

CLASSICAL HINDU AND
ISLAMIC APPROACHES TO
PUNISH AND TREAT
OFFENDERS

NAME OF THE STUDENT :SAMRUDDHI LAAD

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LAW**

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A) INTRODUCTION

Introduction¹

Scholarly views on classical India suggested the importance of Dharma and śāstras as the central theoretical and textual categories that create a moral self in Hinduism. Various theories on evolution of Hindu Law and Dharma suggested that it developed from macrocosmic universal order and microcosmic sphere where the focus shifted from super humans to individuals. Dharma in the later stage became more associated with the duties of the individuals and self-controlled order. In the process of this evolution, textual understanding of Hindu law and Dharma developed through the sacred texts of Śruti and Smṛiti genres and their commentaries and digests. These texts have traditionally formed the corpus of Hindu law, a law which was to govern every part of a Hindu's life. Later, more secular and personal understanding of Hindu law and Dharma developed under Muslim and British rulers in India.

India's legal system presents the most extensive and diverse written law in the world. Law in India emerged from classical traditions rather than a construction of a public body or state and the system was considered as very near to people. The classical legal traditions of India were exclusively recorded in the Sanskrit texts and believed to have developed by the ancient sages. These traditions are widely understood as Hindu law which originated from community principles and not from a state polity. Hindu law refers to the system of personal laws (marriage, adoption and inheritance) applied to Hindus in India. Very recently, Donald Davis has given more convincing definition of Hindu law as 'variegated grouping of local legal systems that had different rules and procedures of law but that were united by a common jurisprudence or legal theory represented by Dharmaśāstra literatures'. This definition suggests that Hindu law is a system of

¹ Santhosh Abraham, "CLASSICAL LEGAL TRADITIONS: SOME HISTORIOGRAPHICAL INTERPRETATIONS", Journal of History and Social Science, Vol IV, Issue I, Jan-June 2013

religious law, deeply rooted in a legal theory, i.e., the concept of Dharma. The significance of the Dharma, pointed out by Kane, as ‘the privileges, duties and obligations of a man, his standard of conduct as a member of Aryan community, as a member of one of the castes, as a person in particular stage of life’.

Dharma is generally understood as the concept, ‘comprises of rules of morality, conduct and good behavior, religious principles, legal precepts and all that supports the harmonious functioning of human relationships’. It is important to trace the recent historiographical interpretations on the nature, evolution and sources of Hindu law and Dharma which passed through several transitions of meaning.²

² Santhosh Abraham, “CLASSICAL LEGAL TRADITIONS: SOME HISTORIOGRAPHICAL INTERPRETATIONS”, Journal of History and Social Science, Vol IV, Issue I, Jan-June 2013

B) DANDA : HINDU PUNISHMENT

Danda is the Hindu equivalent of punishment. In ancient India, punishments were generally sanctioned by the ruler, but other legal officials could also play a part. The punishments that were handed out were in response to criminal activity. In the Hindu law tradition, there is a counterpart to danda which is *prāyaścitta*, or atonement. Whereas danda is sanctioned primarily by the king, *prāyaścitta* is taken up by a person upon his or her own volition. Furthermore, danda provides a way for an offender to right any violations of dharma that he or she may have committed. In essence, danda functions as the ruler's tool to protect the system of life stages and castes. Danda makes up a part of *vyavahāra*, or legal procedure, which was also a responsibility afforded to the king.³

Dharmashastra Interpretation of Punishment⁴

It must be stated that even the Hindu Shastras have emphasised on King's power to punish the law breaker and protect the law abider. According to Manu, King was Danda Chhatra Dhari i.e. Holder of Danda(Punishment) and Chhatra(Protector). According to Gautam the word danda meant restrains. Vasista Samhita also upheld King's power to punish and destroy the wicked and the evil. But "punishment must be awarded after due consideration of place, time, age, learning of the parties and the seat of injury". For Manu, Danda i.e. punishment was the essential characteristic of law. He justified punishment because it keeps people under control and protects them. To quote him,

³ Danda – Meaning, available at <http://en.wikipedia.org/wiki/Danda> (visited on 13th November 2013)

⁴ Prof. N.V. Paranjape, *Criminology & Penology with Victimology*, (15th Ed.) pg.262

“punishment remains awake when people are asleep, so the wise have recognised punishment itself as a form of Dharma⁵.

Punishment – Defined⁶

Punishment under law is the authorised imposition of deprivations of freedom or privacy or other facilities to which a person otherwise has a right, or the imposition of special burdens because he has been found guilty of some criminal violation, typically, though not invariably, involving harm to the innocent. Thus, punishment may be defined as an act of political authority having jurisdiction in the community where the harmful wrong(crime) is committed. It consists of imposition of some burden or some form of deprivation by withholding some benefit or right to which a person is legally entitled to enjoy.

Punishment under law is fundamentally a technique of social control, and its employment is justified to the extent that it actually protects such social justice as society through law has achieved.

⁵ Id. at pg.263,

⁶ Prof. N.V. Paranjape, Criminology & Penology with Victimology, (15th Ed.) pg.263

C) – ADMINISTRATION OF JUSTICE⁷

From the Vedic period onward, the perennial attitude of Indian culture has been justice and righteousness. Justice, in the Indian context, is a human expression of a wider universal principle of nature and if man were entirely true to nature, his actions would be spontaneously just. Men in three major guises experience Justice, in the sense of a distributive equity, as moral justice, social justice, and legal justice. Each of these forms of justice is viewed as a particularization of the general principle of the universe seen as a total organism. From the broadest to narrowest conception, then, ancient Indian views on justice are inextricably bound up with a sense of economy. Human institutions of justice - the state, law, etc. - participate in this overall economy; but the belief has remained strong in India through the centuries that nature, itself, is the ultimate and final arbiter of justice. Ultimately, justice is cosmic justice.

The administration of legal justice and infliction of punishment was performed on the basis of Varna system. Manusmriti considers that it is only natural to take Varna into account in the administration of legal justice. Manu indicates that the king, acting as judge should consider "the strength and knowledge" of the defendant. His strength and knowledge are estimated as functions of his Varna. Legal consideration of varna rank has two main outcomes, one having to do with responsibility, the other with privilege, and one concerning the perpetrators of crime and the other its victims. Crimes against persons were adjudicated with reference to the class-status of the victim and the perpetrator. The

⁷Manusmriti: A Critique of the Criminal Justice Tenets in the Ancient Indian Hindu Code, available at www.erces.com/journal/articles/archives/v03/v03_05.htm (visited on 13th November 2013)

penalty for a crime was increasingly severe the higher the Varna of the victim and lower the Varna of the perpetrator (Das 1982). One of the chief duties of the king was the maintenance and protection of the Varna system through his power of *danda* (*the sceptre*). The king obeyed this concept because it is realized that Varna and the state are necessary aids to the achievement of the final goal of life (Underwood 1978; Lahiri 1986). The legal distinctions of ancient India are firmly based on an ideal of equity and justice expressed in terms of hierarchy rather than of equality.

Types of Punishments⁸

In his digest, the Mānava-Dharmaśāstra, Manu cites four types of punishment: Vak-danda, admonition; Dhikdanda, censure; Dhanadanda, fine (penalty); and Badhadanda, physical punishments. Vak-danda is the least severe type of punishment and the severity increases as one examines Dhikdanda, Dhanadanda, and Badhadanda respectively. Manu also states that the different types of punishments may be combined to serve as a just punishment. Later authors added two more types of punishment: confiscation of property and public humiliation.

1. Admonition and censure⁹

If forgiveness is not possible or desirable, it is seen whether the circumstances of the offense are deserving of admonition. Admonition is to be used first, and then censure. Both admonition and censure are the lowest and least severe of the possible punishments because neither inflict physical pain or loss of property. When using censure, "a good man committing his first offense should be asked: 'Is this your evil action.' 'Is it proper of you?'" Censure is a stronger disapproval than admonition.

2. Fines

⁸ Types of Punishments available at <http://en.wikipedia.org/wiki/Danda> (visited on 13th November 2013)

⁹ Ibid.

The imposition of fine was a common mode of punishment of offences which were not of a serious nature and especially those involving breach of traffic rules or revenue laws. This mode of punishment is being extensively used in almost all the sentencing systems of the world. Fines by way of penalty may be used in case of property crimes and minor offences such as embezzlement, fraud, theft, gambling, loitering, disorderly conduct etc. Other forms of financial penalty include payment of compensation to the victim of the crime and payment of costs of the prosecution. Financial penalty may be either in shape of a fine or compensation of costs.¹⁰

A fine is to be imposed when damage is done to another; the amount of the fine is dependent on many factors. In the ancient Hindu tradition, it was generally accepted that if a Kshatriya, a Vaisya, or a Sudra was not able to repay the fine, then the offender was made to perform manual labor. However, it was expected that Brahmins would pay the fine in installments. The last resort was to imprison the offender if the offender could not perform manual labor. Presently, any offender may repay the fine in installments, but there cannot be more than three planned installments. According to the ancient Indians, the King must pay a heavier fine for committing a crime. This was thought because he was the prosecutor of his subjects, and therefore, he was also an example for his subjects. In accordance with this idea, the King was made to pay 1,000 Karshapanas when a common man would be fined just one Karshapana.¹¹

3. Fines for first offenders

There were conflicting views on how fines should be imposed on first-time offenders: either inflict lenient fines or very heavy fines to prevent the offender from becoming a recidivist. Over time, it became commonplace to base the amount of the fine on the nature of the crime. In totality, the nature of the crime, the ability of the offender to pay, whether or not it was the first offense, and whether it had been an individual or group that committed the crime were used to determine the amount of the fine. It was thought that

¹⁰ Prof. N.V. Paranjape, *Criminology & Penology with Victimology*, (15th Ed.) pg.266

¹¹ Types of Punishments available at <http://en.wikipedia.org/wiki/Danda> (visited on 13th November 2013)

an individual should have a lesser amount imposed upon him because he did not conspire to commit the crime with others.¹²

4. Fines and caste

The amount of fine varied according to the caste in which one belonged. A Sudra would pay eight times the amount of the damage, a Vaisya would pay sixteen times the amount, and a Kshatriya would pay thirty-two times the amount. A Brahmin would generally pay sixty-four times the amount; however, a Brahmin could be made to pay up to a hundred times the amount of damage. The multiplier was different for each caste, because the mental capacity of the offender and the offender's ability to pay the fine were taken into consideration.¹³

5. Fines due to the complainant

"If a blow was struck against men and animals in order to give them pain, the Judge had to inflict a fine in proportion to the amount of pain caused. If a limb was broken or wound caused, or blood flowed the assailant had to pay to the sufferer the expenses of the cure, or the whole (both the usual amercement and the expenses of the cure) as a fine to the King. He who damaged the goods of another, intentionally or unintentionally had to give satisfaction to the owner, and pay to the King a fine equal to the damage."^{[2]:155-156} Here it is demonstrated that the offender must be fined proportionate to damage done, as well as, repay the victim. There were also heftier fines placed on certain items such as leather, utensils made from wood or clay, flowers, roots and fruits. The fines placed on these were five times the value of the item damaged.

6. Imprisonment

The main function of imprisonment, for ancient Indians, was deterrence. Prisons were to be situated near main roads where the offenders could easily be seen. The Dharmaśāstras

¹² Ibid.

¹³ Types of Punishments available at <http://en.wikipedia.org/wiki/Danda> (visited on 13th November 2013)

do not lay out specific crimes for which imprisonment is required; moreover, the Dharmaśāstras do not state how long a prisoner should be kept. It was left to the King to decide who would be imprisoned and for how long. The people who received stolen property "had to be put in iron fetters, kept on a lean diet, and made to do manual labour for the King till their death." Brahmins could be sent to prison if one had committed a crime that required mutilation; however, the Brahmin would not be forced to perform manual labor. The Brahmin could be made to do menial labors instead such as cleaning dirty dishes.¹⁴

7. Mutilation

Mutilation was yet another kind of corporal punishment commonly in use in early times. This mode of punishment was known to have been in practice in ancient India during Hindu period. One or both the hands of the person who committed theft were chopped off and if he in sex crime his private part was cut off.¹⁵

Mutilation was also used to deter the offender from repeating the crime. Therefore by cutting off the limb that was used to commit a crime, for example, stealing cows belonging to a Brahmin resulted in the offender losing half his feet, the offender would physically be unable to commit such crimes again. Lastly, there were eight main places of mutilation: the organ, the belly, the tongue, the two hands, the two feet, the eye, the nose and the two ears.¹⁶

8. Death

Under the Indian Penal Code, the death penalty is reserved for the gravest offenses. There are only several crimes, for which inflicting death upon the criminal, is permissible. The first of which is waging war against the Government of India. All of the cases, in which one can be sentenced to death, are those in which death has resulted or was likely to result. For all seven of these cases, there is the alternative of lifetime imprisonment.

¹⁴ Types of Punishments available at <http://en.wikipedia.org/wiki/Danda> (visited on 13th November 2013)

¹⁵ Prof. N.V. Paranjape, *Criminology & Penology with Victimology*, (15th Ed.) pg.264

¹⁶ *Supra* 14.

Today, attempts are made to find mitigating and extenuating factors so that the lesser punishment is inflicted. It was commanded that the King should avoid capital punishment and instead detain, imprison and repress offenders.

There are some main differences between the ancient and the modern Hindu law with respect to the death penalty. The first difference is that in classical India the death penalty was permissible in a very large number of cases. Second, the death penalty was not prescribed solely in cases in which death resulted or was likely to result. Instead, it was also used in cases such as adultery and theft. Third, there were numerous ways to inflict the death penalty, unlike modern India which uses hanging as their only means of imposing death. Fourth, in modern India the death penalty is an exception whereas in ancient India it was a rule. Fifth, today the underlying principle seems to be retributive while in classical India it was a means of deterrence. Lastly, today the law in relation to the death penalty is the same regardless of caste or color. However in ancient India Brahmins were never subject to the death penalty.¹⁷

Other forms of punishment¹⁸

Whipping

Whipping was done with a whip, cane, rope, or something similar. Whipping was performed upon women, children, men of unsound mind, the impoverished, and the sick. Whipping, and the other forms of corporal punishment, would only be inflicted if the other three forms of punishment (admonition, censure, and fine) had failed to reform the offender.

Branding

The convicts were branded as a mark of indelible criminal record leaving visible marks such as scars in the body parts which are normally noticeable. These permanent indelible

¹⁷ Types of Punishments available at <http://en.wikipedia.org/wiki/Danda> (visited on 13th November 2013)

¹⁸ Ibid.

marks not only served as a caution for the society to guard against such hardened criminals but also carried stigma which deterred them from repeating the offence.¹⁹

Flogging

Of all the corporal punishment flogging was one of the most common methods of punishing criminals. In India, this mode of punishment was recognized under the Whipping Act, 1864, which was repealed and replaced by similar act in 1909 and finally abolished in 1955. The English Penal Law abolished whipping even earlier. Penological researchers have shown that whipping as a method of punishment has hardly proved effective. Its futility is evinced by the fact that most of the hardened criminals who were subjected to whipping repeated their crimes.²⁰

Confiscation of property

In ancient Hindu society, the entire private property of an offender would be confiscated, as opposed to, present day where the Indian Penal Codes only confiscate the property used in the commission of the crime.²¹

¹⁹ Prof. N.V. Paranjape, Criminology & Penology with Victimology, (15th Ed.) pg.265

²⁰ Prof. N.V. Paranjape, Criminology & Penology with Victimology, (15th Ed.) pg.264

²¹ Types of Punishments available at <http://en.wikipedia.org/wiki/Danda> (visited on 13th November 2013)

D) - CRITICISM ON MANU'S CRIMINAL JUSTICE

Manusmriti has treated different *varnas* and gender as unequal for legal purposes. The Hindu law as codified by Manu was based on the principle of inequality. The punishment for a particular crime was not same for all *varnas*. In fact, the punishment varied depending on the *Varna* of the victim as well as the *Varna* of the person committing the crime. For the same crime, the *Brahmin* was to be given a mild punishment, whereas the *Shudra* was to be given the harshest punishment of all. Similarly, if the victim of a crime was a *Shudra*, the punishment was mild, and the punishment was harsh in case the victim was a *Brahmin*. For example, if a *Brahmin* is awarded death sentence, it is sufficient to shave his head, but *Kshatriya*, *Vaishya* and *Shudra* are to actually die. If a *Kshatriya*, a *Vaishya*, or a *Shudra* repeatedly gives false evidence in the court, he is to be punished and expelled from the kingdom, whereas the *Brahmin* is not to be punished, he is to be only expelled.

Manu clearly asserts the supremacy of Brahmanism by exempting Brahmins from any kind of punishment. Manu has identified ten places on which punishment may be inflicted for three *varnas*, but exempts Brahmin to depart unhurt from the country. Manu even goes to the extent of asserting that *No greater crime is known on earth than slaying*

a Brahmin and a king, therefore, must not even conceive in his mind the thought of killing a Brahmin.²²

Manu also have widely discriminated women in the administration of justice. Unequal punishments were to given for women who have committed the crime same as men. Manu has prescribed death penalty for women guilty of infidelity. Manusmriti prescribes that the wife who touches, meets, or even talks to a man who is not her husband is to be fed to animals. Lesbians were cruelly punished by having their fingers chopped off²³

CHAPTER V - CONCLUSION²⁴

For Nietzsche the human wisdom of Manu far surpassed that of the New Testament; for the British Raj it seemed to be the perfect tool with which to rule the Hindus. No understanding of Hindu society is possible without it, and in the richness of its ideas, its aphoristic profundity, and its relevance to universal human dilemmas. Manu stands beside the great epics, the Mahābhārata and the Rāmāyana. Many commentators find Manu contradictory and ambiguous and others perceive a clear thematic integrity. Even after several centuries, it still generates controversy, with Manu's verses being cited in support of the oppression of women and members of the oppressed castes. The criminal justice tenets of Manu are remarkable in its vision and application. However the inequality in rendering justice based on Varna system is a chink in the armour of Manu, the first lawgiver of India.

To conclude it is worth mentioning what Jawaharlal Nehru (1990) told about religion in the context of codes and law: “*Religions have laid down values and standards and have pointed out principles for the guidance of human life. But with all the good they have done, they have also tried to imprison truth in set forms and dogmas, and encouraged*

²² Manusmriti Chapter VIII 379-81

²³ Id. pg 356-372

²⁴ Manusmriti: A Critique of the Criminal Justice Tenets in the Ancient Indian Hindu Code, available at www.erces.com/journal/articles/archives/v03/v03_05.htm (visited on 13th November 2013)

ceremonials and practices which soon lose all their original meaning and become mere routine”.

CHAPTER II - CLASSICAL ISLAMIC APPROACH

A) INTRODUCTION

In a dark period of history when nothing but ruin, squalor and desolation remained of what were once great civilizations, when oppression, exploitation and the right of might prevailed, when human rights had ceased to be recognized, when superstitious and hedonic cults were followed at many places and man still terrified of the forces of nature and gave a very low place to himself in the scheme of creation, was born Muhammad, the Prophet of Islam, on Monday the 12th Rabi-ul-Awwal (corresponding to 29th August, 570 A.D.) in the desert country of Arabia.²⁵

Since the first half of the nineteenth century, the application of Islamic criminal law has seen important changes. In most parts of the Islamic world, it was replaced by Western-type criminal codes. The Ottoman Empire, from the sixteenth to the eighteenth centuries, had a stable and fairly well-functioning system of criminal justice. The emergence of Western hegemony in the nineteenth century greatly affected the legal systems in the Islamic world. In most Islamic countries that came under European colonial rule, Sharia criminal law was immediately substituted by Western-type penal codes. In some other countries, however, this was a gradual process: there the final abolition of Islamic criminal law took place after a period of reform, during which Islamic criminal law

²⁵ Syed K. Rashid, Muslim Law, (3rd Ed), pg. 1, as cited in Athar Husain, The Prophet of Islam, p. 1

continued to be implemented. The processes of reform during this period are of interest because they show us which precisely were the frictions between systems of penal law based on the Sharia and legal concepts based on Western law. In India and Nigeria, the colonial rulers directly interfered with the substance of Islamic criminal law and tried to mould it into something resembling Western criminal law, before replacing it entirely by a Western-type penal code.²⁶

In the classical textbooks of *fiqh* [*Fiqh* is an expansion of the code of conduct (*Sharia*) expounded in the Quran, often supplemented by tradition (*Sunnah*) and implemented by the rulings interpretations of Islamic jurists. *Fiqh* deals with the observance of rituals, morals and social legislation in Islam), criminal law is not regarded as a single, unified branch of the law. It is discussed in three separate chapters²⁷:

(1) Provisions regarding offences against persons, i.e. homicide and wounding, subdivided into:

- (a) those regarding retaliation (*qisas*.) and
- (b) those regarding financial compensation (*diya*).

(2) Provisions regarding offences mentioned in the Koran and constituting violations of the claims of God (*h. uq⁻uq All⁻ah*), with mandatory fixed punishments (*h.add*, plural *h. ud⁻ud*); these offences are:

- (a) theft
- (b) banditry
- (c) unlawful sexual intercourse

²⁶ Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century, Rudolph Peters, available at www.cambridge.org, (visited on 15th November 2013)

²⁷ Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century, Rudolph Peters, available at www.cambridge.org, (visited on 15th November 2013)

- (d) the unfounded accusation of unlawful sexual intercourse (slander)
- (e) drinking alcohol
- (f) apostasy (according to some schools of jurisprudence).

(3) Provisions concerning discretionary punishment of sinful or forbidden behaviour or of acts endangering public order or state security.

Categories (1 (a)) and (2) are expounded in the *fiqh* books with great precision and in painstaking detail. They may be regarded as constituting Islamic criminal law in its strict sense, with characteristic features that set it apart from other domains of the law, such as the absence of liability of minor and insane persons, the strict rules of evidence and the large part played by the concept of mistake (*shubha*) as a defence. Category (3) is a residual but comprehensive one under which the authorities are given wide-ranging powers. They may punish those who have committed offences mentioned under (1) and (2) but could not be convicted on procedural grounds (e.g. pardon by the heirs of a victim of manslaughter, or evidence that does not satisfy the strict requirements), and also those who have perpetrated acts that are similar to these offences but do not fall under their strict definitions. Moreover, under this heading the authorities can punish at their discretion all other forms of sinful or socially and politically undesirable behaviour. The punitive powers of the authorities are hardly restricted by law and, as a consequence, the doctrine offers little protection to the accused.

In classical Islamic theory of government the head of state has wide-ranging executive and judicial powers and may pass legislation within the limits set by the Sharia. Specialised judicial organs, such as courts staffed by single judges (*qadis*) operate on the basis of delegation by the head of state. The latter, however, retains judicial powers and may adjudicate certain cases himself or entrust other state agencies with hearing and deciding them. Moreover, he may issue instructions to the judicial organs with respect to their jurisdiction. Classical doctrine recognises, apart from the head of state himself, three law enforcement agencies. The most prominent is the single judge, the *qadi*, adjudicating cases on the basis of the *fiqh* doctrine. However, officials in charge of public security,

such as governors, military commanders and police officers, also have jurisdiction, especially in criminal cases. But unlike the *qadi*, they usually deal with crime according to political expediency rather than on the basis of the legal doctrine. This jurisdiction is called *siyasa*.²⁸

B) PHILOSOPHY OF THE ISLAMIC CONCEPT OF PUNISHMENT²⁹

Islamic Penal Code sternly prohibits this dual disability for an ex-convict. Once the official punishment ends, the convict is a dignified citizen of the state enjoying civil rights in its totality. He need not carry any appendage of conviction with his name. No hurdles would be placed in his economic or social progress on the basis of his conviction. A return to the normal life is thus facilitated by the whole society and state under Shariah. The Prophet strictly admonished his friends from giving any bad names to Ma'izz Bin Aslami and Ghamiddiya, two sahabi who, out of fear of punishments in the life hereafter, self-confessed the sin of adultery and were stoned to death.

It is merely an allegation that harsh Islamic laws would convert the society into a den of crippled and indolent persons. It is mainly due to the partial understanding of the Islamic System. Islam solves the social and economic problems of a man on a priority basis so that one should not be stimulated to commit crimes due to social and economic injustices. Secondly, the Islamic punitive measures are implemented through a gradual process. With the advent of the Prophet and his party at Medina, the

²⁸ Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century, Rudolph Peters, available at www.cambridge.org, (visited on 15th November 2013)

²⁹ Philosophy of the Islamic concept of punishment, available at www.studying-islam.org, visited on 15th November 2013

Islamic Penal Code was not suddenly clamped over the city. Had it been the 'case the results would have been the same what critics allege.

(i) **PUNISHMENT AND LEGAL PENALTIES**³⁰:

Legal penalties are specified in the Qur'anic Text for: (a) Murder, (b) Theft, (c) Adultery, (d) Cluminous accusation of adultery, and (e) Offence against public security. No apology is needed for death being the Islamic penalty for premeditated murder, its very severity makes the punishment a deterrent, especially if one considers how simple and expeditious judicial machinery is in Islam and how rapid the procedure and beneficial its effects for social tranquillity and the protection of human lives.

Theft, except for the doubtful cases, for example stealing prompted by starvation, its punishment is amputation of the hand. Stealing is too frequently perpetrated by force and often entails murder of the victim. One wonders whether, in such case is it is better to have more pity on the hand of the thief than on the life of the victim.

Punishment for Adultery:

The penalty for adultery for a married person is stoning to death, (to be witnessed by a crowd of people) but there are very strict injunctions regarding the proof. The offence must be testified to by four witnesses of unimpeachable veracity. And, if a person levels a charge of adultery against someone and is unable to bring four such witnesses, he is liable to be punished with, eighty strokes of the whip. By enjoining such punishment, Islam has prevented dislocation of the family, and confusion with regard to paternity. More important it establishes the basis for a peaceful life in human society. Peace at this price is not at all costly compared to modern measures introduced and expenses incurred for a peaceful life but it is no where to be found

³⁰ Ibid.

because the murderers, the thieves, the fornicators and others get away too easily. They are a constant source of fear and disturbance because of the potential threat to life and property. The Shariah provision nips the evil in the bud with a firm hand and puts down its foot strongly to stop mischief and to ensure peace to the society. Islamic punishments are, therefore, the most suited to bring about peace and peaceful conditions. Islam deals with the culprit rather heavily in the interest of his would-be victims.³¹

(ii) *Hudud* Religious Punishments³²

Forte describes the religious *Hadd* crimes, writing “Islamic law denotes five “Quranic offenses” which are regarded as offenses directly against Allah and which compel specific punishment.” These crimes are Unlawful Intercourse (*Zina*), False Accusation of Unlawful Intercourse (*Kadhf*); Drinking of Wine (*Shurb*); Theft (*Sariq*), and Highway Robbery (*Qat’ Al-Tariq*).

1. Unlawful Intercourse—*Zina*: This occurs when a person has sexual relations with anyone not their spouse, nor a concubine (*Shari’ah* accepts sexual slavery). Technically, adultery is not a crime as no woman has exclusive rights to her husband, and the husband has no exclusive bond with his wife, despite this being an offense against Allah. The crime of *Zina* can also occur if a man takes and sleeps with a fifth wife while the four previous yet live, weds a close relative or girl before she undergoes puberty, or commits necrophilia, writes Forte.

³¹ Philosophy of the Islamic concept of punishment, available at www.studying-islam.org, visited on 15th November 2013

³² Crime & Punishment in Islamic Law, *Kelly OConnell* Sunday, September 26, 2010 available at <http://www.canadafreepress.com/index.php/article/28083>, visited on 15th November 2013

Proof of *Zina* must be provided by four adult Muslim males or a confession. The crime should have occurred within the last 30 days. On a discrepancy of testimony, or even a technical irregularity, the four can then receive the punishment for *Zina* themselves. Peters explains that if a man has sex with a slave not his, he owes her master a fine. A woman who reports a rape but cannot prove it occurred via four witnesses can then be prosecuted for *Zina* with her unproved accusation acting as a confession.

Zina Penalty:

The punishment here can be stoning, lashing, or both, depending upon the school. A stoning should only be applied to one convicted of unlawful intercourse, who is mentally competent, is a free person, and has already experienced lawful sexual relations in a marriage. For all others, it is either one 100 lashes for a free person, or 50 for a slave. All homosexual relations fulfill the *Zina* requirements, although the penalty is simply death instead of whipping, according to Peters.

2. False Accusation of Unlawful Intercourse—*Kadhf*: This occurs when a competent adult slanders another competent adult, who is a free Muslim, with false charges of *Zina*. Claiming someone is illegitimate also qualifies. Proof for this occurs via normal Islamic means, using oaths of witnesses, or by confession. Under a special rule, a husband may charge his wife with infidelity without risk if he uses the *li'an* procedure, which Forte describes as "...if he swears four times by Allah that he is speaking the truth and, at a fifth oath, calls down a curse upon himself if he is lying." The woman, as a defense, may repeat the exact procedure. If either one refuses the *li'an*, they are considered guilty, *ipso facto*, and receive the lashes.

Kadhf Penalty: The punishment for *kadhf* is 80 lashes for a freeman, or 40 for a slave.

3. Drinking of Wine—*Shurb*: Alcohol was not originally illegal but became so after Muhammad was appalled at the drunkenness of Arab society. The law also applies to any other intoxicant or drug. Proof can be provided by a confession, which can then be withdrawn at any time without penalty. Or witnesses can attest seeing the accused drinking, smelled alcohol on his breath, or observed him soused.

Shurb Penalty: The penalty for intoxicant imbibing is 20-40 lashes.

4. Theft—*Sariq:* This must be a crime of theft involving removal by stealth of an item owned by another of at least a certain value, kept in a locked area or under guard (*hirz*), says Peters. For example, removal of a gold coin stored in an animal stable would not qualify. This crime should be prosecuted by the government.

Sariq Penalty: Amputation of the right hand, as based upon Qur'an 5:38; although the Shiites allow just four fingers of the hand amputated, according to Peters. A second, third and fourth conviction can remove all such appendages.

5. Highway Robbery—*Qat' Al-Tariq:* The Arabs considered this the most serious kind of crime as it threatens the calm and order of all society, according to Forte. Two types of evil are covered here. The first is robbing travelers from distant places; whereas the second is armed assault into a private home. Even non-Muslims are protected under this law. There must be at least a holdup which occurs outside the city for the penalty to apply to banditry, states Peters. The perpetrator must be of superior force to the victim, and so women do not qualify.

Qat' Al-Tariq Penalty: The first conviction for this offense merits the amputation of the right hand and left foot of the wrong-doer, although some schools allow a simple deportation if no harm occurs. The second results in amputation of the left hand and right foot.

(iii) **Other Shari'ah Crimes, Punishment, & Blood Money**³³

A. *Ta'zir* Penalties

Discretionary penalties, or *Ta'zir*, are punishments delivered at the *qadi's* subjective decision. The purpose is to punish acts against man and God, and sometimes includes reparation and repentance, writes Forte. These punishment vary in severity:

³³ Crime & Punishment in Islamic Law, *Kelly OConnell* Sunday, September 26, 2010 available at <http://www.canadafreepress.com/index.php/article/28083>

1. Private admonition to the guilty party, sometimes by letter;
2. Public reprimand in court;
3. Public proclamation of the offender's guilt;
4. Suspended sentence;
5. Banishment;
6. Flogging;
7. Imprisonment;
8. Death.

Forte says many crimes are covered by *Ta'zir* that for some reason have eluded *Hadd* penalties, such as apostasy (*ridda*—although some schools consider this *hadd*), wine selling, homosexual activity, bodily harm or murder, bestiality, perjury, slander and usury.

B. Fines & Blood Money

Fines are paid to the state, whereas blood-money (*diya*) goes to a victim or kin, based upon his blood-status. Bloodprice is the victim's worth, only calculable against that of the accused, which controls the punishment. A person cannot receive retaliation for killing a person of a lower bloodprice. For example, a Muslim cannot be executed for murdering a slave or member of the protected classes, being Christians or Jews, deemed *dhimmi*s, i.e. the People of the Book (Bible).

C. Public Scorn, Imprisonment & Banishment

A common punishment is public exposure to scorn (*tashir*). Achieved by shaving the culprit's head, or covering his face with soot (especially for false witnesses) and parading him sitting backwards on an donkey, through the community, with a town-crier announcing his sins. Banishment (*nafy*, *taghrib*) is associated with two crimes—simple banditry and illegal sex. If a woman is banished for being sexually immoral, a male relative must travel with her to make sure she stays chaste. Imprisonment (*habs*) is not normally used for penal law, but as a means to encourage debtors to pay.

D. Retaliation

Retaliation for injuries (*qisas ma dun al-nafs*) comes as *Lex Talionis*, eye-for-eye punishment in the form of amputations, blinding, and infliction of wounds the victim received. A recent Saudi case involved a man sentenced to judicial paralysis for severing the spinal cord of another. This should not be done till the victim has healed, in case he dies.

E. Theft & Amputation

Muhammad probably borrowed amputation (*qat*) for theft from the pagan Quaraysh tribe, who inflicted this punishment on rival tribesmen caught stealing, says Forte. While Muslim jurists claim amputation is to prevent recidivism, it more likely originated as judicial revenge. The hand is removed at the wrist, the stump cauterized in boiling oil, at the criminal's expense, and the hand can be hung around the thief's neck for three days. Cross-amputation (*al-qat min-khilaf*) is a punishment for brigands, ie highway robbers.

F. Flogging (*Jald*)

Flogging by leather whip is a very common punishment under the *Shari'ah*. The executioner administers this penalty, but should not raise the whip arm above the shoulder. The more serious a crime, the harder the executioner should flog the criminal. For example, one convicted of illegal sex should be beaten more severely than one guilty of drinking alcohol. Men are whipped standing, women seated. Men are stripped to the waist, while women are allowed to keep on clothes. As advised in *Qur'an*24:2, the punishment should be public. The blows are to be spread over the body, except for dangerous places, like the head or genitals, as the purpose for whipping is not death.

G. Executions: Beheading, Stoning & Other Means

There are many ways to execute a criminal under *Shari'ah*. Typically, the mode of execution is beheading by sword, as done at famed Chop-Chop Square in Riyadh, Saudi Arabia. But the crime defines the manner. For example, homosexuals are executed in

typically dramatic fashion, by stoning, beheading, thrown from a high wall or building, hanging, immolated by fire, or buried alive (despite male homosexuality reportedly being rampant in the Middle East, according to Raphael Patai's Arab Mind).

Death by Stoning (*Rajm*), or lapidation, is delivered by a crowd with the ultimate intent of killing the victim, writes Peters. The stones used should neither be too large, which would kill the criminal too quickly, nor too small, which would delay the job. The proper size is a stone which fills the hand. Women are to be dug into the earth up to their waists before the event. If the conviction is based upon accusations, the accusers are the first to throw. If the conviction is based upon a confession, the state representative is first to toss.

For Highway Robbery (*Qat' Al-Tariq*), if a killing resulted during an attempted robbery, the punishment is beheading by sword. If a murder occurred during an actual theft, the punishment is execution by crucifixion (*salb*), the body left dying three days. Unlike a normal murder, the family of the victim cannot choose blood-money (*diya*) instead of execution.

Apostates may renounce Islam by word or deed, including rejecting axiomatic articles of faith, like denying Muhammad's mission, fasting, or disrespecting the *Qur'an*. The apostate (*ridda*) is given three days to reflect, then put to death. Some schools only execute men, whereas the women are kept alive but flogged during the hours of prayer, according to Peters. Frank Vogel, in *Islamic Law & Legal System: Studies of Saudi Arabia* states that apostates are beheaded in Saudi Arabia before huge crowds on Friday afternoons, in the public square, directly after prayer time has ceased.

(iv) REPENTANCE AND PUNISHMENT³⁴

Punishment in Islam has nothing to do with the notions of atonement, expiation or wiping away of sin. A crime is essentially an act of injustice to one's own self, a sin

³⁴ Philosophy of the Islamic concept of punishment, available at www.studying-islam.org, (visited on 15th November 2013)

against God. It can be wiped away only by God, and that He does when a person turns to Him, truly repentant and seeking forgiveness. Between man and God, therefore, the total emphasis is on repentance, and punishment can be no substitute for it. But a crime is also an act against the social order and in this sphere mere repentance cannot be a substitute for punishment which is a means of protecting and strengthening the society.

(v) FUNCTIONAL NATURE³⁵

Penalties in Islam are more of a functional nature, to regulate and deter. God has laid down a body of mutual rights and obligations which are the true embodiment of justice. He has also laid down certain bounds and limits to be observed and maintained for this very purpose. If men and nations desire to move in peace and safety on the highways of life, they must stick to the 'traffic lanes' demarcated for them and observe all the 'signposts' erected along their routes. If they do not, they not only put themselves in danger, but endanger others. They therefore naturally make themselves liable to penalties –not in vengeful retribution – but to regulate the orderly exchanges in man's life in accordance with justice.

It is a significant contribution of Islam that these penalties are called hudud (boundaries) and not punishments: they are liabilities incurred as a result of crossing the boundary set by God. An important consequence of these hudud having been laid down by God, and not by man, is that it is beyond human authority to reduce or supercede them out of a sense of mercy greater than that of God; nor can a tyrant or autocrat add to them out of a greater sense of strict justice. For no one can be more merciful or wiser or more just than God himself.

Another important function which these punishments serve is educative, and thus preventive and deterrent. The Qu'ran alludes to this aspect when it describes them 'as exemplary punishment from God' (al-Ma'ida 5:38). Punishments are thus designed to keep the sense of justice alive in the community by a public repudiation of the acts violating the limits set by God. They are expected to build up in the society a deep

³⁵ Ibid.

feeling of abhorrence for transgression against fellow human beings, and therefore against God - a transgression which, according to the Qur'an, is the root cause of all disorders and corruption in human life.³⁶

C) CONCLUSION

Even the simplest person can deduce that classical Islamic *Shari'ah* law cannot possibly fit into the modern world anywhere on the globe. But it is especially impossible to apply this system in America, the land that created modern religious freedom, and let millions escape oppression. Most alarming, the Islamic law does not change to fit into other cultures, but is always offered as a "perfect gift," delivered at the edge of a sword.

The Historical review of the Islamic penal system showed that despite the change imposed on the Islamic society to adopt more westernized penal system, the inherited values for punishment, which is built in the Islamic law, reject the principle of physical confinement and imprisonment as the main punishment And or rehabilitation approach. This resulted in the dismissal of prison buildings as a rehabilitation institute. People in Islamic societies still believe in the values of Islamic penal theories. This is apparent in their belief in the differentiation between the determination (*Hudud and Qesas*) and the discretionary crimes (*Ta 'azir*).

³⁶ Philosophy of the Islamic concept of punishment, available at www.studying-islam.org, (visited on 15th November 2013)

CHAPTER III - FUTURE VISION : HINDU AND ISLAMIC LAWS

Anticipating the future is an uncertain but nevertheless necessary activity, since the direction and pace of change is never inevitable but rather a consequence of choices and decisions that are made in the present. In respect to imprisonment in the United Arab Emirates a reappraisal of possible future options seems to be particularly appropriate since even in the last decade the nature of imprisonment appears to have undergone a relatively radical transformation in terms of its functions, organisation, and the size and make up of prison populations.

The real task, which confronts contemporary Islamic jurists, beyond their immediate aim of adopting traditional Islamic law to modern conditions, is to evaluate modern social life and modern legal thought from an Islamic angle to determine which elements in traditional Islamic doctrine represent essential Islamic standards.

Attitude towards increasing comfort in domestic layout facilities and rehabilitative programs, which has considerable cost to the society, is an interesting model. This model should be carefully examined to provide an appropriate balance between punishment, social values, and cost to the society.

Speaking of the hindu laws, the *Manusmriti* represented an archaic and outdated social code. It fit in very well with the British colonial project. It was also convenient in providing ideological cover for repressive legal steps the British wanted to take anyway. For instance, it did not hurt that the *Manusmriti* advocated laws that legitimised gender discrimination or attacked same-gender relationships. Such attitudes were then equally prevalent in Europe and it made it easier to disenfranchise women in matters of inheritance or introduce legal injunctions against same-gender sexual relations (as was the case in Britain during the 18th Century).

However, in the post independent India, under the leadership of B.R. Ambedkar the Indian constitution was made and he took efforts to see that no discrimination creeps in to the constitution. The constitution of India (1950) was a remarkable achievement in the elimination of discrimination on the lines of caste in the administration of justice. The Constitution of India has sought to create a more equal and just rule of law between individuals and groups than what existed under traditional authorities such as *Manusmriti*. The Indian Constitution strives to eliminate the humiliation that people suffered under the traditional social system of caste and patriarchy, thus creating new ground for realization of human dignity.

The caste and gender discrimination continue to cause grave harm, that *Adivasis* and *Dalits* still face all manner of trials and tribulations, and all such social inequities need to be fought with continued vigour.

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