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A MARVEL: *ADINNĀDĀNA-SIKKHĀPADAM*

Preamble

Diodorus of Sicily[1] says it is impossible to keep all mankind from stealing. Many cultures proceed if this were so. Yet the Buddha required his *saṅgha* to be pure in respect of this, and purity requires scrupulosity. To abstain from theft is a purification[2], and may lead to heaven[3]. Theft and fraud characterize the "one-eyed"[4]. There is no end of Ill for a thief[5], of being which an *arahant* is incapable. The "Ariya disciple" who abandons stealing or abstains from it is a fearless donor, partaker of unbounded fearlessness, amity and goodwill[6].

The Buddha's and his immediate pupils' rules on the subject apply to the lay men and women who have taken refuge with the Three Jewels. If an employee takes two paper-clips from his employer is that a theft? What if he takes a box of them? Children often say "borrow" when they imply "steal". In India the present writer noted his friends' dismay when his shirts fitted none of them, and his jealousy at their using his ornamented sandals. What is theft? A Buddhist authority slips into tautology at *Sutta-nipāta* 118, "Whoever in a village or a forest (jungle) takes by theft (*theyyā*) what has not been given to him and belongs (*mamāyitam*) to others,

[1] Dio. Sic. 1. 80, 2.

[2] *Aṅguttara-nikāya* (hereafter "AN") V. 264,266; trans. F.L. Woodward, *The Book of the Gradual Sayings* (hereafter "BGS"), vol. 5, London: Pali Text Society (hereafter "PTS"), 1972, pp. 176-179.

[3] AN V.284, 304; trans., Woodward, BGS, vol. 5, pp. 185, 197.

[4] AN 1.129; trans., Woodward, BGS, 1979, vol. 1, p. 112.

[5] AN V.292; trans., Woodward, BGS, vol. 5, p. 218.

[6] AN IV. 246; trans., Woodward, BGS, vol. 4, p. 168.

him we should know as an 'outcaste'." In fact Buddhist casuistry is the most elaborate and provides, with well-defined exceptions, the most complete definition ever devised.

The Anglophone world has adopted this definition of theft: "The dishonest appropriation of property belonging to another with the intent of permanently depriving the other of it." But this contains undefined terms, a fault in a definition[7]. "Taking" need not be actual removal; "property" includes possession or control[8]. Belief in legal entitlement, or that the owner *would* consent, exclude theft[9]. "Appropriating" is defined as without consent or authority[10]. What of implied consent? All such questions came within the purview of the *vinaya*. Under *pārājika* no. 2 a monk or nun must be expelled for this offence. The law relating to monks applies equally to nuns. The Buddhist monastic law was and may still be a "servant" legal system within the "dominant" state system[11]. To appreciate the *vinaya* one may compare it with contemporary non-Buddhist systems, whereby the superiority of the former appears. But such a contention relies entirely on detail, for which the reader's patience is required. We commence with the Pāli *Pātimokkha, pārājika* no. 2[12].

Pārājika 2

This definition includes *theyva* as a popular term.

> Whichever *bhikkhu* (monk) should take away from a village or a forest *what is not given,* in a way called *theyya* (theft) in such

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[7] Elizabeth A. Martin and Jonathan Law, edd., *Oxford Dictionary of Law*, 6th edn., Oxford: Oxford University Press, 2006, p. 534.

[8] Ibid.

[9] Ibid.

[10] David Hay, ed., *Words and Phrases Legally Defined*, 3rd edn., London & Edinburgh: Lexis Nexis, Butterworths, 2006, p. 63, a decision of the House of Lords of 1993.

[11] Malcolm B. Voyce, "The control of the king over temples in ancient India", 11 *Ar. Or*. 51. 1983, pp. 310-326 at pp. 318-319; id., "The legal authority of the Buddha over the Buddhist Order of monks", *Journal of Law and Religion* 1/2, 1983, pp. 307-323; id., "The communal discipline of the Buddhist order of monks: the 'sanction' of the Vinaya Pitaka", *American Journal of Jurisprudence* 29, 1984, pp. 123-150.

[12] William Pruitt, ed., and Kenneth R. Norman, trans., *The Pātimokkha,* Sacred Books of the Buddhists 39, Oxford: PTS, 2001, pp. 8-9 (slightly varied here). Vinaya (hereafter "Vin") 111.46.16-20. The expression *asaṃvāsa* ("not entitled to joint residence") eventually required to be explained as it is in the Prātimokṣa of the Mahāsāṅghika-Lokottaravāda.

> a manner of *taking what is not given* that kings, having arrested a *cōra* (robber) would (kill or) flog, bind, or banish him, saying "You are a robber, you are a fool, you are stupid, you are a *thena* (thief)", the *bhikkhu* taking anything of such a nature that it was not given, becomes "defeated", not in communion.

Ostensibly this formula arose from the rather ridiculous cautionary tale of Dhaniya, the potter's son, the persistent hut-builder[13]. "Taking what has not been given" is an Indian encapsulation of *caurya* and *steya*. It does cover embezzlement and breach of trust. The term is found in the *dharmaśāstra*[14]. Manu VIII.340 runs, "A Brahmin who ... tries to get property from the hands of a person who took it when it was not given to him (*adattādāyinaḥ*), is like a thief (*stena*)" and punishable as such. Spoils of war are included, plainly, whereas property abandoned is excluded. The Buddhist includes property that is guarded, belonging (*mamāyitaṃ*) to another, yet seized. "Taking" includes interrupting the passage (of any fluid) and changes in location[15]. So the Indian Penal Code (1860), sec. 378 specifies "movement", Manu, meanwhile, deals with accomplices less fully than the *vinaya* does (Vin III.53)» At IX.271 he recommends the king to punish corporally those who maintain thieves or provide room for storing their implements. At IX.278 he recommends punishing as robbers those who give thieves fire, food, a place to stow weapons and accessories of those we call "dacoits". He does not deal with the crime of "attempt" (see below). The Buddhist obviously has no obligation to study the state's entire responsibility, acknowledging that the term *adinnam ādiyeti* ("takes what is not given") is an example of criminal charges under the state[16].

Next why did the Buddha limit the *saṅgha*'s expulsion to cases where the state is alerted? We admit the *saṅgha* must not

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[13] Vin III. 41-45; trans., I.B. Horner, *The Book of the Discipline* (hereafter "BD"), Sacred Books of the Buddhists 10, vol. 1, London: PTS, 1949, pp. 64-72.

[14] J.D.M. Derrett, "Adattādānam: Valuable Buddhist Casuistry", *Indologica Taurinensia*, 7, 1979, pp. 181-194 at p. 184.

[15] Vin III. 46; trans., Horner, BD, vol. 1, p. 74.

[16] Milindapañha (hereafter "Miln") 293.20; trans., I.B. Horner, *Milinda's Questions* (hereafter "MQ"), London: Luzac, 1969, vol. 2, p. 122.

harbour runaway or other thieves as this would be repugnant to the royal duty[17]. Some light may be had from Manu VIII. 129-130 (cf. *Yājnavalkya-smṛti* I.366). Verse 129 runs, *vāg-daṇḍam prathamaṃ kuryād dhig-daṇḍaṃ tad-anantaram* ..., "First he should inflict verbal punishment, then the punishment by reproof; the third punishment is financial; after these comes corporal punishment." Verse 130 recommends that if these are not sufficiently deterring all four should be applied. Kings slew thieves[18]. Our Buddhist author is not suggesting that a *bhikkhu* be expelled only after the king has done his worst, but the reverse. The monk or nun is to be "banished" even where a king would merely admonish him or her. Membership of the *saṅgha* implies awareness of the state's handling. Where the state would not even admonish the *pārājika* would not arise, but there are other possibilities (see below).

Vin 3.44.17-18 states that the king would not flog, bind or banish a *bhikkhu* such as Dhaniya (above) on his first offence, but would submit him to *vāg-daṇḍa* in the nature of *paribhāsa*, insult[19], reserving the right to flog him for a second offence. Hence the Buddhist definition is not inapposite. The Buddha did *not* approve of the royal disciplinary measures, which included savage punishments[20], but two observations arose. He claimed that the thief's destruction arose from his own fate[21] and the Buddha could not meddle with that; on the other hand the Buddha, within the *saṅgha*, had no hesitation in banning (picturesquely called "destroying" (*hanāmi*)) [22] *bikkhu* whom it was not worthwhile

[17] See n. 97 below.

[18] Vin I.75; trans. Horner, ED, vol. 4, 94. AN III.209; trans. E.M. Hare, *BGS*, vol. 3, London: PTS, 1973, pp. 153-154. The Buddha is interested in the state's penalties for theft, here and at Majjhima-nikāya III.173; trans. I.B. Horner, *Middle Length Sayings,* vol. 3, London: PTS, 1977, p. 218.

[19] Vin III.47.14.

[20] Miln 293.20; trans. Horner, *MQ*, 1969, vol. 2, p. 122; similarly Miln 157, 166, 203; trans., Horner, *MQ*, vol. 1, pp. 221, 234, 294. The death penalty: Miln 110; Horner, vol. 1, p. 154. The different "restraints" for a thief appear at Miln 186.7-10; Horner, vol. 1, p. 263.

[21] Miln 186; trans. Horner, *MQ*, vol. 1, pp. 203-264.

[22] AN 11.113; trans. Woodward, *BGS*, vol. 2, 1973, pp. 117-118. For the ambiguous term *nāsanā* ("destruction, exclusion") see Ute Hüsken, "The application of the *vinaya* term *nāsanā*", JIABS, 20, 1997, pt. 2, pp. 93-111 (parallels).

even to speak to, let alone admonish[23].

Meanwhile it may be argued that the king's abuse of the thief is paralleled by the Buddha's standard abuse of monks whose mistakes gave rise to fresh *vinaya* rules. They were all *mogha-purisa* ("foolish men")[24]. An intelligent monk would anticipate the precept. To shelter under previous rules might often be "foolish" or hypocritical. We know that the actually insane and first offender were *anāpatti*, free from offence. Antisocial behaviour is anticipated by state and *saṅgha*, and a culprit ought to have a conscience (Manu VIII. 314-316). The king ignored theft of property worth less than 5 *māsakas,* the *māsaka* being the smallest coin[25].

A Mature Definition

The *saṅgha* arrived at a definition in two forms. There were originally five ingredients: (1) another's possession; (2) known to be such by the taker; (3) important (*garuka*); (4) a requisite (*parikkhāra*) worth 5 or more *māsakas;* (5) the intention to steal (*theyya-citta*)[26]. Later six ingredients were discussed: (1) he does not know it to be his own; (2) he has not undertaken a trust or responsibility (*na ca vissāsagāhi)*[27]; (3) it is no temporary expedient; (4) it is important; (5) it is worth 5 or more *māsakas;* and (6) there is the intent to steal[28]. Five examples are given where the absence of one of the five ingredients, and three of the absence of one of the six, prevent a monk from being "defeated"[29].

By the twelfth century the laity needed further definition of theft, with a realistic illustration of how it occurs. The term *adinnam* will cover victims encountered at random, who are blameless, undeserving of punishment. The thief puts into

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23 Ibid., p.118. Cf. Saṅghadisesa 12 = Vin III.178.3-18.

24 For examples see Vin III.44-45, 46.

25 Vin III.45; trans. Horner, *BD*, vol. 1, p. 71 n.2.

26 Vin III.54; trans. Horner, *BD*, vol. 1, p. 90.

27 Horner's translation (vol. 1, p. 91) "does not take a confidant" (cf. Vin III.55.21; trans., vol. 1, p. 92) is less apt. Cf. Manu VIII.198, where kinship is a possible excuse. As a bailee or trustee he would not be a thief unless he asserted ownership.

28 Vin III.54; trans. Horner, vol. 1, p. 91.

29 Without prejudice to his guilt of a *dukkaṭa* or a *thullaccaya*.

operation, with his faculties, an under-taking which effectuates his thieving intention[30]. Further definition refines the ingredients: the undertaking is a distinct element as with other serious offences. When we come to illustrations of "thieving" fraud with for example weights and measures and coinage, housebreaking, dacoity and dealings with the soldiery must all be included[31].

Lesser Guilt

The *vinaya,* not content with the ingredient of 5 *māsakas* goes further and makes taking grass an offence[32]. On the other hand where the object is unimportant (*lahuka*), worth less than 1 *masaka,* the theft is a mere *dukkaṭa* (wrongdoing)[33]. It is said that taking even a tooth stick[34] is "defeat", comparable with cutting down a useful tree, but such a tooth stick must be worth 5 *māsakas,* a very rare circumstance[35].

Nor is the *vinaya* satisfied with that *pārājika*. The Pāli *Nisaggiya pācittiya* no. 25 displays a case where a monk gives a robe to a colleague and then out of anger or otherwise[36] snatches it from him, or has it snatched pretending that he did not and does not mean it was a gift. The second monk acquired the robe in what we would call "good faith" and complained that his property had been interfered with: the alleged mistake was not clearly made out. One wonders if this was a robbery? Anyhow the robe was forfeited and the offender was censured. To take, imagining one has permission, whereas the form of the latter really excluded

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[30] Ānanda, *Upāsaka-janālaṅkāra*, London: PTS, 1965, p. 178.

[31] Ibid., pp. 210-211.

[32] Vin 1.96; trans. Horner, *BD*, vol. 4, p. 124.

[33] Vin. III.55; trans. Horner, *BD*, vol. 1, p. 92.

[34] Such a stick, plucked every morning, is an alternative to a toothbrush, than which it is more hygienic and effective.

[35] Vin III.51; trans. Horner, *BD*, vol. 1, p. 85.

[36] Vin. III.254, trans. Horner, *BD*, vol. 2, pp. 139-141. Pruitt & Norman, *Pātimokkha,* p. 42. The Pāli has *kupato anattamano;* the Mahāsāṅghika-Lokottaravāda *prātimokṣa* has *duṣṭo doṣāt kupato* - his anger is wicked (Gustav Roth, *Bhikṣunī-Vinaya*, Patna: J.P. Jayaswal Institute, 1970, p. 183); that of the Mūlasarvāstivāda (Anukul C. Banerjee, ed., *Two Buddhist Vinaya Texts in Sanskrit,* Calcutta: World Press, 1977, p. 30) has *abhiṣiktaḥ kupitaś caṇḍibhūto nātmamanā*, «wetted, angry, furious, displeased.»

what was done, is to steal[37], a clear case of "foolishness".

Many illustrations are given of culprits going about with questionable intentions. The *saṅgha* is to grade offences less grievous than would come within the *pārājika* category. To summarize the abundance: where he touches the object his commits a *dukkaṭa*; but where he goes on to shake the object or cause it to quiver (prior to intended removal) it is a *thullaccaya* (grave offence). Comprehensive illustrations include those where actual removal brings him within the *pārājika*[38]. The lesser forms of misdoings' discipline are left indefinite-the *saṅgha* can be trusted to behave appropriately. In one strange case[39] of an object improperly constructed out of material taken in error the Buddha ordered its destruction.

Stealing by dishonest handling, e.g. secreting a deposit, is mentioned. Rendering the object useless will not prevent its being a theft [40]. An interesting example is the theft of an elephant: to touch it with intent to steal it is a *dukkaṭa*; there is a repeated *thullaccaya* as each foot moves; but a *pārājika* offence arises when the fourth foot passes out of the enclosure[41]. The subject of litigation seldom affects monks or nuns but will interest lay Buddhists. If one claims a park it is a *dukkaṭa*; if one deceives the keeper it is a *thullaccaya*; but if the latter actually resigns it is a *pārājika* offence[42]. Even starting a lawsuit is a *dukkaṭa* if one wins (!), but only a *thullaccaya* if one loses[43].

In Anglophone systems the question of *attempt* arises. An attempt is an act done with intent to commit a serious crime, forming one of a series of acts which would constitute the commission if it were not interrupted. It proceeds beyond mere

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[37] Vin III.44; trans. Horner, *BD*, vol. 1, pp. 69-71. Cf. Vin III.60.3-14.

[38] Vin III.48-56; trans. Horner, vol. 1, pp. 78-95.

[39] Vin III,42; trans. Horner, vol. 1, pp. 65-67.

[40] Vin III.48; trans. Horner, vol. 1, p. 78.

[41] Vin III.52, trans. Horner, vol. 1, p. 88. This absurdity finds a place even in Jayarakṣita's *Sphuṭārthā Śrīghanācāra-saṃgraha-ṭīkā*, Patna 1968, p. 29; trans. J.D.M. Derrett, *A Textbook for Novices,* Pubblicazioni di *Indologica Taurinensia*, Collana di Letture 15, Torino, 1983, p. 38.

[42] Vin III.50; trans. Horner, *BD*, vol. 1, p. 82. A rather ridiculous adherence to the *adattādāna-virati* is illustrated by Father Sangermano, A *Description of the Burmese Empire,* Rome, 1833 reprinted Rangoon, 1885, p. 91.

[43] Vin 111.50, 62; trans. Honer, *BD*, vol. 1, pp. 82-83, 104-105.

preparation, but falls short of its purpose, and is a crime in itself[44]. Some preparatory acts may, by statute, be crimes[45]. It may be questioned whether the Buddhist definitions are not better than the Anglophone tradition in this respect.

The concept found in Canon Law (Code of 1983, can. 1328, par. 2) that one who desists in the course of preparation is punishable, though less severely than one who completes the crime, is much closer to the Buddhist formula, which is more logical than the Anglophone concept.

The Buddha, being much less concerned about the victim's loss[46], does not occupy himself with the questions prominent in other systems, namely compensation and restitution. The *saṅgha* was not capable of either, cases where it refuses to accept transfers coming into another category.

Jain Law

Jains, traditionally involved in commerce, vow not to take what is not given (*adattādāna*). *Steya* is "taking with intent to steal objects (or people), even grass, in the possession of others and not given by them." Receiving stolen goods, suborning thieves, transgressing frontiers, false weights and measures, and substituting inferior commodities are all included[47]. Indirect involvement in theft is an offence, as in the cases of receivers, royal ministers, retail traders, purveyors of food or office. Taking even roadside rubble may be *steya*. Digambara Jains vow not to take the property of others whether pledged or dropped or forgotten unless given, even if abandoned through fear of princes or otherwise. One must not take property through anger

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[44] Richard Card, Rupert Cross, and Philip A. Jones, *Criminal* Law, Oxford: Oxford University Press, 2006, pp. 689-705; Earl Jowitt and Clifford Walsh, *Jowitt's* Dictionary of English Law, 2nd. edn., London: Sweet & Maxwell, 1977, vol. 1, p. 155. J.M. Kelly, *Short History of Western Legal Theory*

[45] Card *et al.*, *Criminal,* p. 346.

[46] AN IV.247; trans. E.M. Hare, *BGS*, vol. 4, 1978, pp. 169. A most important principle of "irresponsible religiosity". (Oxford: Clarendon Press, 1992), PP- 32-34.

[47] R. Williams, *Jaina Yoga. A Survey of the Mediaeval Śrāvakācāras,* London Oriental Series 14, London: Oxford University Press, 1963, pp. 78-80.

or greed, even by buying at a derisory price[48]. Jains apparently did not consider implied permission, nor distinguish *thullaccaya* from *dukkaṭa*, perhaps because *aticāra* covers all breaches[49], including a failure to effectuate an intention[50], or desiring what is forbidden[51]. A judgement that the Jains' law was less complete than the Buddhist must await access to better and earlier sources.

Dharma- and Artha-śāstra

The Middle Ages provided at least a considered definition of theft. Vardhamāna (*Daṇḍaviveka*, p. 80): *steyaṃ nāma anaiyāyikaṃ para-sva-grahaṇam iti*, "Theft is an unjust (or illegal) taking of another's property[52]." The formation of intention figures at Āpastamba 1.10.28,1, but this result is not to be compared with *vinaya's* subtlety or completeness. Manu leaves theft as a topic within the king's duty[53]. Fines figure (VIII.319) and physical punishment when the goods are found on the thief; and the highest fine should be imposed upon the culprit of highest rank, especially on one versed in "virtues and vices" (VIII.337). But the *saṅgha* was not concerned with the state's right to collect fines, save for the marginal factor dealt with above.

However, Manu (VIII.332) partially defines *steya* as when, there being no "connection" (*anvaya*) one takes away property and then denies it. Kullūka's commentary explains: "Theft occurs when the owner is unaware of it (e.g. without his permission), and the taker denies (what took place)." One who does not return a deposit, and one who demands what he never bailed, are to be punished as thieves (VIII.190), a provision reminiscent of Buddhist and Jain casuistry, though fragmentary. By *vinaya* standards Manu is inadequate. But we must consider the ambiguous term, *anvaya*. Commentaries on Manu VIII.331-332

[48] Ibid., pp. 83-84.
[49] Ibid., p. 79.
[50] Ibid., p. 63.
[51] Ibid., p. 103.
[52] Derrett, "Adattādānam", pp. 181-182.
[53] Manu VII.14-34; VIII. 302-303, 314-316, 337, 343; IX.252, 312.

help. At v. 331 we are told that theft of comestibles deserves a fine of 100 if no *anvaya* exists, 50 if one does. At v. 332 violent acts where there is *anvaya* are robbery, otherwise mere theft.

Bühler reports commentaries[54]. We may add Bhāruci, and a modern commentator, e.g. Bühler himself (p. 312n) and R.P. Kangle[55]. Bhāruci says *anvaya* means guarding, a watchman; Medhātithi understands friendly lending, residence in the same village, or a watchman. Two commentators agree with Medhātithi's first explanation, Kullūka with the second. Bühler points to VIII.198. There the implication is that there is no theft if the alleged thief was connected, e.g. as a relative, with the owner. Kangle rejects the idea of the joint firmly[56]. Both he and Kullūka seem mistaken: but the superiority of the *vinaya* over this mishmash is obvious. The Buddhist interests in attempts and preparations find no echo in the *dharma-śastra*, for Hindus lacked professional legal advisor pleaders.

The Hindu list of privileged thefts (usually of trifling amounts in association with sacrifices)[57] has a marginal interest since such behaviour is defended by Jesus apropos of his disciples (Matthew 12:1-8) using a biblical precedent[58]. Buddhism however does not allow privileged thefts, any more than privileged lies[59], and since it penalizes thefts of grass there are no "trifling" amounts. The *Arthaśāstra* adds something: he who hides a thief is to be punished as a thief, and one accused of theft shall be acquitted if implicated out of enmity or hatred[60]. I do not find this point in the *vinaya*, where punishments exist for false accusation[61].

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[54] G. Bühler, *The Laws of Manu*, Sacred Books of the East 25, Oxford: Clarendon Press, 1886, p. 312n.

[55] See next note.

[56] Kauṭilya, *Arthaśāstra* 111.17,1-2; trans. R.P. Kangle, *The Kauṭilīya Arthaśāstra,* Part II, Bombay: University, 1963, pp. 284-285.

[57] Manu VIII.335, 341; X.11-23.

[58] Deuteronomy 23:24-25; 1 Samuel 21:1. J.D.M. Derrett, *Studies in the New Testament,* vol. 1, Leiden: Brill, 1977, pp. 85-95.

[59] J.D.M. Derrett, "*Musavāda-virati* and 'Privileged Lies', "*Journal of Buddhist Ethics,* 13, 2006, pp. 1-17.

[60] Kauṭilya, *Arthaśāstra* IV.8.6-7; trans. Kangle, p. 318.

[61] Pātimokkha, Saṅghādisesa 8,9; Suddha-pācittiya 76; Bhikkhunī-pacittiya 159.

Roman Law

Theft (*furtum*) was originally a "secret removal of a thing (or person) whereby another's custody was infringed." In classical law it was confined to "the intentional, secret appropriation of a movable object out of another's legal sphere"[62]. The complainant might have only custody of the object. Theft of land was not contemplated, nor was it in Buddhist law. By the time of Justinian's Institutes (IV.1.1) "theft is the fraudulent interference with a thing whether with the thing itself or the use or possession of it, which is forbidden by natural law." The Digesta (47.2. 1,3; 43.4) adds "for the purpose of gain", which implies an arrogation of rights[63]. We see here some enlargement of *vinaya* concepts, but casuistic development is, in general, meagre. Removal was no longer necessary but physical interference (not necessarily touching) was required. It is of the nature of theft that such considerations will arise, but the Buddhist insistence on the guilt of commencing the process is missing. Roman law notices that the intention of stealing - *mens rea* implies *dolus,* deceit, hence no negligent *furtum* can occur - coincides with a want of consent by the victim, and so a claim of good faith or belief in the victim's probable acquiescence would negative *furtum*[64]. This can be compared with *anvaya* (above). One can steal one's own property from a pledgee[65]. One can steal the use of property (one thinks of the Buddhist inclusion of interruption of fluids). The Roman law included embezzlement (Dig. 47.2.52,7) and to *furtum* was added (one recalls Manu) concealing a thief and his loot, and receiving stolen goods[66]. The Roman law covers much the same ground as the Buddhist, but since the judge decides difficult cases *ad hoc* no corpus of casuistry developed, and attempts and preparations seem not to have been considered.

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[62] *Der Kleine Pauly* II, Stuttgart: Druckenmüller, 1967, coll. 642-648.

[63] J.A.G. Thomas, *Textbook of Roman* Law, Amsterdam: North Holland Publishing Coy, 1976, pp. 353-355.

[64] Ibid.

[65] Ibid.

[66] Max Kaser, *Roman Private* Law, Durban: Butterworths, 1965, pp. 211-213 (=par. 51.I).

Greek Law

City states gave jurisdiction in cases of theft to popular juries. Decisions were always made *ad hoc*[67]. No doubt the crime was abhorred - was not the theft of Helen the cause of the Trojan War[68]? Philosophers gave attention to its causes and to the psychology of thieving[69]. One can fall into theft, as Buddhists might put it[70]. Compensation for a proved theft was the major concern, thieves generally being fined[71], and stealing from the public deserved exemplary punishment. Plato thought foolish and light-hearted thieving deserved a lighter punishment than one done out of lust, envy or anger[72]. Aristotle knows many will admit taking but deny stealing. On the other hand one might take something by stealth yet neither injure another nor acquire for himself[73]. This interest in intention, comparable with certain Buddhist casuistry, never developed into a legal literature.

In the practice of Ptolemaic Egypt a fixed ingredient of theft was the actual removal of the object[74]. In ancient Egypt, it was said, steps were taken to enable victims of theft to recover stolen property for a small fee[75]. One recollects that according to Manu VIII.40 the king should restore stolen property retrieved from thieves. In sum, Greece never developed a study of the ingredients of theft or of lesser misdemeanours.

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[67] Justus Hermann Lipsius, *Das attische Recht und Rechtsverfahren,* Leipzig, 1905-1918.

[68] J. Walter Jones, *The Law and Legal Theory of the Greeks,* Oxford, Clarendon Press, 1956, p. 249.

[69] Plato, *Laws*, VIII.831E; Aristotle, *Politics* 1267a3-8; 1271a18-19.

[70] I.B. Horner, *BD*, vol. 2, p. 81 and note. Cf. Plato, *Laws*, XII.941.

[71] Plato, *Laws* IX.857.

[72] Ibid., XI.934A. Thieves caught with their booty were harshly treated.

[73] Aristotle, *Rhetoric* 1374a17-19. Compensation occupied minds: Plato, *Laws* XI.933E; Aristotle, *Nicomachean Ethics* 1130b-1134a.

[74] Raphael Taubenschlag, *The Law of Greco-Roman Egypt in the Light of the Papyri. 332 BC - 640 AD,* 1st edn., New York: Herald Square Press, 1944, p. 344.

[75] Diod. Sic. I. 80,1-2; trans. C.H. Oldfather, Loeb Classical Library, Cambridge, Mass: Harvard University Press; London: Heinemann, 1933, reprinted 1968, pp. 273-275.

Jewish Law

Jewish law is more interesting, since its codification by Maimonides, an extremely conservative writer, places us in a position to compare his results with the *vinaya*. Casuistry is at home in the *halakhā.* The commandment, "Thou shalt not steal" (Exodus 20:15; Leviticus 19:11; Deuteronomy 5:19) does not explain *gānāv* ("to steal"). Mekilta on Exodus interprets Leviticus 19:11 as prohibiting a theft of money[76]. Sifre on Deuteronomy is not particularly helpful[77]. The Qumran community, notorious for their piety, has left no definition of theft.

From Maimonides we learn that a thief takes another's property of any value even less that a *perutah* (1/192th of a denarius), secretly, without the owner's knowledge[78]. A theft occurs even if the intention was to annoy the owner, is a joke, or is coupled with the expectation of returning the thing, paying for it, or making restitution (as a concealed gift)[79]. The insistence on secrecy is not found in the *vinaya*. Implied permission is not considered by Maimonides. Philo illustrates a harmony between Jewish and Hellenistic practice. The thief is potentially a public enemy if he acts publicly and by force; the secret thief is liable to private prosecution[80]. Philo makes a moral lecture out of *greed*[81].

Theft is severely treated but the emphasis is on compensation,

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[76] Mekilta on Exod. 20:13, ed., trans., J.Z. Lauterbach, *Mekilta,* Philadelphia: Jewish Publication Society of America, 1976, vol. 2, pp. 260-261.

[77] Reuven Hammer, trans., *Sifre. A Tannaitical Commentary on the Book of Deuteronomy*, Yale Judaica Series 24, New Haven & London: Yale University Press, 1986. For early Jewish law see Hyman E. Goldin, *Hebrew Criminal Law and Procedure. Mishnah-Sanhedrin-Makkot,* New York: Twayne, 1952; Ze'ev W. Falk, *Introduction to Jewish Law of the Second Commonwealth,* 2 vols, Leiden: Brill, 1972-1978; Bernard S. Jackson, *Theft in Early Jewish Law*, Oxford: Clarendon Press, 1972.

[78] Maimonides, *Code* (= Mishneh Torah) XI.II,i.2-3; trans. Hyman Klein, *The Code of Maimonides, Book Eleven, The Book of Torts*, Yale Judaica Series 9, New Haven: Yale University Press, 1954, p.60. Babylonian Talmud (hereafter "b."), B.Q. 79b.

[79] b. B.M. 61b. Maimonides, *The Commandments,* Negative Commandment no. 244, trans. C.B. Chavel, *Sefer ha-Mitzvoth of Maimonides,* 2 vols., London & New York: Soncino Press, 1967, vol. 2, pp. 232-233.

[80] Erwin R. Goodenough, *The Jurisprudence of the Jewish Courts in Egypt as Described by Philo Judaeus,* New Haven, Conn., 1929, reprinted Amsterdam: Philo, 1968, pp. 147-150.

[81] Ibid.

depending on the animal stolen and the use made of it[82]. There is a trifle of casuistry: if a washerman pulls out more than three threads these belong to the householder, and if surreptitiously the washerman is a thief[83]. If he stole a lamb from the flock and then restored it before the owner noticed the loss he is not liable[84]. Surreptitiousness is evidently important. A want of subtlety in comparison with the *vinaya* is discernable. One aspect of Jewish law is commendable: where the owner gives up hope of recovery[85] the thief, delinquent, is not liable for his theft[86]. Since the *vinaya* is concerned with the moral condition of the monk/nun it does not contemplate cessation of theft by lapse of time.

Moral Theology

Heirs to Roman and therefore Canon law and to echoes of Jewish tradition, moral theologians have had opportunities to define theft, and they have hardly used them. Theft (*furtum*) is the taking of another's property without the owner's informed consent *(rationabiliter invito)*[87]. The details of any modern penal code (e.g. the French, artt. 379-409) do not concern us. To the moral theologian three kinds of theft are known, sc. secret usurpation of another's thing; an open and violent, therefore disgraceful taking of the same; and removal of a thing dedicated to God[88]. The last is treated outside *furtum* by Roman law and subject to doubt in Hindu law and some other laws ("Let the god look after his/her own property!"). Theft, a sin against justice, is in theological terms "mortal"[89]. The amount stolen is relevant, relative to

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[82] b. B.Q. 119a; Maimonides, *Code* XI. II. 1,13; trans., Klein, *Torts,* p. 62.

[83] Mishnah, B.Q. X.10; trans; Danby, *Mishnah,* p. 347.

[84] Mishnah, B.Q. X.8; trans. Danby, p. 347.

[85] J.D.M. Derrett, *Law in the New Testament*, London: D.L.T., 1970, reprinted Eugene, Or.: Wipf & Stock, 2005, pp. 258 n.2, 303-304.

[86] Mishnah, B.Q. X.2, trans. Danby, *Mishnah,* p. 346; b. B.Q. 66a. Maimonides, *Code* XI. II. i, 11-12, trans. Klein, Torts, p. 62.

[87] Adalbert Tanquerey, *Brevior Synopsis theologias moralis et pastoralis,* Paris, Tournai & Rome: Desclee & Coy, 1946, par. 424-430 at par. 425.

[88] Tanquerey, *Brevior*, par. 425.

[89] Tanquerey, par. 426.

the incomes of the victims[90]. The Buddha's 5 *māsakas* rest on a different footing: it was a question of the *pārājika* itself. The gravity of a theft in moral theology depends also on the degree of the owner's presumed unwillingness: a mortal sin is not incurred by theft from a spouse or by a son (the amount can be determined according to current prices)[91]. Small thefts may accumulate into a grave matter, especially in a conspiracy to defraud (cf. the paper-clip question)[92]. Theft is negated in moral theology in cases of necessity or where the taker is exacting compensation owed to him[93].The question of restitution is considered. The Buddha is not concerned with the plight of the victim.

Conclusion

One will allow that the *vinaya* is more elaborate and consistent than any ancient system, granted that the present writer's acquaintance with the law of the Jains is superficial. The Buddha had no concern with compensation of victims or privileged thefts the making of *arahants* was his purpose. The present is a good opportunity to consider why the *vinaya* abounds in casuistry, when contemporary state laws did not. Our current interest in Buddhist casuistry[94] is justified. The deliberate allusion to the "king's" hypothetical address to his prisoner gives a clue. We shall first pause to consider "irresponsible religiosity"[95].

Corpora of ancient precepts, whether Jewish, Hindu, or Muslim, operate on a "top-down" hypothesis: the rules owe nothing to deliberate democratic inspiration or control. They unintentionally reflect the inefficiency and corruption of ancient

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[90] Tanquerey, par. 427.

[91] Ibid., n.4.

[92] Tanquerey, *Brevior*, par. 428.

[93] Ibid., par. 429-430.

[94] Derrett at n. 59 above. Dr Petra Kieffer-Pülz has occupied herself in the same area. An excellent treatment of *vinaya* on theft is by Marcel Hofinger at *Indianisme et Bouddhisme. Mélanges offerts* à Mgr *Étienne Lamotte,* Publications de l'Institut Orientaliste de Louvain 23, Louvain-la-Neuve, 1980, pp. 177-189. See also Andrew Huxley, «Buddhist case law on theft: the *vinītavatthu* on the second pārājika," *JBE* 6, 1999, pp. 313-330.

[95] J.D.M. Derrett, "Irresponsible religiosity", to be published in *Indologica Taurinensia.*

legal systems as means of social control. Judicial use of discretion was chaotic (Luke 18:3-6): texts admit it (e.g. Deuteronomy 16:19; 1 Samuel 12:3). No comparable situation would arise in the *saṅgha.* There they have no king or his official. The allusion to the king or his deputy[96] in *Pātimokkha*, *pārājika* 2 no doubt illustrates the Buddha's concern to avoid clashes with the state, retaining the ruler as patron[97]. But the democratic character of the *saṅgha* was of its essence. Whereas judges. in Roman, Greek, Jewish and Hindu law used the widest discertion, the *saṅgha*, though by no means deprived of discretion as such - for example the right to make allowances outside the *pārājikas* - deserved the most detailed guidance so that discretion could be used intelligibly and consistently wherever a *saṅgha* could meet ever (it was hoped) the wide world. The *saṅgha* would act judicially, much as the Qumran community did, and Canon law judges do. For their discretion a backbone was needed, hence the casuistry. The lay patrons of the *saṅgha*, with their Five Precepts would, if indirectly[98], gain this standard of *dharma.* A Buddhist ruler, like Piyadassi Aśoka, could be trusted to acquaint himself with this corpus of jurisprudence, and to protect it as facilitating one of his servient jurisdictions.

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[96] Vin 111.47; trans. Horner, *BD*, vol. 1, p. 94.

[97] Vin 1.73-75; trans. Horner, *BD*, vol. 4, pp. 91-96.

[98] Layfolk were not, originally, entitled to hear the *vinaya-piṭaka* personally: Miln 190-192 at 190.4,13,21 trans. Horner, MQ, vol. 1, pp. 269-274 at pp. 260-270.