

# THE VINAYA AND THE DHARMAŚĀSTRA: MONASTIC LAW AND LEGAL PLURALISM IN ANCIENT INDIA

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This article outlines the relationship between the Buddhist Vinaya (the rules of Buddhist monks)<sup>1</sup> and the Dharmaśāstra<sup>2</sup> in ancient India. My purpose is to show that the Vinaya should not be seen as a form of customary law,<sup>3</sup> but as a wider

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<sup>1</sup> There are several recensions of the Vinaya, the best known being the Pāli version translated by I.B. Horner as the *Book of Discipline*, 1938-1966 (B.D.). For an excellent introduction to the Vinaya, see Schopen 2003. For the legal aspect of Vinaya see: Bhagvat 1939; Holt 1981; Grero 1996; Dhirasekara 1981; Wijayaratna 1990.

<sup>2</sup> As a preliminary description I refer to the Dharmaśāstra as the sacred literature of Hinduism originally based on the Vedas encompassing for my purposes both Dharmaśāstra and Dharmasūtras. These texts embrace both religious and legal learning and are primarily the product of a learned Brahmanical tradition.

<sup>3</sup> There is a complex genealogy over the usage of this term. The history of the word 'customary law' in Anglo-American jurisprudence is embedded in the idea of Common Law, which from Blackstone's time has been used in contrast to the modern law emanating from Parliament. In terms of western scholarship 'customs' may be seen as localized practices reflecting long-standing practices. These practices become 'customary law' should these customs be seen as 'immemorial, continuous, peaceful, and reasonable' (Blackstone 1857: 66-67; Callies 2005). In India there were long discussions as to what would qualify as a custom (acāra).

system of jurisprudence linked to Dharmaśāstra principles and precepts.

I make this argument to show that particular aspects of the Vinaya and the legal relationship with the Dharmaśāstra are examples of the operation of 'legal pluralism' (J. Griffiths 2001; F. and K. Benda-Beckmann 2006: 14). This concept is useful as a starting point to develop analytical criteria for distinguishing various bodies of law and their interrelationships. I use this concept to show that in the context of the Vinaya and the Dharmaśāstra, the term 'legal pluralism' helps us to delineate the relationship between the Sangha (Buddhist order of monks) and the Dharmaśāstra in two situations.

Firstly, I describe the situation where a 'dominant' legal system recognizes a part of a system of customary law.<sup>4</sup> Here I take the 'dominant' legal system in ancient India to be the Dharmaśāstra.<sup>5</sup> While I use the term 'dominant' I recognize that in many cases the Sangha was located in kingdoms controlled by Buddhist kings.<sup>6</sup>

With the development of colonialism, states often recognized customary law or forms of religious law on their own conditions (F. and K. von Benda-Beckmann

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From earliest periods 'the usages of the good', 'one's ancestral usages' counted: Derrett 1999: 156. The Dharmaśāstra recognized forms of local laws or conventions and those local groups such as guilds, villages or religious orders would make their own laws and amend them as necessary.

<sup>4</sup> The term 'customary law' is not commonly used by Vinaya scholars as regards the Vinaya. Perhaps this has been because they were not familiar with the area of knowledge known as 'legal anthropology' or 'historical jurisprudence'. This is not necessarily a disservice to scholarship as often this literature assumed an evolutionist perspective (such as reflected in the work of Henry Maine), together with a sense that customary law was inferior and indeed the suspicion that it might not be 'real law'. Finally there was the incorrect assumption that customary law was inflexible to change. For a recent discussion on the problems with the 'appellation' customary law, see: Davis 2004: 120-127; Stewart 2006.

<sup>5</sup> I later elaborate on the complexities of the Dharmaśāstra in terms of its 'actual authority' and the extent it was actually followed in practice.

<sup>6</sup> See Bronkhorst 2007. I take this study as an example of recent scholarship that recognizes the complexity of relationships between Buddhist and Hindu kings in ancient India.

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2006: 25). This form of legal pluralism has been described as 'juridical legal pluralism' (J. Griffiths 2001).

However, complete recognition of a 'customary legal system'<sup>7</sup> in its entirety in a modern state may not in reality be found, as such a system would have the attributes of an independent state or at least a vassal state. An accommodation may take several forms. Hooker suggested in writing on the recognition of customary legal systems, that use of the terms 'dominant' and 'servient' 'directs our attention to the political willingness and theoretical ability of a particular legal system to accommodate a subject system in terms of admitting its principles and stating the limits of any such admission' (Hooker 1975: 55). The parameters of recognition may take the form of 'intersystem-demarcations' over issues such as marriage and property rights (F. and K. von Benda-Beckmann 2006: 23).

Many scholars who have written on the Vinaya have shown how the Sangha (order of monks) had its own form of monastic property, which was 'inalienable, permanent property' which could not be divided (Gernet 1995: 67-73; *B.D.* 5. 239)<sup>8</sup> and that monks were only allowed a few personal items.<sup>9</sup> At the same time scholars have well described how the Vinaya specified a range of punishments for various types of infractions (Bhagvat 1939; Holt 1981; Dhirasekara 1981; Voyce 1984; Wijayaratna 1990; Grero 1996; Schopen 2003). Such studies do not generally show the extent that monks were subject to the Dharmaśāstra<sup>10</sup> and such

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<sup>7</sup> The term 'customary law' often refers to unwritten legal systems. The origins of this approach go back to the eighteenth century historical school which was based on the assumption that all law originated from customs. See K. von Benda-Beckmann 2001.

<sup>8</sup> The assets of the sangha are property that cannot be divided (Pāli: *avebhangiya*) and so not given away (Pāli: *avissajjiyāni*) and if any one does so he commits an offence of *Thullaccaya*. These are offences preliminary to a *pārājika* offence or a *sanghadisesa* offence.

<sup>9</sup> These are things that monks find along the way, such as meals of scraps, robes of rags, lodgings at the root of a tree and medicine from cow urine (*Vinaya Piṭakim* 1879-83: 1.30; see: Wijayaratna 1990; Findly 2002: 105-178). However as later work by Schopen, Gernet and others has shown, this Spartan lifestyle did not seem to be followed by monks in later times. See further below.

<sup>10</sup> The major exception is the work of Schopen who discusses the relationship

studies do not give consideration to the extent that the Vinaya incorporated ideas from the Dharmaśāstra.<sup>11</sup> I do not intend to pursue this type of analysis which describes the Vinaya as a ‘self sufficient legal system’. My main concern is with other forms of legal pluralism.

Secondly, the concept of legal pluralism helps us to understand how a subservient legal system may seek to deploy norms outside of it for business advantages. At the same time a servient legal system may have to conform to wider norms to achieve social respect and acceptance. Here I examine two situations.

Firstly, I examine the situation where monks were directed to obey ‘outside dictates’ of the Dharmaśāstra to facilitate business and to ensure the continued support of donations. In this regard I show how the Vinaya replicated wider norms within the Dharmaśāstra as regards the requirements of other business communities with which the Sangha aspired to do business. Secondly, I examine the situation where monks had to adhere to wider notions of Indian society based on notions of purity and pollution.

As regards this second type of legal pluralism scholars have noted that all social fields consist of plural interpenetrating normative orders (Roberts 2005: 12). This approach recognizes that there may exist in any one community duplicate parallel accounts of the same laws which may differ or conflict. Le Roy here prefers to talk of *multilegalism* (*multijuridisme* in French rather than legal pluralism) (Le Roy 1998; for a discussion of legal pluralism in India see Agrawal 2006).

As regards the Vinaya,<sup>12</sup> monks were subject both to the rigor of their own monastic code and to general expectations of mendicants (*sramana*).<sup>13</sup> In general

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between the Dharmaśāstra and the Vinaya of the Mūlasarvāstivāda-Vinaya which I discuss later.

<sup>11</sup> In some areas the Vinaya depended on state definitions for offences such as theft and for its self-protection from inadmissible candidates for entry. See Voyce 1986.

<sup>12</sup> The meaning of the Vinaya is often rendered as ‘training, education, discipline or control’ (Holt 1981: 4). Scholars have noted the influence on the Vinaya from ancient Indian ascetic practices and Jainism (Jing Yin 2002: 84; see also *Jaina Sutras*, 1884-95, 1: 184).

<sup>13</sup> For a discussion of this term see Olivelle 1993: 11. Olivelle argues that by the time of Asoka the term was used principally, but not exclusively to indicate non-

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all mendicants were expected to follow an itinerant life style, with the abandonment of social and economic activities and the practice of celibacy (Olivelle 1995: 15). The rigor of this life style and the signifying clothing helped foster internal discipline and identified them as a group that therefore could be held accountable to their own ideals (Schopen 2007: 68-74). Another general requirement, as I will show, was that mendicants would not offend the general rules as regards purity and pollution found in India emanating from Hinduism.

Issues arising from these approaches to legal pluralism raise the question of whether these parallel laws were accomplished by cooperation, subservience or resistance. Which forms of the rules are binding? Another issue is who was thus responsible for the framing of the legal issues involved: was it done in mutual consultation or was it the result of one group being subservient to another? Does a new form of hybridization arise through such rules being 'vernacularised' (Merry 1997). Moreover the process of inter-reactions between different levels in the legal system may become the context for further interactions (F. and K. von Benda-Beckmann 2006: 24, following Giddens 1979 and his idea of idea of 'structuration').

I now proceed to develop an approach to understand how the Vinaya was connected to the Dharmaśāstra, with special reference to the second type of legal pluralism.

To make this analysis I examine points of contact between the Sangha and the Dharmaśāstra in the area of 'commercial dealings' and in the delicate area concerning partition or inheritance of property where the ritual treatment of deceased monks brought monks into contact with local communities and concerns over pollution and purity.

I focus in particular on the Mūlasarvāstivāda-Vinaya, a text possibly redacted by the end of the fifth century in the Common Era in north India.<sup>14</sup> This text is noted

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Brahmanical ascetics. For a translation and critical text of the twelfth-century which outlines the duties of Brahmanical asceticism, see Olivelle 1995.

<sup>14</sup> See the recent discussions in: Schopen 2004c: 20-22, 2004h: 207-212. Bhikkhu Sujato assigns the Mūlasarvāstivāda-Vinaya to the period 500-1000 a 'vagueness of this ascription', he says, telling us how little we know of this Vinaya (Sujato 2006: 173-4).

for the great variety of material, its great length and for the fact it was composed over a thousand years (Sujato 2006: 174). The Tibetan Sangha owes its lineage to this school.

I take it that the Dharmaśāstra texts were in place by the second or third century of the Common Era.<sup>15</sup> As a form of sacred law, the Dharmaśāstra involved more than law in a western sense as it involved moral, social, intellectual and spiritual issues as well as those that appear to be entirely legal (Ingalls 1954: 34; see also: Rocher 1972; Menski 2002).

Two issues have been persistently raised by research on the Dharmaśāstra. The first is in terms of the actual legal authority of the Dharmaśāstra.

The Aryan invasion of north India imposed upon the indigenous people an intellectual system of law as celebrated in the sacred texts. The customs of the Brahmins were taken as the norm. Generally speaking the king was bound to respect the customary laws of groups outside the range of the Dharmaśāstra (Kane 1962-75: Vol. 3, 883). The policy of the king was to protect all religions and not to interfere with the internal affairs of a group. However the king would interfere into the affairs of groups where there were disputes and to resolve cases of misappropriation (Lingat 1973: 227).

Dharmaśāstra allowed these groups to make their own laws (Kane 1962-75: Vol. 2, 1, 66-69, Vol. 3, 158-60, 486-89; Olivelle 1993: 209-10). Such groups included guilds, castes and ascetic communities. The Dharmaśāstra extolled that the king should support the conventions of various heretical groups and the Sangha is specifically mentioned.<sup>16</sup>

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<sup>15</sup> Olivelle argues based on internal evidence that Apastamba, Gautama and Baudhayana date from this time and Manu from the first couple of centuries of the Common Era (Olivelle 1999: xxvi-xxiv, 1993: 137).

<sup>16</sup> Manu mentions Grāma (village), Deśa (country) and Sangha (community) <sup>16</sup>. Medhātithi, his commentator, explains sanghas as follows:

Ekadharmānugatānām nānādeśavāsinām nānājātiyānām api  
prāninām samuhah yathā bhiksūnām sangho vanijām sanghā-  
ścāturvidyānām sangha iti. (Trans: A group of persons, of the  
same persuasion [dharma], belonging to different localities or of  
different classes [or castes], as for instance, the sangha of

The Dharmaśāstra in terms of its 'authority' should be seen as containing 'precepts' or 'recommendations for human action' (Derrett 1973: 3). This approach differs from some recent scholarship that argues that the Dharmaśāstra is more than 'merely prescriptive' (Davis 2004: 79). Under this view some scholars argue that the Dharmaśāstra records as much as it prescribes. Lariviere for instance argues that the whole of the Dharmaśāstra 'can be viewed as a record of custom' (Lariviere 2004: 612. For a review of this approach see Olivelle 2006a: especially 172.) Menski corrects this approach in arguing that such scholars 'miss the point when they characterise dharma as 'law' as understood in 'common parlance and in positivism-focussed legal circles'. 'In fact' he says, 'the concept of dharma as 'self-controlled' order carries a definite anti-positivist legal message - it seeks to avoid state law'. 'Classical dharma' he argues 'was centrally concerned with self-controlled order and ideally requires no formal legal intervention' (Menski 2003: 548-549)

The second issue relating to Dharmaśāstra research is over the 'historical actuality' of the Dharmaśāstra and the extent that the Dharmaśāstra material was actually deployed in concrete disputes. Texts were referred to only when there was no evidence of custom; texts were a last resort, a residual service to law, not the source of law to be consulted first.<sup>17</sup> Where the principles differed between local laws and the Dharmaśāstra the Brahmins utilised śāstric texts along with other traditions such as custom to solve the problems (Derrett 1977a).<sup>18</sup>

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Bhikkhus, the sangha of merchants, the sangha of men learned in the Four Vedas.) (Translation in S. Dutt 1962: 144)

<sup>17</sup> Derrett says in ancient times there was a response to the question 'what is dharma?': 'the question was to be asked with reference to practical problems' (Derrett 1999: 153). Kātyāyana specifies that 'a king should decide causes (of people) according to the rules of the śāstra; but in the absence of texts he should carry out [judicial administration] according to the usages [or customs] of the country' *Kātyāyanāmṛti on Vyavahara* 1933, verse 45: 126.

<sup>18</sup> See also Davis in his recent study on Medieval Kerala (Davis 1999: especially 814). Davis however has a different interpretation of the authority of the Dharmaśāstra as noted above. Menski writes that 'the dharmic system is not a uniform code of obligations but rather a situation-specific and context-sensitive method of expecting the best possible results in what may often have been quite inauspicious circumstances' (Menski 2003: 125).

It is clear from at least the 6<sup>th</sup> century BC that many ascetics roamed the Ganges area and through out India. By later times Buddhism spread from the place of its origin in Magadha to other regions including the north western area of India.

In India there were a wide variety of ascetic traditions which have been divided by Brahmanical taxonomists into two broad categories. One was the forest hermit and the other was the 'world renouncer'. The latter involved life long celibacy, homeless wandering, and the giving up of ties, such as the ownership of property. In addition such a life style involved the abandoning of ritual activities and living from alms (Olivelle 1995: 15). Soon after the Enlightenment of the Buddha the Sangha had become well established and patronised by both laity and kings.

One starting point in the discussion on the role of renouncers such as the Buddhist Sangha, is to contrast the renouncers to the 'man-in-the-world'. In this sense I refer to the contrast between the renouncer or ascetic and the ideal-typical Brahmin householder and the differing ideals between the two (Dumont 1970). In these formulations ascetics rejected the basic needs of society such as housing, agriculture, the use of fire and kinship relations (Olivelle 1990).

This 'unambiguous textual distinction' (Olivelle 2006b: 26) between the ascetic and the 'man-of-the-world' as advanced by Dumont (1970) has received much criticism. One critical approach has been to refuse to see asceticism as an aberration but as part of human nature and culture (Harpham 1987). In adopting this approach I suggest we might not only see Brahmanical institutions as adopting ascetic cultures but see ascetics as seeking legitimacy and patronage by a variety of strategies to keep themselves within the mainstream tradition (Olivelle 2006b: 26).

The typology of Dumont is also weakened by some new Buddhist scholarship which in general redefines the place of the laity, and which does not see the Sangha as breaking all social bonds (Mills 2000). The approach of the past towards Buddhism has seen an emphasis on the 'two-tiered model of religiosity'. This approach regarded Buddhist monks (Lester 1973: 47-150; J. Samuels 1999), as expressed by Weber, as a form of 'religious technology of wandering and intellectually schooled monks' (Weber 1958: 205-6, 215). This 'ideal therefore takes the form of two normative lifestyles, that of the monk occupying the upper tier and the lay person as occupying the lower tier' (R. Ray 1999: 15-36). This approach has emphasised the idea of rigid separation of the monks to practice poverty and chastity while separating them from the lay community.



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The description of Buddhism as a two-tiered institution has a long history in Buddhist studies (N. Dutt 1945; Lamotte 1988: 65-84; Hirakawa 1990: 61; J. Samuels 1999). Despite the fact that monks 'go forth' from society into a state of homelessness, monks and nuns remain deeply connected to the laity in a 'symbiotic manner' (G. Samuels 2003). Monks need involvement in the world to retain credibility and continued material support, if only to ensure continued recruitment (Silber 1995: 65).

Implicit in this description of Buddhism as being a 'two-tiered' institution has been the recognition of the role of laymen and laywomen in Buddhist affairs through the role of lay disciples. The usual translation of layperson is 'Upāsaka' (laymen) and 'Upāsakās' (laywomen) who commonly take the Three Refuges<sup>19</sup> and undertake to abide by the Five Precepts (Lamotte 1988: 65-84).

Some scholars have noted that there were non-Upāsakas who were involved in making donations (Agostini 2002: 15).<sup>20</sup> Inscriptions contain evidence that there were gifts to these viharas by people who do not seem even to have been lay-devotees (Schopen 1997h).

Sarao argues that the conversion of a follower from Brahmanism to Buddhism did not mean anything more than showing respect to the Buddha through the making of donations. Such conversions, he argues, did not result in a separate and distinct religiosity or a socially identifiable community of Buddhists. Sarao concludes Buddhism failed to establish a group of lay devotees who regarded themselves as different from the community (Sarao 2002; Jaini 1980: 9. See a similar comment by Lamotte 1988: 68). Lamotte commented that the Upāsaka, whose religious instruction leaves much to be desired, will rarely break away from the popular circle into which his roots are plunged and establish a compromise between the Buddhist Dharma and the superstitions of paganism' (Lamotte 1988: 69, and a

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<sup>19</sup> The act of going for refuge in the Buddha, the Dharma and the Sangha.

<sup>20</sup> Agostini suggests in reviewing the discussion of this term that there were two levels of lay involvement in religious life, one where there was a strong religious commitment and another, followed by a group who perhaps were the majority, where some time and money were spent in Buddhist activities. See Schopen 1997e: 72; Nath 1987: 76-81, 99-109. Schopen indicates that the significance of this term is much glossed over (Schopen 1997a: 323, footnote 30).

similar comment, 78).

Here I refer to recent work on the complex relationship between pre-existing popular beliefs and the Sangha (Decaroli 2004). It has been often assumed that Buddhist elite were above involvement with spirit deities. However Decaroli has shown with the aid of inscriptional evidence, that this activity was not regarded as a corruption, but through the conversion of yakṣas and nāgas the Sangha increased its social relevance (Decaroli 2004: 185-187). The incorporation of popular deities into the Buddhist context signalled Sangha purity and became a methodology of expansion thus increasing its hegemony over rivals.

Secondly, recently Shayne Clarke, using inscriptional evidence and the Mūlasarvāstivāda-Vinaya, has argued that the monastic tradition was not incongruous to family life and it is not commonly recognised monks kept contact with their families. He shows how monks visited former wives, implemented a sense of obligation to parents, acted as go betweens for the marriages of their children and that some monasteries even had a place for pregnant nuns (Clarke 2006. See also Schopen 1997h).

Numerous sources testify that the Sangha was anxious to avoid social censure from the laity (Findly 2002: 337-367). Bailey and Mabbett conclude that as a heterodox or minority tradition the Sangha had to relate to mainstream practices (Bailey and Mabbett 2006: 121). Schopen, concludes in a similar way, that the Sangha was anxious to avoid censure from the central tenets of Brahmanical culture resting as it was on issues of purity and pollution (Schopen 1997g: 219). As I note later, while the Buddha scorned Brahmanical culture for its clinging to ritual formulae, the Buddha inverted the Brahmanical notion of virtue into the morality of the 'actor's state of mind' (G. Bailey and Mabbett 2006: 122; Mabbett 1998; Tsuchida 1991).

These evaluations or re-evaluations of the Sangha-layman relationship allow us to question whether law in India was 'theological' in that there were religious groups purely bound by their sectarian law. Schopen's work, as well as arguing a variety of things, shows that the division of India into Hindu and Buddhist has been overemphasised. Legal ideas in particular melt these divisions (Davis 1999: 200, footnote 2, citing Schopen 2004h, 2004d, 2004g). In a similar way Charles Hallisey argues that Buddhism is too often treated as a thing apart from the rest of the intellectual and cultural history of India (Hallisey 1995: 46).

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There is often the implicit assumption that the Sangha had their own law which covered every aspect of the life of the religious community. In earlier sections I have shown that this view was not correct as the Sangha did have to rely on the law of the state. The Sangha had to adjust to the moving world it lived in and could not be totally self enclosed from the world (Davis 1999: 196. Davis was writing here on custom generally).

In attempting to examine the relationship between the Sangha and its Vinaya with the laws of the outside world I start with Schopen's suggestion that the Vinaya appears to have been redacted to avoid conflict with Brahmanical values and concerns. He argues there were areas in India, where the redactors of the Vinaya, perhaps an influential group of monks, redacted the Vinaya in a form so it would not overlap with Brahminical values and concerns governing issues of debt, property and inheritance (Schopen 1997g: 219).

### The Sangha in the Commercial World

It is clear that the Sangha in some parts of Asia developed monastic institutions with considerable autonomy and independence and those monastic institutions became embedded into local economies. However, it is clear that such development occurred differently in different places and times (Schopen 2007: 60).

In Sri Lanka Buddhist institutions developed into a phase which became known as the 'domestication of the Sangha': a process by which the Sangha and the laity entered into a complex variety of relationships which was residential, ritual, social political and economic (Strenski 1983: 463; Gunawardana 1979; Carrithers 1983). In India land was early given to the Sangha (Nath 1987: 165) and later kings of both Hindu<sup>21</sup> and Buddhist traditions continued this tradition (Thapar 1978: 68-75).

Buddhist pilgrims reported the prosperous conditions of monasteries and the considerable real property held by them. Fa-hsien for instance reported in the fifth century A.D. on the considerable wealth and property held by monasteries and how monasteries were bestowed fields, houses, gardens, men and oxen (*Travels of*

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<sup>21</sup> Many Brahmanical institutions would have paralleled the monastic landlordism of Buddhism with land grants to Brahmins. See Heim 2004: 73, citing Dirks 1996: 122; Kosambi 1985: 329.

*Fa-hsien* 1956: 43. See Niyogi 1973).

Xinru Liu has shown how monasteries were located on trade routes which benefited from the patronage of traders while the Sangha provided valuable services to these traders (Liu Xinru 1994: 89-136; H.P. Ray 1994: 121-151) and monks even participated in this trade. The diffusion of Buddhism in ancient India was assisted through monks moving along trade routes to prosperous cities or agricultural areas where lay patrons generated sufficient economic surpluses to support and establish new monasteries (Neelis 2001: 537).

Historians have linked the early success of Buddhist monarchism with the growing availability of wealth that could be transferred to monasteries (Thapar 1978). Ray concludes that no other renunciant tradition matched the ability of receiving wealth as the early brilliance and opportunism of early Buddhism (R. Ray 1999: 403).

The position in the Vinaya on handling of money and property was simple. The rules covered three areas: monks were forbidden to accept gold and silver, engage in trading and to engage in bartering.<sup>22</sup>

The ownership of property brought problems, necessitating managers, both lay and monastic.<sup>23</sup> The Vinaya indicates that certain ‘administrative staff’ was allowable in the Vinayas to assist monks through the usage of administrators such as attendants, issuers of meals, robe keepers and keepers of money. Many hoards of coins in India found in ruins indicate that rules that forbade monks to hold and deal with money were not enforced (Schopen 1997b, 2004c). Inscriptions also indicate that a great number of donations were made by monks and nuns.<sup>24</sup> The implication from inscriptions is that they must have acquired money as their own before they could donate it (Schopen 1997b: 6 et seq., 1997d).

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<sup>22</sup> In the Pāli Vinaya these were offences of Nissaya Pācittya which involved forfeiture and confession (*B.D.* 2.112). For the Mūlasarvāstivāda-Vinaya version of these rules see Prātimoksa rule, Prebish 1975: 71. On the rules against buying and selling see Schopen 2004f. As regards the handling of money see Wijayaratna 1990: 76-88.

<sup>23</sup> In the Pāli Vinaya these were called kappiya kāraka. See: Wijayaratna 1990: 79; Gunawardana 1979: 95-136; also Schopen 2004h: 199-206.

<sup>24</sup> A good example is Sanci in central India, where donations have been dated about the first century BCE; see Dehejia 1972, discussed in Clarke 2006: 60.

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The monks of later times appear to be very different according to the Mūlasarvāstivāda-Vinaya from the wandering monk indicated in the Rhinosorus Sutra (*Khadgavisana-gatha* 2000). These monks had servants, they ate fine meals and their main concern was about property. Finally they could even inherit property from relatives (Schopen 2004f: 125-126). Moreover they were concerned with maintaining good relations with their donors who at least in some ways had become employers (Schopen 2004c: 2). Ray argues that this development may have come about as the way of the forest renunciant was seen as arduous and the development of settled monasticism offered a more attractive option (R. Ray 1999: 398, 403).

With the development of monasteries monks needed to maintain architecture and finance ritual which necessitated the borrowing of money. These transactions needed to be secure to deal with the worries of lay donees about repayment and continuation of the ritual services after the donor's death (Schopen 2004d: 68-70).

There were implications for the monastic ownership of property and monks being involved in commercial matters as these activities increased the possibility of friction with the king. I speculate property owned in perpetuity by the Sangha deprived the king of revenue.<sup>25</sup> There were implications for the state treasury as in one account we read how the king impounded an estate (Gilgit Manuscripts iii 2, 113-148, cited Schopen 1997g: 207). We may only surmise that the king had an economic motivation.

The question of monks owning property is of considerable importance as Buddhism was supposed to be the classic world-renouncing religion (Zaehner 1974: v). Dealing with property brought the Sangha into conflict with the norms of Brahmanical society and their expectations as regards ascetic behaviour and issues of pollution. Permanent quarters required long-term maintenance and lasting

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<sup>25</sup> The Mūlasarvāstivāda-Vinaya lists taxes that monks could be subject to (Schopen 2004f: 160, footnote 8, citing *Derge* Ca 72b.6-84a.6). I am presuming that the king in ancient India did have rights to own land (Gopal 1961; Nath 1987: 167). However, as Derrett has shown in a seminal essay, there may have been multiple holders of a piece of land, the idea of a single owner of a piece of land not being the pattern of ownership in ancient India (Derrett 1977b; see recent critiques of this position by Davis 2004: 68-77). On monastic ownership of property see Schopen 1997i.

relationships. Such donors would have had ample time to observe monks and the extent they followed their own rules (Schopen 2007: 60; Ali 1998).

I perceive that a proper evaluation of the monk-laity relationship enables us to appreciate that Buddhist institutions were not austere and remote institutions defined by their own all-encompassing faith (Gellner 1992: 99). One particular aspect of this relationship was the degree of contact and influence between the Mūlasarvāstivāda-Vinaya and the Dharmasāstra towards Brahmanical values. Part of this claim was that the Mūlasarvāstivāda-Vinaya was redacted by *Vinayadhara* (monk lawyers) to build an institution to minimise friction between the Sangha and those the Sangha might have been in contact with (Schopen 1997g: 214).

### The Sangha and the Procedures of Borrowing Money

I have mentioned the monastic need to finance ritual activities and building. Foucher argues that the transformation from a style of support based on almsgiving for immediate necessities, to a life style based on the donation of rent-bearing properties, represents a crucial innovation in Buddhist almsgiving (Foucher 1949: 239-40).

There is clear evidence of the use of pledges to secure loans in ancient India (Chatterjee 1971: 291-297; Schopen 2004d; Jain 1929). Early Dharmasāstra texts express contempt for usury (Visser and McIntosh 1988) but in later times the contempt for usury 'seems more restrained' (Derrett 1977b: 38). A text illustrating changing views is Manu X.117:

Neither a Brāhmana, nor a Kshatriya must lend [money at] interest; but at his pleasure [either of them] may, in times of distress [when he requires money] for sacred purposes, lend to a very sinful man at a small interest (*The Laws of Manu*, 1970: 427).

Ancient India used pledges to secure loans. Here I use the term pledge to cover the situation where a debtor hands over an article to secure repayment, the transfer of the property being of sufficient value to repay the debt with interest (Chatterjee 1971: 291-297).

A passage in the Mūlasarvāstivāda-Vinaya shows how lay supporters were

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concerned about the condition of the viharas for the living, as well as the dead. The Buddha accordingly allowed perpetuities for building purposes to be accepted.

The Buddha said:

Taking a pledge (*ādhi/ bandhaka*) of twice the value (*dviguna*), and writing out of contract (*likhita*) that has a seal and is witnessed (*sākṣimat*) the perpetuity is to be placed. In the contract the year, the month, the day, the name of the Elder of the Community, the Provost of the monastery, the borrower, the property, and the interest should be recorded. When the perpetuity is to be placed, that pledge of twice the value is also to be placed with a devout lay-brother who has undertaken the five rules of training. (Schopen 2004d: 49, translated from *Vinayavibhaṅga Derge*, 'dul ba Cha 154b.3-155b.2)

Schopen demonstrates how certain key terms or requirements in the texts such as the notion of 'perpetuity itself', 'pledge', 'to get in writing', 'with a seal' have parallel passages in the *Dharmaśāstra*.

For instance the idea of 'perpetuity' as it appears in the above Tibetan text, Schopen argues, reflects the Sanskrit meaning of 'an endowment or a kind of donation'; the interest was to be used for a specified purpose (Schopen 2004d: 52).<sup>26</sup> The Vinaya text I have quoted above arguably correlates with *Dharmaśāstra* texts, to provide evidence of the usages of 'pledges',<sup>27</sup> of full value so that the pledge was sufficient to meet capital with interest,<sup>28</sup> and that the transaction

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<sup>26</sup> Schopen argues that the idea behind the Tibetan term *mi zad pa* is reflected in the Sanskrit term *abṣaya* meaning 'exempt from decay' or 'permanent'. The term *abṣaya-nīvī* appears in endowments and the inscriptions in which the term appears to record donations made to the Sangha such as that found at Sanci and elsewhere. On the meaning of the term *akṣaya-nīvī*, see Derrett 1974.

<sup>27</sup> The Vinaya term in the text here (*gta' nyi ri*) corresponds according to Schopen with the term 'pawn' or 'pledge' (Schopen 2004d: 58). The *Dharmaśāstra* terms to convey these terms are *ādhi* and *bandhaka*. See *Bṛhaspati*: X. 5, which stipulates one should make a loan after having taken a pledge or deposit of full value (*paripūrṇaṃ grhītvādhiṃ bandhakaṃ vṃ*).

<sup>28</sup> Compare the Vinaya text cited above with *Dharmaśāstra* texts which allow an

concerned was ‘witnessed in writing’ with the usages of seals (Schopen 2004d: 59-64).

The parallel use of legal requirements indicates that in order to obtain finance the redactors of the Vinaya seem to be trying to come to terms with or to negotiate with an established legal system and set of values that surround them (Schopen 2004h: 209, 1997g).

### The Sangha and the Inheritance of Property: The Dangers of Pollution for Monks and its Consequences

#### *Interpretations of death pollution*

One of the central strands of thought in Indian society and its caste system revolves around rules concerning pollution and ritual purity (Dumont 1959). Pollution may occur with life cycle transitions, inter-caste relations and contagion, as regards bodily parts such as hair, sexual fluids and dead bodies. Different theories have been used to understand pollution and contagion. (For a review of the different theories of death pollution in Indian society, see Lamb 2000; and Glucklich 1988: 48-363.) Mary Douglas has argued that the human body is seen primarily as a symbol of the social body. She argues that ‘dirt may be seen as matter out of place’ (Douglas 1984: 56-57). ‘Dirt’ is seen as gathering on the margins and openings of the body. The protection of these boundaries has been a major preoccupation of Brahmanical thought and maintaining body purity is an essential focus of ritual pertaining to death (Olivelle 1995: 19).

Of particular concern here were the elaborate Brahmanical rules for the treatment of a dead body. The general procedure involved the washing of the body, decking the body with a *tilaka*, putting garlands on the body and the performance of prayers (Kane 1962-75: Vol. 4, 212. For good descriptions of funeral practices and rituals, see: Evison 1989; Lamb 2000). Should the strict procedures be violated there was the risk of pollution. At the same time the Manusmriti makes

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increase of interest: *The Laws of Manu*: V111.151; *Kauṣīliya Arthaśāstra*: 3.11.6. For a discussion of this issue see: Chatterjee 1971: 21-75, 226-227; Sternbach 1965: 109-146.



clear that Brahmins should not mix with those castes who wear the clothes of the dead (*Manu's Code of Law*, 2005: X.35, X51-55).

Brahmanical ideas on pollution were physical, external and in some cases consisted of psychological defilement. The Buddhist idea of purity was entirely 'spiritual'.<sup>29</sup> The Buddha insisted to his followers that clinging to passion and hatred was the root cause of all defilements (Tachibana 1992: 160-168). He criticised the social institutions and mental attitudes of Brahmins rather than the concepts to which they adhered. Buddha did not discard the concepts underlying Brahmanism but gave them different connotations according to his own concept of dharma or non-dharma (Tsuchida 1991: 75).

#### *The funeral practices of monks*

Monks generally would arrange the funerals for their own brethren.<sup>30</sup> The Pali Vinaya has no rules on how to conduct a funeral for a dead monk. According to the Mūlasarvāstivāda-Vinaya, 'the honors of the body' should be performed.<sup>31</sup> This would involve the washing of the body and the placing of the body on the cremation pyre (*Derge Nya* 65a.2-66a.4 trans. Schopen 2004j: 287-289; Schopen 2004f). In addition a small structure over the pot of ashes would be constructed. The type of funeral ritual depended on the status of the monk. Arahants may have larger stupas built over their remains (Schopen 2004j: 287-289). A Mūlasarvāstivāda-Vinaya text makes it clear that after handling a corpse a monk must wash (Schopen 2007, 2004e: 107-8).

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<sup>29</sup> In Buddhism purity and impurity are not concepts which apply at the physical and external level. On the contrary purity is always expounded as an internal virtue related to the mind: Wijayaratna 1990: 84.

<sup>30</sup> Schopen notes that the instance of the burial of Kālodāyin in the Mūlasarvāstivāda-Vinaya seems to assume that monks were in charge of their own funerals (Schopen 2004j: 293).

<sup>31</sup> See the account of the funeral of the monk Kālodāyin where the person in charge of the ceremonies (Queen Mālikā), removed the chalk from the body, bathed the body in perfumed water, heaped a pile of aromatic woods and subsequently cremated the body. Later she extinguished the pyre with milk and erected a mortuary stupa (*Derge Nya* 65a 2-66a.4, trans. Schopen 2004j: 288).

While Buddhist monks had their own procedures for dealing with their dead any disregard as to the proper treatment of a body of a deceased monk, accordingly to Brahmanical standards would expose the Sangha to immediate criticism. This would especially be the case where the history of a deceased monk was well known (Schopen 1997g: 219).

Schopen has argued that the improper performance of these obligations could lead to other communities complaining about pollution should Buddhist monks be involved in the mistreatment of dead monks or should monks not pay their debts regarding commercial transactions (for example Schopen 1997g, 2007). To this explanation I would like to add that the rules may have also reflected monks' personal ideas of pollution distilled from their own background (a point which I develop later).

*The rules on monks' inheritances and the dangers of pollution*

The property of the Sangha was held in perpetuity and was not divisible on the death of an individual monk (Gernet 1995: 67-68). Only 'light goods' (Gernet 1995: 70), such as robes and bowls were capable of being inherited. Since the bowl and a robe were items which every monk possessed, there had to be a procedure of devolution for these items.

The Pāli Vinaya version of the rule simply indicates that the bowl and robes should be given to the monks of the order who had tended the sick monk (*B.D.* 4. 434). The Mūlasarvāstivāda-Vinaya account is much more elaborate (Schopen 1997g: 207-8). One possibility for the expanded and comprehensive treatment is that this code was stricter, rather than necessarily later, than the Pali treatment (Schopen 1997g: 209). The Mūlasarvāstivāda-Vinaya code establishes that before property may be distributed a certain ritual procedure had to be completed. Those who perform these obligations had the first rights to the dead monk's property (Schopen 1997g: 213-4). These procedures involved the ringing of a gong, the assembly of the community, being a participant at the funeral and the ritual disposing of the body and the transfer of the merit (Schopen 1997g: 213-4). Essential here was the ritual handling or treatment of the body (*śarīrapūjā*) prior to cremation (Schopen 1997g: 211).<sup>32</sup>

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<sup>32</sup> On the meaning of the expression of (*śarīrapūjā*) see Schopen 1997a, 2004j.

Should a monk die without debts the procedure indicated above would be followed. What if a monk died with debts? This issue is of importance as the issue arises where does the debt fall, on the shoulders of the creditors or does it expose the Sangha to what we might call corporate liability? (Schopen 2004f: 122 especially at 132)

The issue here for the legally minded is what happens if the liquidation of the estate realises less than that which is owed to the debtors? If the debt was incurred by independent members of the Sangha the same monks must repay the debt as would have inherited the property. In other words the debt falls on individual monks who got the division (Schopen 2004f: 139, 142). However if the debt is incurred by a monastic officer on behalf of the community the community is responsible for that debt (Schopen 2004f: 139).

### The Dharmaśāstra and Inheritance of Property

I have outlined the Brahmanical treatment of the dead and indicated the social significance of pollution in Indian society. I have also outlined the funeral practices of Buddhist monks and how the devolving of property could bring the monks into 'pollution danger'. It is now necessary to outline the Dharmaśāstra approach to the payment of debts as the non-payment of 'inheritance debts' had implications for the Sangha, should monks be in default.

The approach to inheritance in the Dharmaśāstra is clear: debts are inherited along with property (Olivelle 1984: 145; *Nāradaśmṛti*, 1989, 1.7. vol. 1). However there is a link in the Dharmaśāstra between the judicial categories of inheritance and the performance of funeral rights. The person who enacts the rites and the person who inherits are one and the same (Kane 1962-75: Vol. 3, 732-6; Dumont 1983: 9). The son of a dead person alone can unite the dead person with his ancestors and by performing the ritual the son inherits the property (Baudhāyana-Pitṛmedha-sūtra, Bapat 1962: 1037, quoted in Schopen 1997g: 214).

The right of a son to inherit property of his father requires the son to discharge the father's debt (Chatterjee 1971: 90). In this regard Visnu says 'when a debtor dies or renounces or is away in a distant land for twenty years his sons or grandsons should settle the debt' (Viṣṇu, 1880: 6.27).<sup>33</sup>

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<sup>33</sup>This is translated by Lariviere as: 'if an ascetic or an agnihotrin dies in debt, all

In the next section I indicate how monks could be implicated here should they be involved in the non-payment of debts to lay creditors.

*Commercial relations between the Sangha and its creditors and the issue of pollution*

I suggest there are two implications as regards the non-payment of debts for the Sangha. The first implication is unremarkable: lenders would be concerned should their loans not be repaid. This could prejudice the repayment of debts and the continuation of ritual practices on which lay folk depended. However there is an associated implication here. Should debts<sup>34</sup> not be repaid by monks the defaulting monks would suffer the consequences of pollution association with the contamination of debts which Hindus conceived were inherited.

According to this way of thinking the debts of twice-borne men became burdened with their ancestor's debts. The so called 'pious obligation' involved the extinguishment of the liability,<sup>35</sup> so that the soul of the ancestor might be free from

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of the merit of his austerities and sacrifices belongs to his creditors'. Gautama says those who inherit the property should settle the debt. See the discussion of these texts in Schopen 2004f: 123, 131.

<sup>34</sup> Debt in the earliest strata of Vedic literature refers to a loan with the promise of future payment. (Rig Veda 8.47.17, in *Hymns of the Rig Veda* 1963). Even in this common sense debt appeared to have broader implication as debtors will remain bound by their debts even after death (Malamoud 1996; Chatterjee 1971: 82). The ambiguity of the terms *ṛṇa* or *kusida* (debt) also encompasses the idea of fault, crime or guilt. The remitting of a debt to the gods refers not only to the payment but rather releases the inner state of bondage caused by indebtedness (Olivelle 1993: 48-49).

<sup>35</sup> Vedic literature recognises that the very birth of a man creates the condition of his indebtedness. This idea is a reflection of the idea that a Brahmin at his very birth is born with a triple debt - of studentship to the seers, of sacrifice to the gods, of offspring to the fathers. While these debts are incurred immediately on birth, payment could only be made when an individual was qualified to do so. Payment to the gods and forefathers necessitated marriage and children and payment to the seers requires Vedic initiation (Olivelle 1993: 50).

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binding indebtedness (Derrett 1963: 310-11). This way of thinking was not consistent with the idea of karma<sup>36</sup> but we may surmise that to lenders the implications of the defaulting obligation spilled over into the kind of prejudices monks would suffer from. In other words they were tarred with the same brush as lay defaulters.

The second implication is that the 'community' in which the Sangha operated would be critical of the Sangha, should the rituals as regards the succession to personal property and the proper respect to dead bodies not be demonstrated.

While the Buddha rejected ideas of caste and the associated notions of impurity two factors operated. Firstly, each monk may have had his own particular Buddhist idea on pollution<sup>37</sup> and secondly, as novices Buddhist monks would to some extent replicate Brahmanical notions of pollution from the environment in which they were born and socialised. The extent that monks had discarded such notions in favour of the Buddhist disapproval of pollution would depend on the individual monk. Whatever was the case they had to negotiate their way around common beliefs as regards pollution occurred by association with dead bodies. I presume these factors had commercial implications. Lay folk would be disinclined to donate to 'polluted monks' or to invite monks to attend or conduct funerals of their own families.<sup>38</sup>

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<sup>36</sup> As Olivelle notes the doctrine of karma insists that people reap what they sow. However the doctrine of debts asserts that Brahmins are burdened with the debts of their ancestors without any action on their behalf. Furthermore repayment can only be made when a person is qualified to do so (Olivelle 1993: 50).

<sup>37</sup> Recent ethnographical studies of Tibetan groups have shown that ideas of caste and death pollution persisted until recent times (Gellner 1992: 204-213; Mills 2000, 2005). Studies of the Newar by Gellner have shown that pollution is not necessarily incurred by the handling of dead bodies as such; rather it is a question of the relationship between the respective parties. A guthi member may help in the cremation and come into contact with the dead body and not be polluted while an elderly member who plays no part in the cremation may be polluted (Gellner 1992).

<sup>38</sup> Schopen has argued from textual passages that monks did attend lay ritual occasions such as the dedication of buildings, marriage and funerals (Schopen 1977e). However, Gombrich denies this ritual role for Buddhist monks in lay life crises, except, importantly for my argument, the case of death (Gombrich 1995).

### Conclusion: Legal Pluralism and the Convergence of the Dharmaśāstra and the Vinaya

I take the Dharmaśāstra to consist of a collection of precepts and recommendations. We have some instances of its operation in specific contexts.<sup>39</sup> While the Vinaya can be seen as a system of training for monks it serves other purposes. These include the development of disciplinary precepts to make clear to members and the outside world that the Sangha's members were as a particular group of mendicants distinct from other ascetic groups. At the same time the Vinaya delineates membership rights and duties, property rights and rules as to access to relics (Schopen 2007). The facility of the Sangha to regulate its own constitution enabled monks to change the rules of the Vinaya without deviating from the strict letter of the Vinaya, and thus empowered monks to own property. While we have some evidence from Buddhist pilgrims and inscriptions we are not sure how in ancient times the rules operated in practice.<sup>40</sup>

As regards the relationship between the Vinaya and the Dharmaśāstra, I envisage that the concept of legal pluralism helps us to track the 'textual configurations' between the Dharmaśāstra and the Vinaya in two ways.

The first type of legal pluralism helps us to consider the Vinaya as a servient system of 'customary law' within Hinduism. I have noted my reservations about this term in the context of particular historical approaches to custom and law.<sup>41</sup> However it is clear that the king in ancient India authorised the constitution of many groups, such as the Buddhist Sangha, and the Dharmaśāstra allowed these groups to make and amend their own laws (Kane 1962-75: Vol. 2.1, 66-69, Vol. 3.158-60, 486-89; Olivelle 1993: 209-10). This situation allowed the Buddha to establish a self-enclosed order with its own internal laws which were sufficiently self-enclosed, and therefore sufficiently self-sufficient, to avoid entanglements with the state (Voyce 1986).

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<sup>39</sup> Above, footnotes 17 and 18 and accompanying text.

<sup>40</sup> Above, text accompanying footnotes 23-24.

<sup>41</sup> Above, footnotes 3, 4 and 7.

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The second aspect of legal pluralism covers two situations.

Firstly is the situation where a religious institution needed to conduct business activities with the outside world. I assume like any group surrounded by differing 'communities' the Sangha needed to obtain finance for their activities. Accordingly the Vinayavidins ( Vinaya specialists ) redacted texts consistent with these norms to obtain finance and to pay for ritual activity.

Secondly, this type of legal pluralism invites us to see that while the Sangha had areas in which to make its own laws, it was also subject to some specific norms of ancient India. This approach invites us to consider the Buddhist Sangha not, as a tradition existing outside the Brahminical fold, but as a complex part of the whole development of the Vedic tradition.

Seen in this light it is possible to argue that the Buddhist-laity distinction has been overworked and the monk did not seek to depart from social relationships, as the Sangha needed the laity for material support, converts and as part of the need for merit (Mills 2000).

As a consequence Buddhist monks had to adhere to conventions or norms which were not purely forms of localised laws specific to one particular group but the reflection of a wider set of values as represented by the wider precepts of the Dharmaśāstra and the Vinaya. This approach invites us to consider that the Sangha was subject to a further set of norms as regards pollution. I have suggested that more was perhaps involved than avoiding the displeasure of followers and patrons. Another way of reading the Vinaya then is to suppose that monks themselves had norms from their own cultural background which they wished to adhere to. These norms may have been reflected in monks who came from non-Buddhist backgrounds.

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