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The Chinese Conceptions of Law: Confucian, Legalist, and Buddhist

By Luke T. Lee*
Whalen W. Lai**

Introduction

THREE PHILOSOPHICAL traditions affecting the legal systems in China stand out in clear relief: the Confucian, the Legalist, and the Buddhist. Although the legal system in China grew out of the thoughts of the Legalists, who helped found the first empire, Ch'in (221-206 B.C.), under Han, the immediately following dynasty (207 B.C.-220 A.D.), a Confucian-Legalist synthesis was struck. The only other independent concept of "law" in any sense of the word belonged to the Buddhist establishment. The major Chinese traditions may be characterized in terms of their conceptions of law, man, and the cosmos as follows: the Legalist believes in man, or rather, the king, as the agent in the creation of law; the Confucian trusts in the natural harmony between man's ritual propriety and the natural principles of the universe; and the Buddhist believes in the sacred transcendental law, with a historical but superhuman origin in the teachings of one man—the Buddha. Because much has already been written on the Confucian-Legalist traditions, this Article will only briefly summarize them, devoting the main discussion to an examination of the Buddhist conception of law and to the impact of the various religious traditions upon the current Chinese state.

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The Confucian-Legalist Traditions

There is a widespread belief that Chinese law is not "law" in the Western sense at all. Escarra, the French jurist, once remarked, "Where it is anything else but a fiction, the opposition traditionally established between Orient and Occident is met nowhere more clearly than in the domain of law." He went on to contrast the Confucian society of China with Western civilization, dominated by the Greco-Roman conception of law carried along with the spread of Christianity. The Westerner, according to Escarra, views the law as almost sacrosanct, as the regulator of the social conduct of all people. In contrast, the Chinese traditionally hold the law in low esteem.

Even in the West, however, law is defined many ways. The Austinian definition of law is a command, prescribed or dictated by a superior, which an inferior is bound to obey under threat of punishment. Eugen Ehrlich, on the other hand, discusses the "living law of the people." Under that concept legal regulation and enforcement based on the political state are only a fraction, albeit an increasing fraction, of the sum total of this living law, the balance being comprised of norms which result from the influence of family, religion, and other social organizations and associations. The Chinese equivalents of these two approaches to law are fa and li, terms representing a conceptual dichotomy which is traditional in China. Li—translated variously as propriety, ethics, or moral rules of correct conduct and good manners—embraces chiefly the teaching of Confucius, in particular the "five relations": ruler and subject, father and son, husband and wife, elder and younger brother, and friend and friend. Liki (The Book of Li) describes li as "a regulator of human desires that has been devised for the protection of the people."

It is a form of social control over unrestrained expression of human desires. It "forbids trespasses before they are committed, whereas

2. Id. at 10.
3. Id. at 11.
Fa punishes criminal acts after their commission." Li is closely related to tao, the natural order, and this emphasis on moral rules and natural order is not unlike the emphasis on natural law in the West, which is frequently concerned with the problem of how actuality is related to the normative order.

Fa, although it has been translated as "law," is actually much narrower in scope. It is chiefly associated with the Legalist school of Han Fei-tze, which reached its zenith in the despotic Ch'in dynasty during the Third Century B.C. The Legalists rely on the force of sanctions to obtain obedience to and compliance with the law, and therefore they stress government by fa or decree, as opposed to the Confucian emphasis on government by man and li. The Legalists insist on complete equality before fa, as opposed to the Confucian acknowledgment of the inequality of people. The Legalists enforce objective and unvarying rules of conduct, in contrast to the Confucian acceptance of different rules for different relations and positions. Although the Ch'in dynasty was short-lived, Legalist thought continued to influence subsequent dynasties, as evidenced by centralized bureaucracies and official codes.

If one discards li and identifies only fa with "law," using the criteria of codification and enforcement by government authorities, one must reject, for example, the validity of customary international law because it lacks these qualities. Although li does not fulfill Austin's definition of law, it certainly fits into the broader definition of law given by Ehrlich. In fact, li can be described as a code enforced by society rather than by government. Li and fa were commingled in the T'ang Code, which provided: "That which deviates from 'li' comes within the competence of legal penalties. Violations of li are subject to punishment." In the Code of Law drawn up by Prime Minister Hsiao Ho and in the Court Ceremonials formulated by Shu Sun Tung, li and fa were made to coordinate and complement each other, a principle which was to endure 2,100 years to the present century.

6. Id.
11. Id. at 13.
Even Confucius did not totally reject the role of fa.\textsuperscript{12} Li comprehends fa as one facet of the law, even though the converse is not true. If Ehrlich's definition of law is accepted, Wigmore was correct when he said in 1935 that the Chinese legal system is "the only one that has survived continuously to date—a period of more than 4,000 years; in comparison, the other living systems of today are but children."\textsuperscript{13}

In any conflict between \textit{li} and \textit{fa}, traditional Chinese society preferred \textit{li}. The reason for this resolution was eloquently explained by Confucius:

\begin{quote}
If the people are guided by \textit{fa}, and order among them is enforced by means of punishment, they will try to evade the punishment, but have no sense of shame, but if they are guided by virtue, and order among them is enforced by \textit{li}, they will have the sense of shame and also be reformed.\textsuperscript{14}
\end{quote}

Confucius noted the value of this system when he said: "As a judge, I decide disputes, for that is my duty; but the best thing that could happen would be to eliminate the causes for litigation."\textsuperscript{15} In fact, the highest ideal of \textit{chiin-tze} (gentleman) is to show oneself capable of exact proportions and moderation in all circumstances. Compromise or yielding with propriety is always far more important in China than invoking personal rights and privileges.

\textit{Li} traditionally dominated not merely domestic society but also interstate relations. For example, in one instance Confucius praised the action of the Marquis of Ch'\={i}, a leader of a league, in convening a congress of states to conclude a new league in 651 B.C. and thus uniting the lords by peaceful means instead of military force.\textsuperscript{16} In another instance, the Duke of Hsüang and the Marquis of Ch'\={i} tried to reconcile a conflict between the states of Ch'\={u} and T\'an. The people of Ch'\={u} were unwilling to be reconciled, and so the Duke invaded Ch'\={u} and took the city of Hsiang. The classic history, \textit{Tso Chuan} condemned the Duke’s act as not being in accord with \textit{li}:

\begin{quote}
\begin{flushright}
They assembled at K'wei-ch'\={u} to renew the league and to cultivate the good relations among the princes themselves; which was proper.
\end{flushright}
\end{quote}

\begin{flushright}
\textit{Duke Hsi}, bk. V, yr. IX, in 5 \textsc{Chinese Classics} 154 (2d ed. J. Legge 1966) [hereinafter cited as \textsc{Chinese Classics}].
\end{flushright}
States must be reconciled by the rules of propriety, and not by disorder. To attack Chʻu, without regulating [the differences by those rules] was creating disorder. By disorder [sic] to attempt to reconcile disorder, [it] left no room for the [proper] regulation; and without such regulation, how could any rule of propriety be carried out?  

In another historical episode, the powerful state of Tsin, upon defeating the state of Cheng, tried to impose a harsh peace settlement. Cheng protested that peace terms should be based on li and should not be imposed arbitrarily. Tsin conceded the propriety of this claim, acknowledging that a coerced settlement would be contrary to li. Tso Chuan noted the statement from a Tsin leader:

We indeed have not virtue, and it is not proper to force men to covenant with us. Without propriety, how can we preside our covenants? . . . If we are without virtue, other people will cast us off, and not Cheng only; if we can rest and be harmonious, they will come to us from a distance.

Accordingly, Tsin agreed to a revision of the terms and withdrew its forces.

Above all, li is concerned with sincerity (chʻeng) and trustworthiness (hsin), for which Western legal equivalents are good faith and Pacta sunt servanda. The concepts of chʻeng and hsin are extensions of the Confucian concept of the proper relationship between friend and friend. Mencius, a Chinese thinker, said: “Between father and son, there should be affection; between sovereign and subject, there should be righteousness; between husband and wife, there should be respective duties; between the elder and the younger, there should be order; between friends, there should be sincerity.”  

The dominance of li in the Chinese law of treaties was manifested when China was forced to enter the modern family of nations. The Chinese of the mid-nineteenth century viewed the 1842 Sino-British Treaty of Nanking, known as the Wan-nien Ho-yüeh (the Peace Treaty of Ten Thousand Years), as unalterable and forever

20. 30 BRITISH AND FOREIGN STATE PAPERS 389 (1841-42).
valid. The Tsungli Yamen wrote in 1867 that once an item enters into a treaty, every word of it becomes ironclad.\textsuperscript{21} Li Hung-chang was convinced that once a treaty had been ratified, nothing could be done to change it.\textsuperscript{22} Even the xenophobic monarch, Emperor Hsien-feng, did not unilaterally abrogate any treaty. The closest he came to doing so was to encourage the obstructionist tactics and tendencies of his Canton viceroy, Yeh Ming-ch'en, and the Canton populace.\textsuperscript{23}

\textit{Li} continues to be a strong influence in modern China, in both interpersonal and interstate relations. Specific rules of conduct decreed by the government and constituting \textit{fa} continue to be dominated by \textit{li}. \textit{Li} and \textit{fa} are two of the major religious concepts that have become ingrained in the Chinese legal system. They are not, however, the only religious ideas to have affected that system. This Article now turns to a consideration of other important religious concepts that originated not from Confucian or Legalist tradition but from Buddhism as it developed in China.

The Buddhist Concept of Law

The Buddhist tradition constitutes the third major legal tradition in China. As a religion seeking liberation from \textit{saṃsāra} (rebirth), Buddhist legalism is not legalism in the usual sense of the word. This section of the Article focuses, not on the internal structure of Buddhist law, but on the general Buddhist concept of "law" and its historical consequences in China. We focus on the concept in order to reveal the ethos of Buddhism and the spirit of its rational life style.\textsuperscript{24}

Levels of Law in Buddhism

Buddhism is, strictly speaking, the \textit{Buddha-Dharma}, the Law of the Buddha. Law is only one meaning of the word "\textit{dharma}," which also means truth, virtue, righteousness, and duty. The word "\textit{dharma}" is rooted in \textit{ṛta}, the cosmic norm followed by the Aryans who

\textsuperscript{21} Hsu, China's Entrance into the Family of Nations 6 (1960).
\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} The schematization will lend some clarity to law in Buddhism although it might not do justice to all the finer aspects in this tradition.
invaded India and founded the Brahmanical culture. In Hinduism, *dharma* oversees the society and therefore encompasses the duties of caste. When the Buddha discovered the *dharma* (truth) he understood it outside the caste context. His teaching is referred to as *Buddha-Dharma*, the Law of the Enlightened One. Corresponding to the Greek *logos* or the Chinese *Tao*, *dharma* is both the correct and the actual norm of the universe. *Dharma* is reality and truth. Inasmuch as the truth is embodied in his teachings (*dharma*\(^25\)), the *Buddha-Dharma* is truth itself. In Christian thought, Jesus Christ is seen as the *logos* personified. Similarly, in Mahayana, the Buddha is said to be the *dharma*, and all Buddhas, enlightened ones, are one in the *Dharmakāya*, the Law-body.

The Chinese were converts to the *Buddha-Dharma* beginning some time in the first century A.D. A consensus was soon reached to translate the Sanskrit term to "*fo-fa*": *fo* stood for the Buddha, and *fa*, for the *dharma*. Although it may appear peculiar that the Buddhists would settle on the word *fa* (law) in the face of the traditional Confucian stigma against law and against the Legalist, at that time the term "*fa*" had a more general meaning than law. *Fa* connoted method and therefore teaching or school. It thus functioned to convey the law as well as the teachings of the Buddha in the translation. *Fa* may also mean model, pattern, or, perhaps in Mohist usage,\(^26\) shared characteristics. Thus, Lao-tzu's *Tao-te-ching* at one point says:

\[
\begin{align*}
\text{Man patterns (fa) after Heaven.} \\
\text{Heaven patterns (fa) after Tao.} \\
\text{Tao patterns (fa) after Nature.}^27
\end{align*}
\]

The word *fa* (pattern) conveys the sense of cosmic pattern which is also basic to the word *dharma*. The choice was therefore not legalistic.

**The Development of the Legal Institution: Šila and Vinaya**

*Śila* (precepts) and *vinaya* (disciplines, monastic rules) correspond most closely to law in the Buddhist tradition. The Buddha

\(^{25}\) *Dharma* in the sense of a personal "teaching" is a Buddhist innovation.

\(^{26}\) *Tao* also had the meaning of "way," "teaching," "school."

\(^{27}\) LAO-TZU, *TAO-TE-CHING*, ch. 25.
set down for the lay congregation the five basic precepts, *pañcasīla*. The novice (*śramaṇa*) follows, in addition, five more *śīlas*. *Vinaya* is the monastic code designed specifically for the full monk. It grew out of the early fortnight confessions, *prātimokṣa*, when the brethren would publicly confess their transgressions. The Chinese term for *vinaya* was "*lū*" (regulations), a legal term. The mature legal system known as *lū-ling*, "regulations and commands," evolved in the seventh century. *Lū* pertains to administrative regulations or decrees; *ling* pertains specifically to commands or orders from above. *Lū-ling* became the general term for legal code. One Japanese scholar has speculated that the Buddhist institution of *lū* and its corresponding mentality might have influenced the T'ang creation of an objective, bureaucratically more efficient administrative and legal system.

The Buddhist *lū* was introduced into China relatively late. Comprehensive awareness of *lū* began in the fifth century. The Chinese probably never adopted the harsh rules of a full monastic life, because most monks at that time were only *śramaṇas*, barely initiates. By the time Chinese Buddhists became familiar with the full Buddhist teaching, they had created their own Ch'ān (Zen) monastic code known as *ch'ing-kuei* or "pure rules." Nevertheless, beginning in the fifth century, there were identifiable masters of the *vinaya* known as "*lū-shih,*" a term now used to designate legal counsel or jurists. Although the *lū-shih* in Buddhism did not approach being modern jurists, and although their impact at that early date was probably minimal, they may represent the first legal specialists in China. Famous *lū-shih* studied more than one recension of the *prātimokṣa*, compared the teachings, formulated their own interpretations, and settled disputes in the monastic community.

Basic Legal Principles

There are different levels of law operating in the *Buddha-Dharma*. The most basic one is the law of *karma* (action), which is accepted

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28. *Ahimsa* (nonviolence to life) is the first rule. The other rules forbid lying, stealing, adultery, and alcohol consumption.

29. The suggestion is that *lū* and *ling* were differentiated from the more compact notion of *fa* (law) used in the Han dynasty. Due to the complexities involved in this issue, such a discussion is beyond the scope of this Article.

30. T'ang monk, Tao-hsien, is the acknowledged master and founder of the *lū* sect. He developed rules for the Chinese monasteries patterned upon Indian precedents.
without question by Buddhist and Hindu alike and which forms the basis for all Indian philosophy. After the Buddha sought and found an escape from the karmic cycles of samsāra (rebirth), he charted the Buddhist law of causation. The Buddha believed in the rationality of the universe, rejecting the concept that the world is structurally adharmic or lawless. Even if the ultimate wisdom (prajñā) is not open to rational analysis, the path (mārga) leading to it may be constructed. A summary of various laws appears below.

Karma

The law of karma is the law of action and reaction: all deeds will generate, inevitably, their proper rewards and punishment whether immediately, in the next life, or in lives ahead. Karma (action, deeds) includes all action, “good, evil or indifferent,” physical or psychic, overt or covert, or large or small. Without question by Buddhist and Hindu alike and which forms the basis for all Indian philosophy. After the Buddha sought and found an escape from the karmic cycles of samsāra (rebirth), he charted the Buddhist law of causation. The Buddha believed in the rationality of the universe, rejecting the concept that the world is structurally adharmic or lawless. Even if the ultimate wisdom (prajñā) is not open to rational analysis, the path (mārga) leading to it may be constructed. A summary of various laws appears below.

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The Buddha, furthermore, uncovered the power of latent actions (actions unperformed) and recognized the centrality of citta-karma, the karma of the mind. Just as the religious principles of Jesus emphasized that sin could be committed in the heart, the Buddha’s doctrine also underlined the perilous nature of the mind. Both religious founders introduced a new “ethics of motivation” into what previously had been predominantly an ethics of consequence. Jesus said that a man who lusted in his heart had already committed adultery. Buddha was certain that good and evil follow faithfully from the actions of the mind.

31. This theory of action is much more comprehensive than the Western concept of moral action. Even the ethically neutral movement of a blank thought constitutes karma that will generate a minute momentum toward one’s rebirth.

32. More accurately, nothing in the material world falls outside the laws of karma. Transcendental realities like nirācāra or Buddha-Dharma may fall outside this domain.

33. This meaning of karma appeared in the Vedic Brahmanas (priestly lore) prior to the time of the Buddha.

34. The opening verse of the popular Dharmapada speaks of good and evil, following closely upon the mind like the track and the wheel of a cart. Also, both in Christianity and in Buddhism, will or samskāra becomes a new focus of moral concern in matters of salvation or enlightenment.
Historically, religious concern about ethics of motivation usually led to a rational and critical review of traditional morals. Lore, custom, and taboo which constituted law or part of the sacred law before were refined, redefined, or rewritten by the resulting moral criticism. The early Christian church, for example, challenged Hebraic rules of dietary cleanliness. The Buddha, too, rejected old ideas about caste uncleanness, opening his fellowship to the śūdra, the lowest caste, and to women. This focus on ethics of motivation perhaps also led to a redefinition of the Chinese concept of legal responsibility. Sharper distinctions were made between the intent to do evil, actions committed with intent, and acts committed mindlessly or accidently. This distinction was a clear advance beyond the innocent guilt and subsequent punishment that previously was visited upon an unaware taboo-breaker. Above all, a culture influenced by ethics of motivation insists on personal responsibility. A person will not be punished for sins committed by a brother. So, too, the Buddha emphasized that a person is a Brahmin not by birth but only because of his actions and present virtue. Birth (ascription) is secondary to merit (achievement). *Karma* in Buddhist understanding is therefore not passive fate; to resign oneself to karmic fate is in fact a sin in Buddhist thought.

The Buddha emphasized free will and karmic consequence. In the earlier tradition, preserved in Theravāda (Hinayana), *karma* was entirely individualistic and could not be transferred. Each man was required to earn his salvation by his own actions. This idea was fairly alien to China because even the Taoist community had the idea that the sins or the blessings of ancestors would visit upon and be borne by their children. Similarly, Chinese familism could not free itself from communal responsibility. Only the Legalist tried to insist on strict personal responsibility, at the same time preserving the idea of guilt by association. The impact the Buddhist empha-

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35. For a comprehensive treatment of this issue, see P. Ricoeur, *The Symbolism of Evil* (1967).
36. Thus, there is both active *karma* and passive *karma*, depending on emphasis, and the Buddhist tradition is highly critical of the latter, referring to it as the "poison" of indolence or lassitude.
37. Māhāyāna modifies this with the notion that one pays for one's own sins but works for the good of all.
38. This concept is called "carrying the burden" in the *T'ai-p'ing-ching* and is comparable to the concept of *nemesis* in Greek myth and drama. Both boon and burden sent down by ancestors may undermine the ideal of individual responsibility.
sis on individual responsibility had upon the Chinese notion of justice and the legal system in the medieval period is difficult to ascertain. Buddhism did not appear to change much of the traditional practice of assigning liability on the basis of responsibility, a practice that was most severe in cases of crime against the state. 39

The shortcomings of the ethics of motivation arise precisely because of the subjective nature of such ethics. Pushed to its extreme, this ethic would make the administration of justice in society impossible. No judge can charge and sentence all men who lust in their hearts on the grounds that they have, thereby, committed adultery. A monk's concern about any unbecoming thought, however minute or private, should not be duplicated into a society's paranoia about hidden evils. In contrast, laws based on the ethics of consequence, tend to allow greater privacy to the individual because only those of his actions that have public consequence will be judged. Ethics of motivation generated in the puritan West and in the Neo-Confucian China regrettable witch-hunts seeking to control and punish private behavior. The moral common law of the people made life difficult for many people.

In India the law of karma was wedded to Buddha's concept of anätman (no-self, no-soul, no-actor). The philosophical contradiction of insisting on moral retribution while denying the reality of a self was more acute in India than in China. The harshness of this contradiction was mitigated by the Chinese acceptance of the doctrine of an immortal soul that transmigrates from one life to another. This development was attributable to the Confucianist emphasis on morality and to the Taoist emphasis on immortality of the spirit. In India, the evil of a socially reprehensible deed may be counteracted by the practice of private austerities or yoga. In Confucian China, the dialectic of karma was more narrowly defined as moral good and evil to be rewarded or punished publicly. Thus in the Ming and Ching periods, Chinese authors produced numerous treatises on the inevitability of moral retribution, often within this life. These moralizing tales preached that where human justice fails, divine justice will ultimately triumph with total impartiality. "The net of Heaven (justice) is wide; though thinly woven, it never lets the evildoer escape." 40

39. The most severe punishment was execution "up to nine tribes (lineages)."
40. Chinese idiom. The Divine Law is thought to be supportive of, but more
One Buddhist answer to the paradox of moral retribution without a lasting self is given by the formula of pratyaya or "condition." Although there is no permanent selfhood, there are conditions that create an everchanging self identity. The physical self does not transmigrate to the next life, but subtle psychic forces might. Similarly, actions are accounted for, not by a permanent actor but by a set of conditions permitting those of actions to arise. The classical formula is the Buddhist theory of causation, pratītya-samutpāda: "when this is present, that is present." The theory is also called "conditioned co-arising" or "dependent origination." The Buddha is said to have discovered, under the bodhi (enlightenment) tree, that whenever there is craving, there is suffering; whenever craving ceases to be, there is the cessation of suffering. This law of causation is more a law of concomitancy than a mechanical law of cause and effect. Technically, only when the proper conditions exist, usually in the moment just preceding the action to be analyzed, will the result occur. For example, in murder the murderous act can be committed only when the correct conditions are present: the intent, the presence of the victim, the timeliness, and the availability of a weapon. In theory, the Buddhist law of causation is similar to the modern liberal theory of environmental determinism, a view that imputes social responsibility to extrapersonal conditions, for example, a high crime rate in the ghetto. It appears, however, that the Confucianists and the Legalists never openly accepted the theory of condition as a mitigating circumstance. The theory of yiian, when wedded to a doctrine of no-self, would easily shift moral responsibility entirely away from the moral agent to surrounding factors.

An understanding of conditioned co-arising can lead to a counteraction of the law of karma. If one knows that craving leads to suffering, this knowledge can free him from suffering. The Buddha, after discovering this formula, mapped out a path of mārga, describing the karmic chain that produced suffering in saṃsāra. His teaching, his Law, can transcend the law of karma. This Law may either depict the path to nirvāṇa or may, because of the Buddha's

comprehensive than, the laws of men, who are often only agents of Heaven, karma, or Tao.


42. In Chinese and Japanese Buddhism, karma and Dharma are often set up as opposite poles. The burden of life's karma is said to be lifted by the infinite mercy of the Buddha-Dharma.
great power in Mahayana, liberate the devotee through merely his faith in the *Buddha-Dharma*. The latter case involves the theory of merit transference from the Buddha to the believer and touches upon the irrationality of grace. The more rational path is seen in the classic program of śīla, samādhi, and prajñā (precepts, meditation, and wisdom). These three steps correspond to the Western spiritual path of purification, contemplation, and illumination practiced by medieval mystics. Adherence to the precepts in combination with the practice of meditation will lead to enlightenment. This law or path counteracts the effects of *karma*. Contemplation of enlightenment defies the rational parameters of this Article and the supernatural laws governing the Buddha's grace and the flight of spirit during meditation are also beyond the scope of consideration. The *vinaya* (*lī* in our earlier discussion), however, merits further examination.

**Monastic Regulations**

The *lī* or monastic precepts are the body of rules to which monks should adhere. The Buddha reputedly authored or authorized this second "basket" (division) in the *tripitaka*, the Buddhist "three-basket" canon in Theravāda. The Buddha, in rejecting the caste duties and founding his own community, outlined these communal laws and regulations. Different sects have slightly different versions of the basic 250. The *vinaya* governs both personal and official conduct of individual monks and monks-in-fellowship. The rules are extremely detailed because they are designed to cover all conceivable misdemeanors, including even the private contents of dreams. They must have appeared at an early date because in the second council after the death of the Buddha, such minor misdeeds as storing salt were important enough to split the community. Compared with the monastic codes of the West or the canonical law of the Church, the Buddhist *vinaya* is older and much more detailed. Its substantial impact on Chinese culture is traced below.

The Buddha's act of establishing a semipermanent community of *sannyāsins*, or ascetics, was a break with the previous individualistic tradition of eremites. Responsible for organizing a new communal life for individual hermits, the Buddha founded the *sangha*.

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fellowship of monks, the first large-scale "tertiary group" beyond the traditional family, village, and state. Custom, lore, and taboos were pushed aside to create an atmosphere conducive to the rational search for enlightenment.

The *sangha* institution, introduced into China in the fifth century,⁴⁴ was distinguishable from even the Taoist experiment in the third century. The religious Taoists of the T'ien-shih-tao were the first to create a tertiary group but even they accepted the Confucianist commitment to the family (the primary group). In Taoism, filial piety was affirmed as the basic precept. Filial piety was rejected, however, in the early Chinese *sangha*. The Buddha, the *bhiksu* (ordained monks), and even the *śramaṇas* (novices), as teachers of the Dharma, were seen as more important than parents. The community even called its members brothers, sisters, mothers, sons, and other family appellations not unlike the primitive Church. The rational lifestyle of the independent brotherhood may have affected secular institutions. Later Zen monastic codes, without historical precedent, created a previously unknown organizational ability. The Zen simplicity in lifestyle, its devotion to task (*kungfu*), and its faithful reverence toward teachers (regarded as living Buddhas) influenced the Neo-Confucians. The Neo-Confucian private academies were, like monasteries, removed from the secular world. Rules governing student life and master-disciple relationship were sparkingly clear, concise and structured so as to be spiritually edifying. The members of those academies then produced, from the 12th century on, popular family laws, bureaucratic codes of behavior, and the moralizing treatises.⁴⁵

The *vinaya* was regarded as the word of the Buddha, on the same level of sacredness as the *sūtra*.⁴⁶ For perhaps the first time in Chinese history, there was a code that was inviolable because no man, not even the precept-master, was above the law. The seriousness of the rules of the *vinaya* can best be illustrated by the example of Hui-yüan. This gentry monk died after refusing to take any medicine containing alcohol, a forbidden substance.

The *vinaya* inculcated the ideal of uniformity and equality before the law. This ideal is contrary to the Confucian *li*, ritual pro-

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⁴⁴. About three centuries after the initial acceptance of the *sūtras.*
⁴⁵. In their detailed regulations, puritanical overtones, rigidity, and evangelical zeal, the Neo-Confucianists seem to have been indebted to the Buddhists.
⁴⁶. The same claim is not made by the Christian monastic codes.
priety, which recognizes grades of deference and addresses itself primarily to the cultured classes. According to Confucian thought, the common people should not be bound or burdened by the decorum and etiquette of the gentlemen. The Buddhist spirit of law is also contrary to the Legalist tradition. The Legalist desires total objectivity in law and dreams of a country ruled automatically by clear, understandable decrees. Notwithstanding this dream, the Legalist must cater to the wishes of the king who is above the law. Legalist fa is also positive law, changeable at will and dependent on power and craft of the ruler, who is the ultimate source of the definitions of right and wrong. In contrast, the law of the Buddha, created by a man, is neither arbitrary nor coercive. Anchored in the transcendental dharma, the vinaya is impersonal and therefore objective. Designed for sannyāsins brought together in a fraternity, the vinaya, unlike Canon Law, is nonhierarchial and insists on obedience to the letter of the law and not, as in Christian monasticism, personal obedience to the superior or abbot. Only in Zen monasteries is the master seen as a living Buddha, a representative in the unbroken transmission of the dharma and, therefore, one who may flout the rules for expedient purposes.

Autonomy is the goal the vinaya seeks to inculcate because the goal of the Law of the Buddha is not justice but discipline, especially self-discipline. Self-discipline is the implicit goal in any yoga, the art of perfect self-control. The Chinese term to describe this is tzu-li, self-regulation. This ideal may be new in view of the Confucianist belief in li, an interpersonal and societal standard, although Confucianism does insist on introspection. The Neo-Confucianists, who came after the Buddhist era, stressed, even more, the independence of spirit. Confucianists, however, also trust in te, the virtue and the power of sages and illustrious ancestors. Te exerts an almost magical influence upon their fellow men. The ideal of self-regulation, or tzu-li, was foreign also to the Legalist way of thinking. In the Legalist-Taoist outlook, law, fa, may be self-regulating to such a degree that the king could withdraw into wu-wei, nonaction. Legalist fa insists on fear of punishment as a basic prerequisite to law-abidance and utilizes coercion to get its way. The Legal-

47. Compare the impersonal Torah of the Jewish religion as the word of God and the subjective Grace sought by Christians through the person of Christ.
48. The Buddha, however, is comparable in this incidence to the sage's te; and monks are thought to generate waves of friendliness in the world.
ist would not accept Buddha's last instruction: "Be a lamp unto thyself; strive on in diligence." The idea of autonomy for the people suggests to the Legalist only anarchy and lawlessness.

The foregoing discussion illustrates the ascetic rationality in the Buddha-Dharma. Despite Buddhism's otherworldly goal (nirvana) and the transrationality of prajña (wisdom), the Buddhist believes in a structured universe and a structured lifestyle.

**Sociological Impact of the Buddha-Dharma**

The Buddha-Dharma, which calls a person to leave family and home to join the sangha and seek enlightenment, created the first real tension between a church and the Chinese state. Loyalty to the Buddha was incompatible with the Confucian and Legalist ideal of "one king, one ideology." The Confucian concept of state is paternalistic; the king is theoretically replaceable if he fails to fulfill the moral mandate of Heaven. The Legalist idea of the state is absolutistic; the king "owns" his domain and his subjects and is not answerable to anyone. In the Buddhist period, there suddenly arose in China a class of people who forsook the sacred family, pledged a new loyalty to Buddha and declared themselves his sons, shih-tzu.49 Young men reaching the age of majority, eighteen, wanted to join the sangha as novices and become monks at twenty-one, the Buddhist age of majority.50 Sūtras declared that a "master" was more precious than parents.51 Filial piety was losing its status as the most important virtue in the Six Dynasties.52 An enduring controversy among Buddhists, Legalists and Confucianists ensued from these conflicts.

The conflict between fo-fa, the Law of the Buddha, and wang-fa, the Law of the King, flared up many times. The initial Buddhist position rejected the laws of the state. It conceived of the monk as having left home and country and having accepted the new laws within the sangha instead. Hui-yüan was successful in defending

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49. All Chinese monks adopt Sakya, Shih, as their new clan name.
50. Buddhist vinaya recognizes human laws and would discourage the sole son of a family, for example, from joining the fellowship.
51. See T'i-wei Po-li ching (Sūtra of Trapusa and Bhallika) (recently recovered manuscript).
this position. The more liberal Mahayana followers espoused another view grounded in the sūtra’s notion that being King constituted a contract that could be rescinded if the king was unruly. It taught that the state existed for the common good and for the glory of the Buddha.

_Sangha_ and state coexist in peace. The Buddhists were granted privileges, and the monks maintained a generally apolitical profile. The state did not intrude into the _sangha_’s traditional rights through legislation but expected the _sangha_ to be a passive and ascetic community. The rights had been granted from the inception of the monastic way of life. This broad grant of rights to the institution—the _sangha_ “jewel”—rather than to the individuals—set a precedent. Through this action the state recognized the sanctity of a separate reality, a “City of Buddha” on earth. Previous to this recognition, the Chinese emperor had only recognized the sanctity of individual sages, holy men, and descendants of sages and had granted them privileges out of his own free will and without undermining his claim to absolute control. Such favors were also given in return for their subtle contributions to the state. In granting exemption from searches by any imperial troop to Master Lang, a Buddhist hiding in T’ai-shan, the king still exercised this prerogative. When the king recognized the sacredness of the _sangha_-jewel as an institution, however, it was a much greater concession because the charisma of the individual was no longer relevant. Abuses of the new system proliferated, and repeated persecution through special edicts charging the abuses became the standard method of controlling the Buddhist “state within a state.” Both the Legalist and Confucianist camps recognized the danger of the Buddhist claim to _tzu-lü_, or autonomy. During the sixth century in the north, the _sangha_ actually ran its own monastic bureaucracy alongside the civil Confucianist bureaucracy, collected its own tax in the form of grain and administered its own justice, except in murder cases. Not until the T’ang dynasty were the temples returned to civil control, accompanied by a decree requiring monks to take “placement examinations.”

53. _Id._ at 72-77.

54. The _sangha_ is being compared to the Christian concept of the Church as the City of God on earth.

55. The Chinese Buddhist apologists, under attack, naturally defended the compatibility of the _Buddha-Dharma_ with the law of the family and the state. _See_ K. Ch’en, _The Chinese Transformation of Buddhism_ 65-124 (1973).
The Mahayana community in China did have some positive influence on secular law. Compassion is a key prerequisite to the bodhisattvic career, and in those dynasties in which the rulers were sympathetic to Buddhism, the number of tabooed days in which beheading could not be done increased. Emperor Wu of the Liang dynasty was famous for his leniency in this area. Mahayana encouraged its followers to mitigate the harshness of punishment, because compassion required the suspension of human laws for the sake of enlightening lost souls.

Mahayana, however, also has a concept of the End of the Law stemming from the perceived corruption of the authentic teachings of Buddha as a result of their transmission from men to men. This corruption is only related to the transmission of the teachings and not to the eternal purity of the dharma as such. In contrast to the Hindu concept of cyclical decay and regeneration of the universe, Buddhists perceive only one sequence of decay interrupted by moments of revival. Different dates have been predicted for the commencement of the last age. Because the degeneration of the Buddha-Dharma means not just the decay of the doctrines, but also the nature of humanity, family, state, cosmos, and universe, the arrival of total lawlessness in this period can sometimes be met with "intentional lawlessness" (flouting of all conventions) and eschatological expectations of the arrival of the Future Buddha. The Ming dynasty was founded in expectation of the reign of Light (ming), a Manichaean motif that had infiltrated Buddhism. Because of such eschatological expectations, in the recent dynasties there have been repeated uprisings among peasants whose members deny all current laws and institutions. The political impact of this folk Buddhist discontent registered in the mobilization of the peasant masses in the Communist revolution. This religious underground, often violent, apocalyptic, and a law unto itself, was nurtured by communalistic hopes to serve the oppressed. This late Buddhist tradition was no longer the parasitic, withdrawn, and passive piety of the otherworldly monks.

56. See CHÜ T'UNG-TSU, LAW AND SOCIETY IN TRADITIONAL CHINA 15-90 (1981). The tabooed days occur when the karma accounts are being made. They are often determined by Chinese calendar calculations of "crisis days."

57. Hindu Dharma is cosmic, but the Buddha-Dharma is based on a historically unrepeatable event.

58. One famous Japanese text says that laws in fact are made to be broken and any pretense at keeping the vinaya is prideful and impossible.
The contemporary scene may now be evaluated from the historical perspective gleaned from the preceding survey of the Buddhist tradition.

**Impact on the Present**

The Buddhist "ethics of motivation," as opposed to "ethics of consequences," is echoed in the present-day People's Republic of China, where "thought reform" and "self-criticism" have assumed a religious fervor. The strong note of egalitarianism in Chinese communism reflects the Buddhist emphasis on universal brotherhood, on a life of service, and on personal merit (achievement) over birth (ascription). Even the forsaking of families by the Red Guards recalls the similar actions of Buddhist monks in leaving behind earthly cravings and belongings. Revolutions often produce their own brand of asceticism.

The dichotomy between *li* and *fa* in the Chinese legal system and the dominance of *li* over *fa* in the event of a conflict have continued from Imperial China through the Nationalistic era to the People's Republic of China. In conflicts between the heavily Western-oriented laws and Constitution of the Nationalist period and *li*, *li* prevailed. The inheritance law is one example. The traditional *li* would, in the interest of continuing the cult, pass everything from a deceased father to the eldest son of the legitimate wife. Other offspring, whether younger sons or daughters, married or unmarried, would not have any right of succession to the patrimony, although the deceased or his heir could relinquish a share of the hereditary property to the heir's brothers and sisters. Under the Nationalist Civil Code, equality of the sexes was the proclaimed policy of the State, and all of the deceased's children, sons and daughters, married or unmarried, were allowed equal shares of the property. Nevertheless, Escarra quotes the following remark, made to him by a high Kuomintang official:

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According to law, my interlocutor told me in substance, my wife would have the right, on the death of her father, to claim a share of the property equal to that of her brothers. Perhaps, according to the circumstances, she would have an understanding with them to obtain a share. But one fact is certain. That is, that she will never exercise her right (although it is inscribed in the Code) and that I will never permit her to plead on this point. For in so doing I should act contrary to the rites and I, as well as my wife, should have against me the unanimous disapproval of public opinion.61

It is important to realize that the content of \textit{li} is not immutable. Just as Han Fei-tze, founder of the Legalist School, had no monopoly over the specific rules of \textit{fa}, so Confucius could not dictate the content of \textit{li} for all generations to come. \textit{Li}, in a broad sense, may be interpreted as custom that has acquired the force of law, characterized by moral teachings, the use of persuasion, the appeal to reason and good sense, and the exemplification of good conduct and behavior. Its metamorphosis into law depends upon its widespread and unvaried acceptance by society, but its specific content may change with the times. Just as customary law may change over the ages, so some rules of \textit{li}, appropriate in Confucius' time, may not be relevant in the twentieth century. Anyone able to instill a new \textit{li} into the spirit and mind of the people would succeed in remolding the social behavior of millions in the same way Confucianism has done in the past. The Kuomintang had the \textit{San-Min-Chu-I}\textsuperscript{62} and the New Life Movement but, for a variety of reasons, their goals remained unfulfilled.

The guiding spirit of Chinese Communist Law is Maoism, the new \textit{li} which replaced the Confucian \textit{li}. Fully aware of the danger of a discrepancy between \textit{fa} and the new \textit{li}, the Communist Party, renowned for its mass organizational ability, mobilized all the human resources at its disposal—party members, cadres, and students—to reshape public opinion into accepting the Communist \textit{li} based on Mao's New Democracy. Mass meetings were convened and study groups formed for the purpose of re-educating the people. Furthermore,

\begin{itemize}
\item 61. \textit{ESCARRA}, \textit{supra} note 1, at 31.
\item 62. The \textit{San-min Chu-I} were the Three Principles of the People: Nationalism, Democracy, and the People's Livelihood. Formulated by Dr. Sun Yat-sen around 1905, these three principles formed the dogma of the Kuomintang which Sun Yat-sen founded.
\end{itemize}
the promulgation of important laws, including the 1954 Constitution and the Marriage Law of 1951, was preceded by intense public discussion and debate, and the public was invited to make comments and suggestions. Although it appears that basic policies and doctrines are predetermined by the Communist Party, there is always room for a change on a technical level. There is no doubt that such measures have been instrumental in giving the public a sense of identity with the new legislation and thus in bridging the gap between the Communist li and fa.

When a conflict does exist, the Chinese Communists have not hesitated to follow the centuries-old tradition of elevating li over fa. For example, despite the guarantee of religious freedom in article 88 of the Constitution of the People's Republic of China, such freedom is at best restrictively interpreted and at worst severely impaired because of its incompatibility with dialectical materialism. In addition, article 78 of the Constitution, providing that courts must be guided by law alone when deciding cases, is designed to ensure judicial independence, but this provision for independence has been construed to mean that courts must follow national policy, must be controlled and supervised by the people, and must be in harmony with local governmental activities. A third example of the predominance of li over fa is the vestigial nature of article 10 of the Constitution, which guarantees capitalists the right of ownership of the means of production, and of article 87, which guarantees freedom of speech, publication, assembly, association, procession, demonstration and the Government's material assistance in their implementation.

A question may be raised concerning the compatibility of China's habit of elevating li over fa with its meticulous observance of treaty obligations, even those which conflict with Chinese principles of justice and equity. Cynics may attribute this apparent inconsistency to temporary military expediency in the face of the overwhelming nuclear superiority of the United States and the Soviet Union.

63. See Mizuno, The Judicial System, in CHUGOKU NO HO TO SHAKAI 51 (1959) (Report of the Japanese jurist's mission to China); id. passim.
64. WEI WEN-P0, TUI-YU "CHUNG-HUA JEN-MIN KUNG-HO-KUO JEN-MIN FA-YUAN TSU-SHII-FA" CHI-PEN WEN-T'I TE JEN-CHIH 7 (1956).
The teaching of Confucius may, however, shed some light on this question.

The last of the five relationships which dominate Confucian society is the relationship between friends, a relationship characterized by sincerity. This trusting relationship is based on equality. It is the one that diplomatic relations most closely resemble, governed as they are by *Pacta sunt servanda* or good faith—the equivalent of sincerity on the interstate level. A discussion of the contrast between China’s relations with North Korea and those with Tibet may illustrate the validity of the above analogy.

The suzerain-vassal relationship that has traditionally existed between China and Tibet may be analogized to the relationship between an elder and younger brother in a Confucian society, rather than that between a sovereign and a subject or between friends. Because brotherly relations in a Confucian society call for a strict maintenance of order, the rights and duties between brothers transcend mere observance of agreements. Thus, regardless of the personal preference of a younger brother, the elder brother has, in the interest of the family, certain obligations toward him which cannot be shirked without violating the Confucian code of conduct. Transformed into the international sphere, this duty might form the basis for Peking’s institution of land reform and other programs in Tibet, notwithstanding the provisions of article 11 of the Sino-Tibetan agreement of 1951 against the use of compulsion on the part of the central authorities to effect reforms.66

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In the case of Korea, however, its centuries-old, vassal-suzereign relationship with China was terminated by the Sino-Japanese War of 1895. It was formally annexed by Japan in 1910 and, after World War II, it became divided but independent. Korean relations with China have resumed as those between friends in a Confucian society, characterized by sincerity. This turn of events might explain Peking’s meticulous compliance with promises made to North Korea, including that concerning the withdrawal of Chinese troops in 1958.67

Because of the predominance of *li* over *fa*, the study of Chinese law must be all-embracing. To a much greater extent than is true of Western law, it must include the study of philosophy, religion, classics, history, politics, economics, sociology, and psychology. Preoccupation with scrutinizing, analyzing, and comparing statutes and court decisions—a skill that Western lawyers employ with dexterity and felicity—is futile and misleading68 because such an approach, devoid of insight into the makeup of Chinese society, would at best deal with symptoms and not causes. Yet the mastery of the Chinese language, let alone the mastery of the Chinese culture, is a life-long process for non-Chinese. Although the efforts of a few American universities to initiate Chinese legal studies and a few law professors who have begun the study of the Chinese language serve as encouragement, the tasks ahead are arduous and full of pitfalls.
