a reform committee, and implemented some reforms. Also, the Thirteenth Dalai Lama wanted to extend the national assembly. Usually some officials and then abbots of bigger monasteries. Then during the Thirteenth Dalai Lama he try to expand the participation of different districts and local village leaders. So perhaps the concept of democratization was beginning to reflect in their minds during the Thirteenth Dalai Lama. So during my period around 1952, we already had some movement. Then in 1959, we began to implement reforms fully. But the Chinese found this a little uncomfortable because they wanted reforms according their own idea or pattern. They thought that if Tibetans carried out some reforms according to Tibetan conditions, they would fit and it would be a hindrance to their pattern of reform. Also around 1956 or late 1955, open revolt started, so everything became very complicated, very difficult. After 1959, we came to India and then around 1960 or 1961, we started genuine democratization, with, for example, the election of a parliament. So, now step by step, since six years ago, we

have an elected political leadership. Since then, my position is like semi-retirement.

KENNETH EHRENBERG: I would like to return to Leslie's question about penal law and its relationship to compassion. You said that the long term goal of punishment is compassion for the larger group in society. However, elsewhere, you have written that compassion means that we should not use the utility of the larger group to justify the imposition of pain and suffering on smaller numbers or individuals. How can we then use penal law as a way of implementing compassion in society if for the sake of the larger group we will impose sufferings on a smaller number?

HIS HOLINESS THE DALAI LAMA: Theoretically speaking, violence is a method. Whether the use of this method can be justified or not depends entirely on the [individual actor's] motivation and research [into the circumstances]. This was true in the Buddha's own life; in a story about a previous life, he implemented violence in order to bring greater benefit to a greater number of people and to save their lives. The Buddha's teaching is that you must punish not out of feelings of revenge or hatred but out of compassion. In some cases, unless you provide a harsh treatment, that [criminal] will continue harmful activities which is actually harmful to himself or herself. Therefore, out of a sense of concern, [the judge] orders a [punishment] to stop [the criminal from] doing that kind of action. So, it looks similar but essentially there are big differences: one wrathful action is taken out of genuine compassion, one out of hatred. When the [punishment] is out of hatred and revenge, it is totally negative. So sometimes I asked some legal experts. What about a situation in which a single father or a single mother is the only caretaker of some young children. Then, that parent is convicted of a serious crime, worthy of the death penalty. According to the law, that person has done something very wrong, but if you carry out the death sentence, the children will have no one to care for them. Then, you need compassion.

RICHARD WHITECROSS: Your Holiness, your response raises the question of the character and education of the

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individual judge. Is it your belief that judges should be trained in Buddhist philosophy and meditation in order to possess the necessary compassion?

HIS HOLINESS THE DALAI LAMA: It is not necessary that the training be Buddhist. That is too narrow. As I mentioned earlier, it is on a human level. I think many of our errors in law, the economy, education, politics, in every field including religion involve working on a human level. I am always telling or expressing this to people. Politics is necessarily dirty. It's politics, it's activities relate to the society, to the community. But then I think that in some cases, in most cases politician are little strange. Eventually all politics becomes dirty politics. It is similarly in law.

Tibetan monastic debate education—the early part of the training—deals with learning how to think critically, the children are taught how to think critically. And part of this training is logic. There is a saying that the criteria of the mastery of this early stage of debating is: if you can prove that something that is the case, is not the case, or if something that is not the case, you can show through argument is the case. Then you have mastered the skill. Some lawyers try to prove that a person who did a crime, did not do the crime, or they try to prove that someone innocent is a criminal. When such things happen, it is dirty law. Exploitation in the economy through lying, that is also dirty. Using religion in the wrong way creates dirty religion. Everything depends on the society as a whole. Whether any human action or activity will have a positive and constructive effect or not, depends on the actor's motivation. It is not necessary that the motivation comes from one particular religion. I prefer not to touch religion. We learn basic human qualities such as affection and the value of compassion from our birth and not through religion. Now modern scientists are finding that more compassionate thought brings more calm in our brain. As a result, brain function becomes smoother. Also, [they have found that] negative emotions actually eat at our immune system, and positive emotions strengthen our immune system. So these are now scientific facts, based on scientific findings and also our common experience and common sense. It is common sense that we should promote and pay more attention to the value of compassion and affection and a sense of care in the society through education. Then, I

think, once we create that kind of society, then every person whether a lawyer, a religious person, a politician, an engineer, a scientist, an educator, that person will come from a society that is more compassionate, and all the different professions will be humanized.

WINNIFRED SULLIVAN: So what is the role of religion in a democratic society that is based, as you say, on these basic human emotions and compassion that we learn from birth? What is the role for religion in such a society?

RICHARD WHITECROSS: Could I add on to that question? Should religion, whether Christian or Buddhist, be removed from the written constitution?

HIS HOLINESS THE DALAI LAMA: We prefer secular. When our charter was adopted, one of my assertions in the charter was that we needed a secular basis. But then most of the concerned people rejected it. Religion is related to the individual, democracy is related to society. I now firmly believe that the institutions of religion and the institutions of secular society should be separate. Religion is an individual business. Also [I think] that the people who are working with the secular, personally it is better [if they are] religious minded.

WINNIFRED SULLIVAN: In the United States, one of the things that has happened to American Christianity and American religion generally, is that democracy has changed religion, so that the religion that is available to the individual is a kind of religion that is affected by democracy itself. So, religion also is very democratic and there is been a loss of hierarchy, you might say, in American religion. Do you see that as the problem for religion, that Tibetan Buddhism itself will become democratic as well as the society becoming democratic?

HIS HOLINESS THE DALAI LAMA: As far as Buddhism is concerned, the Buddha I think did not mention how to manage society. The Buddhist monastic community has very democratic principles. There is an explicit statement

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that the authority should not be rested in the single individual or person but rather in the community of monks. Monks rule monk's rights, monastic rights. Everything is discussed by groups of Bikshus, not a single Bikshu. There is no authority in the hands of one single Bikshu. Even the Dalai Lama although a temporal leader, both spiritual and temporal leader, has no power to change aspects of the Vinaya. For example, the ordination of a Bikshu, requires ten Bikshus or at least five Bikshus. So, it's through the meeting of five fully ordained monks that the authority is acquired to then give ordination to others. When a monastic rite is performed such as an ordination, one monk stands up and first informs the congregation such and such rite is being performed today, are you in agreement? And then later on, he reconfirms that there is an agreement for conducting this particular monastic rite. So, this suggests that there is a democratic principle underlying the monastic institutions.

This is the true origin of Buddhism. In the Tibetan case, unfortunately, certain institutions arose such as the lama institution, Tulku institution, reincarnated institution and they became rulers of particular areas. When a particular lama is corrupted, you see corrupted institutions. This should change. The main point is that, if you look at the original spirit behind the monastic institution established by the Buddha there does not seem be any conflict with democracy or democratic principles. Of course, other institutions that evolved later are a different story. But yes, corrupted [institutions] must change.

REBECCA FRENCH: What happens if the laws create economic circumstances that do not provide moral bases for persons? This is true in American society; we have a very difficult time because, as Winni put it, when democracy becomes what matters, religion is much less important. Institutions in capitalist countries have the ability to create consumer greed, to create fear with television, to create a whole series of things, and they are understood as democratic; this is a serious problem in the United States and it's not one which we know how to solve.

ELIZABETH MENSCH: In other words, a very secular constitution presupposes subjective value and pure

privatism. What happens to the notion of objective morality?

HIS HOLINESS THE DALAI LAMA: Look at this is from the Buddhist point of view. The Buddha did not formulate the 253 monastic rules for a fully ordained monk all at one time. It was an organic process. Initially, a set of rules was established and as new circumstances revealed certain problems, then that situation was addressed, and another rule was added. So, organically, the lists of rules grew. And in some cases, rules were created, but later as a result of some other situation, it had to be rewritten with later, new additions. This organic process suggests that one has to be very realistic about the needs of the situation in the context and adapt the code according to this. Your constitution was adopted two hundred years ago. The economic situation at that time, the gap between rich and poor was much less and not a serious problem. Today, this gap has become not only a moral issue but also a problem of the society, either at the global level or national level. New realities are causing more problems, injustices. We have to look accordingly at the new reality and make some amendments. All of this depends on motivation. I think the capitalist system itself is not wrong or the social system. It depends on the individual. Individuals need sincere motivations, compassionate motivations, they need knowledge, a realistic outlook, and accordingly a realistic approach motivated by compassion. Socialism can be good, and capitalism, but I personally prefer socialism. Some Sri Lankan and Indian monks also have the same view, we should set up one Marxist political party among the monks.

JAMES MAGAVERN: I would like to return to the problem of dirty law. I am concerned that maybe I am a dirty lawyer. In our legal system, lawyers owe a very special responsibility to their clients, and although their responsibility can be tempered by compassion, even impartial compassion, we come to a point where if we are going to apply a principle of impartial compassion without regard to the legal rules in our legal role we would do one thing but, because of our obligation to the client, we must do something else. I can give you an example: the homicide defendant who is represented by a lawyer. The defendant

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informs the lawyer that he had also murdered a young woman recently, who had just disappeared; the family did not know where the young woman was and was obviously distraught. And the lawyer felt that he could not properly inform the family or the authorities of this prior murder. This was a famous case in our state in which the court finally said that the lawyer was acting according to his ethically obligations to his client and therefore could not himself be prosecuted for crime. Now, in an imperfect world, we have all kinds of special responsibilities that are recognized by the social order, to the parent, to the child, perhaps your Holiness to the Tibetan people, and certainly the attorney to the client. We recognize these as both social norms and as legal rules - legal responsibilities - and if we are going to live according to those norms and rules, we are at times going to have to act at odds with more general fundamental principle of dispassionate universal impartial compassion. I am very interested in your insights into that problem. Do we need a set of secondary rules that mediate between the fundamental aspiration to impartial compassion on the one hand, and the rules of the imperfect society on the other hand? In the long run, will the cause of human dignity and welfare be served by participants acting in regard to special obligations to particular human beings, particular communities, particular institutions? And if we do that are we dirty lawyers?

HIS HOLINESS THE DALAI LAMA: So, this is again from the Buddhist point of view and also in principle as to how it translates into actual practical applications. In principle, from the Buddhist point of view, one needs to be sensitive to the individual contexts so, sometimes you have contexts where the benefits to the individual has to be weighted against the wider implications for the actual society, the wider community. Also one has to take into account the damaging effects of a particular cause of action as opposed to the benefits the individual will reap. Or the benefits to the community have to be weighed against the damage to the individual. The main point is not to confine your evaluation purely to a single situation but rather look at its broader implications.

DAVID ENGEL: I would like to ask you a question about

the experience of ordinary people in a secular society where most of the people are Buddhist? Our experience in Thailand is that when an ordinary person feels that they have a dispute or when they feel that their rights have been violated, very often they think that it's better to be Buddhist and to accept the workings of karma and to forgive rather than to go to the courts of law. What is your perception of that? Is that a proper response for a Buddhist person living in the secular society or should they use the law in order to protect rights and promote the rule of law?

HIS HOLINESS THE DALAI LAMA: Here also, I think, it depends on the actual circumstances. Now, firstly, this concerns self-discipline not only from a Buddhist basis, but even I think from a secular basis. If a dispute will create more problems, if the rights of others are not being respected, if it is not done out of compassion for others, then it is better not to do it, unless it is out of the principle of self-discipline and on the basis of compassion and respect for others. So, the ideal situation would be to exercise one's self-discipline and compassion and try to see if the problem can be resolved among the people themselves before going to the law court. With some quarrels at the family level or between neighbors, both sides should try to solve the issue between themselves according to the principles of reconciliation and self-discipline. If everyone acted that way, and then lawyers would become jobless !! The concept of karma depends very much upon one's individual understanding. If one's understanding of karma is quite good, then the concept of self-discipline will arise on the basis of respecting karma. However, sometimes people use karma as an excuse. When people use it as excuse for inaction, they say "this is my karma."

KENNETH EHRENBERG: Is there any way to use law to encourage people to develop this self-discipline? I mean Law is an external constraint and Buddhism seems to expect people to develop self-discipline as an internal development or internal practice. In an ideal legal system, is there some way to help or encourage the legal system, the external constraint or would that be not appropriate?

HIS HOLINESS THE DALAI LAMA: Yes, certainly because

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people will be more restrained in their behavior if they know what the legal consequences will be if they do certain things.

REBECCA FRENCH: I think one of the problems that we have in the United States is that law and, to a large extent, politics do not reinforce internal moral compassion and self-discipline. We see law as supporting economics and capitalist production. When the decision is between, “should we be moral” or “should we make money,” the answer is almost always “make money.” Americans are very worried about this now. They do not see their legal structure as promoting compassion, rehabilitation, justice or truth, the qualities that promote self-discipline and individualism. How do we do that?

HIS HOLINESS THE DALAI LAMA: Economic motivation is very powerful and we cannot expect people not to be personally motivated by economic gain. Also without money, there is no progress. Even Buddhist monks who are aiming for Nirvana in their day-to-day life, need money. And I think from the Buddhist viewpoint, it really is a matter of balance. If we are striving for a perfect system, a perfect system can never exist. There will always be imperfections in the system. And with regard to monks needing money, in Buddhism there is a concept that we call the four factors of perfection. The Ultimate goal of nirvana is reached through dharma. The temporary goal of a happy life is reached through prosperity. So the causes of these two goals are dharma for nirvana and prosperity for a happy life. So, prosperity must be there. Capitalism is sort of a dynamic force for a better economy, the creation of better economies. But to just think only about money and forget other sorts of values, this is a mistake. So, individuals and human society need money and material facilities and at the same time they also need some internal values. In society, all of the many religions are related to a moral society. We can't say this one is the most important, and this other one is not important. I have always believed that every human activity, activities meant for humanity, meant for the world, should have as its ultimate motivation. a sense of responsibility, service and compassion.

Ultimately, compassion, serving others, helping others,

is in my own interest. I am part of this. That I think it is important. So compassion now, for example, my own for the future. Even with the life of a hermit, I am part of humanity. If all of humanity faces some serious problems, even a hermit will suffer so it makes sense to think of the well-being of others. If society is happy, I will be happy and get the maximum benefits. So to develop compassion is ultimately in the best interest of oneself.

FERNANDA PIRIE: Your Holiness, could I bring you back to one more practical question? A topic raised by George earlier on is the status of the reincarnate lamas particularly in eastern Tibet. They have great authority, they are respected, they have great ability to resolve disputes and even the government officials ask them often to solve particularly bad cases without fighting. Now you said lamas shouldn't have a role in party politics. What about their very useful role in these disputes? If they don't take on this role, won't this cause social upheaval by trying to change the present system?

HIS HOLINESS THE DALAI LAMA: So long as this system works, go ahead. Those respected lamas are very useful for quarrels among their people. The lama's influence is much stronger than the Chinese officials which is good. But in principle, theoretical speaking, ultimately, I think that when a lama joins one of two political parties, it creates complications.

KENNETH SHOCKLEY: Your Holiness, I am interested in questions of toleration. How far can we extend this personal expression of toleration about the idea of toleration into the political realm? We may accept others as best we can and the motivations are what characterize right or wrong action, but I am wondering about how well we can tolerate selfish motivation in a political level. Surely at the personal level, we can accept all we can. But politically, how far should we tolerate when the motivations of others are not so selfless.

HIS HOLINESS THE DALAI LAMA: There is a concept called misplaced toleration or misplaced forbearance. When

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a politician is pursuing selfish ends and has a damaging effect on the whole community as a whole and people continue to tolerate that, that will be characterized as a misplaced tolerance or toleration. Compassion can be misplaced, and also forbearance. So, this shows us how complicated human society is.

KENNETH SHOCKLEY: This brings us to censorship. In a society that encourages right or wrong motivation in its legal system, what would be acceptable or allowed?

HIS HOLINESS THE DALAI LAMA: I think censorship is wrong. I think people should be informed of the truth. I am always against censorship. I am skeptical whether censorship would ever really work. Censorship means something like “shut up. There is a great deal of criticism of censorship. With more discussion, more argument, and more investigation, the truth becomes clear and that is the way to defeat other sorts of wrong, to make clear the wrong motivation. Isn't it? It is one of the main aspects of democracy - freedom of speech, freedom of thought, and particularly freedom of media, I think a free media is very important. With censorship, the media is closed. This is the greatness of a democratic system. I am always telling media people that they should have a long nose to smell and make things public. If something goes wrong, they must tell or inform the public and write about it. Their motivations should be very objective, unbiased and sincere.

REBECCA FRENCH: The audience is filled with law professors, people who teach law, and care about law. And they would like to know: What do you think is the most important thing to teach in class?

HIS HOLINESS THE DALAI LAMA: Oh, I don't know. In order to give you some kind of suggestions or advice, I should study law and make more money.

So, now time to go. THANK YOU!!