PAPER II

CLASSICAL HINDU AND MUSLIM APPRAOCHES TO PUNISHMENTS

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TABLE OF CONTENTS

1 MEANING AND NATURE OF PUNISHMENT

Punishment is the authoritative imposition of something undesirable or unpleasant upon an individual or group, in response to behaviour that an authority deems unacceptable or a violation of some norm.[The unpleasant imposition may include a fine, penalty, or confinement, or be the removal or denial of something pleasant or desirable. The individual may be a person, or even an animal. The authority may be either a group or a single person, and punishment may be carried out formally under a system of law or informally in other kinds of social settings such as within a family. "Punishment describes the imposition by some authority of a deprivation — usually painful — on a person who has violated a law, rule, or other norm. When the violation is of the criminal law of society there is a formal process of accusation and proof followed by imposition of a sentence by a designated official, usually a judge. Informally, any organized group — most typically the family, in rearing children — may punish perceived wrongdoers."[1]

Inflicting something negative, or unpleasant, on a person or animal, without authority is considered either spite or revenge rather than punishment..Finally the condition of breaking (or breaching) the rules must be satisfied for consequences to be considered punishment. "Punishment under law... is the authorized imposition of deprivations — of freedom or privacy or other goods to which the person otherwise has a right, or the imposition of special

[1] McAnany, Patrick D. (August 2010). "Punishment". *Online*. Grolier Multimedia Encyclopedia. Retrieved 2010-08-04.

burdens — because the person has been found guilty of some criminal violation, typically (though not invariably) involving harm to the innocent.[2]

Punishments differ in their degree of severity, and may include sanctions such as reprimands, deprivations of privileges or liberty, fines, incarcerations, ostracism, the infliction of pain, amputation and the death penalty. *Corporal punishment* refers to punishments in which pain is intended to be inflicted upon the transgressor. Punishments may be judged as fair or unfair in terms of their degree of reciprocity and proportionality.[3] The study and practice of the punishment of crimes, particularly as it applies to imprisonment, is called penology, Fundamental justifications for punishment include: retribution, deterrence, rehabilitation, and incapacitations. The last could include such measures as isolation, in order to prevent the wrongdoer's having contact with potential victims, or the removal of a hand in order to make theft more difficult.

1.1Deterrence (prevention)

One reason given to justify punishment[4] is that it is a measure to prevent people from committing an offence - deterring previous offenders from re-offending, and preventing those who may be contemplating an offence they have not committed from actually committing it. This punishment is intended to be sufficient that people would choose not to commit the

[2] "Theory of Punishment". Stanford Encyclopedia of Philosophy. Retrieved 2010-08-04.
[3] Supra note 2
[4] McAnany, Patrick D. (August 2010). "Justification for punishment (Punishment)". *Online*. Grolier Multimedia Encyclopedia. Retrieved 2010-09-16.

crime rather than experience the punishment. The aim is to deter everyone in the community from committing offences.

1.2Rehabilitation

Rehabilitation (penology)

Some punishment includes work to reform and rehabilitate the wrongdoer so that they will not commit the offence again.[5] This is distinguished from deterrence, in that the goal here is to change the offender's attitude to what they have done, and make them come to see that their behavior was wrong.

1.3Incapacitation and societal protection

Incapacitation as a justification of punishment[6]refers to the offender's ability to commit further offences being removed. Imprisonment separates offenders from the community, removing or reducing their ability to carry out certain crimes. The death penalty does this in a permanent (and irrevocable) way. In some societies, people who stole have been punished by having their hands amputated.

[5] McAnany, Patrick D. (August 2010). "Justification for punishment (Punishment)". *Online*. Grolier Multimedia Encyclopedia. Retrieved 2010-09-16.

[6] Supra note 5

1.4Retribution

Retributive justice

Criminal activities typically give a benefit to the offender and a loss to the victim. Punishment has been justified as a measure of retributive justice,[7] in which the goal is to try to rebalance any unjust advantage gained by ensuring that the offender also suffers a loss. Sometimes viewed as a way of "getting even" with a wrongdoer — the suffering of the wrongdoer is seen as a desired goal in itself, even if it has no restorative benefits for the victim. One reason societies have administered punishments is to diminish the perceived need for retaliatory "street justice", blood feud and vigilantism.

1.5Restoration

Restorative Justice

For minor offenses, punishment may take the form of the offender "righting the wrong", or restitution. Community service or compensation orders are examples of this sort of penalty.

1.6Education and denunciation

Punishment can be explained by positive prevention theory to use the criminal justice system to teach people what are the social norms for what is correct, and acts as a reinforcement.

[7] Supra note 5

Punishment can serve as a means for society to publicly express denunciation of an action as being criminal. Besides educating people regarding what is not acceptable behavior, it serves the dual function of preventing vigilante justice by acknowledging public anger, while concurrently deterring future criminal activity by stigmatizing the offender. This is sometimes called the "Expressive Theory" of denunciation.[8]

[8] "Theory, Sources, and Limitations of Criminal Law". Retrieved 2011-09-26.

2 CLASSICAL ISLAMIC APPROACHES TO PUNISHMENT

Security and stability are basic human needs, no less important than food and clothing. Without security and stability, a human being is not able to properly conduct his daily life, let alone come up with new ideas or contribute to the development of a high level of civilization.

Man has been conscious of the need for security since the beginning of his life on Earth, and he has continuously expressed his awareness of this need in many ways. With the formation and evolution of human society, he has expressed this and other needs through the establishment of a state and the formation of laws. This was accomplished in order to ensure general security, settle disputes and conflicts that threaten society, and oppose external threats to its security posed by other nations. The development of these man-made laws did not come to completion except in the last few centuries as the result of a long process of trial and error.

By contrast, the Law of Islam was sent down to Muhammad, may the mercy and blessings of God be upon him, in its complete form as part of His final message to humanity. Islamic Law pays the most careful attention to this matter and provides a complete legal system. It takes into consideration the changing circumstances of society as well as the constancy and permanence of human nature. Consequently, it contains comprehensive principles and general rules suitable for dealing with all the problems and circumstances that life may bring in any time or place. Likewise, it has set down immutable punishments for certain crimes

that are not affected by changing conditions and circumstances. In this way, Islamic Law combines between stability, flexibility, and firmness.

2.1Crime in Islamic criminal law

The ultimate objective of every Islamic legal injunction is to secure the welfare of humanity in this world and the next by establishing a righteous society. This is a society that worships God and flourishes on the Earth, one that wields the forces of nature to build a civilization wherein every human being can live in a climate of peace, justice and security. This is a civilization that allows a person to fulfill his every spiritual, intellectual, and material need and cultivate every aspect of his being

The Islamic penal system is aimed at preserving five universal necessities aimed at securing human welfare.. Firstly to preserve life, it prescribes the law of retribution. Secondly to preserve religion, it prescribes the punishment for apostasy. Thirdly to preserve reason, it prescribes the punishment for drinking. Fourthly to preserve lineage, it prescribes the punishment for fornication and Fifthly to preserve wealth, it prescribes the punishment for theft.

For our guidance, Allah Almighty has revealed in the Holy Quran a complete code of life - a law to govern all dimensions of human life. This in Islam is known as ‘Sharia’.

Crime as defined in the Shariah consists is legal prohibitions imposed by Allah, whose infringement entails punishment prescribed by him.[9]

In Islamic criminal laws every thing prohibited by God and his prophet is a Crime. In Islamic law every crime is punishable but not every punishment is specified. The role of the State is to ensure that, in a person's public conduct, he does not commit a crime or any act likely to lead to one. Islamic law does not empower the State to infringe on the right of an individual citizen. It cannot break into a man's room and punish him for adultery. It cannot punish a man fr0m drinking his beer. But if a man chooses to drink his beer in front of his house instead of inside his living room, the act immediately leaves the realm of private conscience to one of public morals and the state punishes this severely. "Crime is an act or conduct whereby a person breaks the law and (ii) infringes upon the rights of others. In the religious parlance it is called "a sin".[10]

2.2The Objectives of the Islamic Penal System

The Islamic penal system has many objectives, the most important of which are as follows:

The First Objective: Islam seeks to protect society from the dangers of crime. It is common knowledge that if crimes are not countered with serious punishments, then society will be in grave danger. Islam seeks to make social stability and security

[9] Abdusamed, Kader, Crime and punishment in Islam, Lenasia (South Africa) 1994, 3ff.
[10] Abu Zahra, Mohamed, Crime in Islam, Cairo 1976, 26 ff.

widespread, making life in society secure and peaceful. It has made this consideration a platform for action, legislating punishments that will discourage crime.

If the murderer, or any other criminal for that matter, knows the extent of the negative consequences for himself that his crime will cause, he will think a thousand times before committing it. Awareness of the punishment will cause the criminal to abstain from committing the crime in two ways. The criminal who has already been subject to the punishment will most likely not return to the crime again. As for the rest of society, their awareness of the effects of this punishment will keep them from falling into the crime.

The Second Objective: Islam seeks to reform the criminal. The Quran often makes mention of repentance in association with the crimes that it deals with, making it clear that the door to repentance is open whenever the criminal abandons his crime and behaves properly. It has made repentance a means of waiving a fixed punishment in some instances, like the punishment for highway robbery

This objective is seen more frequently with regard to discretionary punishments, whereby it is incumbent upon the judge to take into consideration the circumstances of the criminal and what will insure his betterment.

The Third Objective: The punishment is a recompense for the crime. It is undesirable to treat a criminal lightly who threatens the security of society with danger. The criminal should receive his just recompense as long as he is pleased with taking the path of evil instead of the path of righteousness. It is the right of society to be secure in its safety and the

safety of its individual members. The Quran has asserted this objective when mentioning a number of punishments.

2.3Forms of Punishment in Islam

Islamic Law confronts other crimes by stating the general principle that decisively indicates their prohibition, leaving the punishment to be decided by the proper political authority in society. The political authority can then take the particular circumstances of the criminal into consideration and determine the most effective way to protect society from harm. In accordance with this principle, punishments in Islamic Law are of three types:

1. Prescribed punishments
2. Retribution
3. Discretionary punishments

2.3.1 Prescribed Punishments;

Crimes that fall under this category can be defined as legally prohibited acts that God forcibly prevents by way of fixed, predetermined punishments, the execution of which is considered the right of God.

These punishments have certain peculiarities that set them apart from others. Among these are the following:

1. These punishments can neither be increased nor decreased.
2. These punishments cannot be waived by the judge, the political authority, or the victim after their associated crimes have been brought to the attention of the governing body. Before these crimes are brought before the state, it may be possible for the victim to pardon the criminal if the damage done was only personal.
3. These punishments are the ‘right of God’, meaning that the legal right involved is of a general nature where the greater welfare of society is considered.

The following crimes fall under the jurisdiction of the fixed punishments:

1. Theft

Theft is defined as covertly taking the wealth of another party from its secure location with the intention of taking possession of it.

2. Highway Robbery

Highway robbery is defined as the activity of an individual or a group of individuals who go out in strength into the public thoroughfare with the intention of preventing passage or with the intention of seizing the property of passers-by or otherwise inflicting upon them bodily harm.

3. Fornication and Adultery

This is defined as any case where a man has coitus with a woman who is unlawful to him. Any relationship between a man and a woman that is not inclusive of coitus does not fall under this category and does not mandate the prescribed, fixed punishment.

4. False Accusation

This is defined as accusing the chaste, innocent person of fornication or adultery. It also includes denying the lineage of a person from his father (which implies that his parents committed fornication of adultery). False accusation includes any claim of fornication or adultery that is not backed up by a proof acceptable to Islamic Law.

5. Drinking

One of the most important objectives of Islam is the realization of human welfare and the avoidance of what is harmful. Because of this, it "permits good things and prohibits harmful things." Islam, thus, protects the lives of people as well as their rational faculties, wealth, and reputations. The prohibition of wine and the punishment for drinking it are among the laws that clearly show Islam's concern for these matters, because wine is destructive of all the universal needs, having the potential to destroy life, wealth, intellect, reputation, and religion.

6. Apostasy

Apostasy is defined as a Muslim making a statement or performing an action that takes

him out of the fold of Islam. The punishment prescribed for it in the Sunnah is execution, and it came as a remedy for a problem that existed at the time of the Prophet, may the mercy and blessings of God be upon him. This problem was that a group of people would publicly enter into Islam together then leave Islam together in order to cause doubt and uncertainty in the hearts of the believers. Thus, the prescribed punishment for apostasy was instituted so that apostasy could not be used as a means of causing doubt in Islam.

At the same time, the apostate is given time to repent, so if he has a misconception or is in doubt about something, then his cause of doubt can be removed and the truth clarified to him. He is encouraged to repent for three days.

2.3.2 Retribution;

This is the second type of punishment in Islamic Law. This is where the perpetrator of the crime is punished with the same injury that he caused to the victim. If the criminal killed the victim, then he is killed. If he cut off or injured a limb of the victim, then his own limb will be cut off or injured if it is possible without killing the criminal. Specialists are used to make this determination.

Important Rules Regarding Retribution

1. Retribution is not lawful except where the killing or injury was done deliberately. There is no retribution for accidentally killing or injuring someone

2. In the crimes where the criminal directly transgresses against another, Islam has given

the wish of the victim or his family an important role in deciding whether or not the punishment should be carried out. Islam permits the victim to pardon the perpetrator, because the punishment in these crimes is considered the right of the victim. Islam even encourages pardon, promising a reward in the hereafter for the one who does. The pardon can either be to the payment of blood money, a fixed, monetary compensation, or can be total, where no worldly compensation is demanded

3. The punishment must be carried out by the government. The family of the victim cannot carry it out.

The Wisdom behind Retribution:

With regard to Islamic punishments in general, and retribution in specific, it has two complementary characteristics. The first of these is the severity of the punishment. This is in order to discourage the crime and limit its occurrence.

The second characteristic is the difficulty of establishing guilt, reducing the opportunities for carrying out the punishment, and protecting the accused by this the punishments are waived in the presence of doubt, and that the benefit of the doubt is always given to the accused. Some prescribed punishments are even waived on the grounds of repentance, as we can see in the case of highway robbery. This is also seen in the permissibility of pardon in the case of retribution and the fact that pardon is encouraged and preferred.

These two elements complement each other in that crime is effectively discouraged, protecting society, and the rights of the accused are safeguarded by the fact that speculation and accusations cannot be grounds for punishment, and that the accused enjoys the greatest guarantee of justice and being spared the punishment whenever possible. Most people abstain from committing crime, because of the severity of the punishment, and the punishments for these crimes will rarely be carried out. In this way, the general security of society and the rights of the individual are equally realized.

2.3.3 Discretionary Punishments;

These are punishments that are not fixed by Islamic Law, for crimes that either infringe on the rights of God or the rights of an individual, but do not have a fixed punishment or a set expiation.

Discretionary punishments are the broadest category of punishments, because the crimes that have fixed punishments are few in number and all other crimes fall under the scope of this last category.

They are the most flexible type of punishment, because they take into consideration the needs of society and changing social conditions. Consequently, they are flexible enough to realize the maximum general benefit to society, effectively reform the criminal, and reduce the harm that he causes.

Islamic Law has defined different types of discretionary punishments starting from

exhortations and reprimands to flogging, to fines, and to imprisonment. These discretionary measures are left to the decision of the legal authorities within the general framework of Islamic Law and the universal purposes of Islam that balance between the right of society to be protected from crime and the right of the individual to have his freedoms protected.

2.4 Classification of crimes under Islamic criminal law

Muslim criminal law arranged punishments for various offences into four broad categories: Kisas, Hudod, Tazeer and Diya

2.4.1)Retaliation (Kisas):

Kisas Punishments means the equal punishment. Kisas punishments are imposed only for premeditated murder and intended crimes other than homicide, which involve the loss of a limb or organ, bearing in mind that the crime and Kisas are equal. It is laid down by the Koran that the Kisas punishment should not exceed the extent of injury or loss sustained by the crime. It states:
"0 believers, prescribed for you is retribution in case of murder. A freeman for a freeman, a slave for a slave. A female for a female. But if his brother pardons a man aught, let the pursuing be honourable and let the payment be with kindness."[11]

That is a lightening granted you by your Lord. And a mercy; and for him who commits aggression after that. For him there awaits a painful chastisement".
"In retaliation there is life for you men possessed of mind haply you will be God fear in".[12]
"And therein we prescribe for them: a 1ife for a life. An eye for an eye. A

[11] Koran, 2:178,194
[12] Koran, 2:179.

nose for a nose. An ear for an ear, a tooth for a tooth". [13]

Retaliation meant principle, life for life and limb for limb. Kisas applied to cases of will feel killings and certain type of grave wounding or maiming and gave to the injured party or his heirs a right to inflict a like injury on the wrong doer.

On the other hand Diya meant blood money. For certain unintentional injuries Diya was awarded to the victim on a fixed scale. In such cases where Kisas was available it could be exchanged with blood money or Diya. The injured of his heir could accept Diya or Kissas according to his choice; it means in case of murder, the heirs of the murdered person could accept blood money and forgo his right to claim death on the murderer. The punishment prescribed under Islamic law for murder and personal injury is known as Qisas or Qawad (retaliation). This means the infliction of injury on a culprit that is exactly equal to the injury that was inflicted on the victim.

The law of Qisas can be understood after looking at the ancient customs of the Arabs prior to the advent of Islam. Hostility was a characteristic feature of the tribesmen of pre-Islamic Arabia. Friendly co-operation was a way of life only among the members of the same tribe. The main feature for this state of hostility was personal revenge for homicide. One of the most compelling reasons for the motive of revenge among Arab tribesmen was their belief that after the death of a murdered person a night-bird known as Ham , would stand on the grave and cry, "I am thirsty, give me a drink." This implied that revenge should be taken in order to quench its thirst. As a consequence, revenge was taken not only against the

[13] Koran, 5:45.

culprit, but also against the culprit's tribesmen. On many occasions tribal pride called for several victims as an equivalent for a fellow tribesman; this was the same with respect to the infliction of injury.

Diya (blood money) was considered as a peaceful alternative to revenge. However, the amount of Diya varied according to the status of the murderer and his or her tribe. After Islam prevailed in Arabia the law of Qisas was introduced. As a consequence, just retaliation allowed only one life, that of the perpetrator of the crime only, to be taken for the life of the AL-QISAS 15 victim, or a fixed sum of money was determined as blood money. This was not to vary from tribe to tribe or due to the status of the victim. At this stage the Quranic law radically changed the legal incidents of homicide (Coulson 1964) . There wasa transition from the pre-Islamic custom of Thar (revenge) to the Islamic law of Qisas.

The punishment for homicide and bodily injury in Islamic law can be either

1)Qisas (retaliation)

2)Diya (blood money).

Qisas can be divided into two categories:

Qisas for homicide and Qawad for wounds or injuries. Diya signifies the blood money owed for killing and the term Arash is used for the blood money owed for injuries. Diya and Kaffara (penance) are the remedies for accidental homicide. The punishment prescribed in the Quran for deliberate homicide is the killing of the culprit or the payment of Diya . With respect to accidental homicide the jurists have determined that no Qisas is owed but the perpetrator is responsible for Diya andKaffara (penance).

Unlike retaliation for homicide the law regarding retaliation for injuries was not clearly prescribed in the Quran or the Hadith. Even the verses of the Quran on which the jurists based the law of retaliation for injuries are subject to interpretation. With regard to the Hadith, there is only one report where the Prophet ordered retaliation for injuries; Imam Bukhari and Muslim transmitted this through their compilations of the traditions.

The law of Qisas for injuries is not set out by the Quran and the Hadith but is based on Ijma (consensus). Jurists since the time of the Prophet are in agreement concerning this. The following conditions have to exist before the law of Qisas for injuries applies:

1)The injury must be deliberate (Amd) and not accidental (Khata),

2)the part of the body where Qisas can be applied must be the same as the part injured by the culprit,

3)it must be practicable for the authority to inflict Qisas .

2.4.2) Hudood or Hadd:

This word means the limit or boundary. In Muslim criminal law, “it meant the specific penalties for specific offence’. The idea was to prescribe, define and fix the nature, quantity or quality of the punishment for certain particular offences, which the society regarded as anti-social or anti-religious. The offences were characterised as being offences against god or offences against public

justice in contradiction to the 'offences against person.'

The punishment prescribed under Hadd, could not be varied, increased and decreased. The judge had no discretion in the matter but to award the punishment if the offence is abolished. Some of the Hadd punishments were: Death by stoning, amputation of a limb or limbs and flogging. The prescribed punishment for certain crimes were:

1)For Zina or illicit intercourse, death by stoning;

2)for theft, amputation of limb like right hand or left foot;

3)for falsely accusing a married woman of adultery, eighty strips.

The Hadd punishment was severe and the object of awarding such punishment was deterrent i.e. to prevent the criminals from committing such crimes, which were injurious to the society or the creatures of the God. In case of Hadd, the injured party could not remit or compound the prescribed penalty as he could do in case of kisas.

The proof of the offence must be very strict and full legal evidence either two or four competent eye-witnessed of proved credit was insisted upon for the conviction of the offender. For example, an offender for the crime of Adultery (Zina) could be punished only if there were four male eye witnesses of actual crime, thus a person could not be punished for Zina unless he defend public decency and committed offence in the open. An accused could be committed for a Hadd offence on his confession but it had to be made four times before (Kadi) judge and it could be retracted at any time. Apart for technical rules of evidence, any doubt would be sufficient to prevent the imposition of Hadd. According to some Jurisprudence, the rules of Hadd are so strict and inflexible that it must be

only in rape cases that the infliction of Hadd as of retaliation would be possible and there are only a few instances known in which Hadd has been inflicted.

2.4.3)Tazeer

Tazeer means discretionary punishments. These punishments usually consisted of imprisonment exile, corporal punishment, boxing the ear and so on. In case of offence governed with Tazeer, the kinds and amount of punishment was left entirely to the discretion of the judge who could even invent new punishments according to his whims.[14]

Tazeer could be inflicted in different situations e.g. firstly, it could be inflicted for offences for which penalty by way of Hadd or Kisas was not prescribed, these offences were not of honesty nature and so were left to the punishment according to the discretion of the judge. Offences falling under such category were bestiality, sodomy, offences against human life, properly public peace and tranquillity, decency, morality, religion,f orgery or deeds and letter with fraudulent design and so on. Actually, the entire Muslim law was based on Tazeer because the Hadd and Kisas had been prescribed for a very few offences only. "The process of trial in cases falling under the category of Tazeer was also simple as compared to the trial procedure in cases falling under Hadd"[15]Tazeer could be inflicted on a confession, evidence of two persons or even on strong presumption. In a sense, the whole past of this criminal law was discretionary and could be regulated by the

[14] Tahir, Mahmood, Criminal Law in Islam, Delhi 1994, 90ff
[15] Mohamed, Schalal, Islamic Criminal Law, Amman 1996, 54ff.

sovereign.

Secondly, Tazeer could be inflicted even in cases falling under Hadd or Kisas, if the proof available for an offence was not such as was required by the law for the award of the prescribed penalty, but nevertheless, was sufficient to establish a strong presumption of guilt, then, instead of Hadd or Kisas, some other punishment was awarded in the discretion of the judge. If because of Insufficiency of evidence or some other technical difficulties, Hadd or Kisas could not be awarded, then Tazeer was awarded.

Thirdly, the principle of Tazeer covered flagrant crimes, crimes having a dangerous tendency or capable of causing extensive injury to society.

2.4.3.1Kinds of Taazir :

There are ten different kinds of Taazir according to the Sharia and these vary in level of severity. They range from a mere admonition right up to the death penalty.

1. Admonition (Al Waz) . Under this category the person committing the transgression is reminded that he or she has done an unlawful thing.

wives. It is sought to be an admonition to remind the offender, that he or she has forgotten or is unaware of the fact that something wrong has been committed. This treatment is meant to be reserved for those who commit minor offenses for the first time, so long as the judge considers it sufficient to reform and restrain the culprit from any further transgression.

2. Reprimand (Al-Tawbikh) : This kind of reprimand could be through any word or

act which the judge feels is sufficient to serve the purpose of Taazir . The jurists refer to some specific words and acts as a means of reprimand. However, it is not necessary to dwell on these means because they vary according to the offense and the offender.

3. Threat (Al-Tahdid) : This is a method through which the offender can be induced to improve her or his behavior out of fear of punishment. It may also comprise credible threats of punishment if the offense is repeated or by pronouncing a sentence against the culprit, the execution of this sentence is delayed until another offense has been committed within a stipulated time period.

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4. Boycott (Al-Hajr) : This form of Taazir punishment is prescribed in the Quran (IV: 34 An-Nisa). Besides being practiced by the Prophet it was imposed by Omar bin Khattab against a man who used to ask about and discuss difficult words in the Quran merely to confuse people and create mischief. Some scholars believe that this form of punishment is not practical in modern times.

5. Public Disclosure (Al-Tashhir) : This type of punishment means that the person giving false witness must be publicly identified so as to warn people not to trust him. The method of public disclosure usually comprised taking the offender by the judge's representatives to every part of the city and announcing that he had committed an offense for which he had received a Taazir punishment. The purpose of this punishment was to inform the public that the offender was not to be trusted.

6. Fines and seizure (Al-Gharamah wal-Musadarah) : Though the Prophet

imposed financial penalties as Taazir punishments, the jurists are split into three groups regarding its legality. One group believes that it is illegal to punish by fine or by seizure of property; a second group considers it to be legal; a third group regards it as legal only if the offender does not repent

7. Imprisonment (Al-Habs) : Under Islamic law there are two types of punishment; either for a definite term or for an indefinite term. Imprisonment for a definite term is imposed for minor offenses. The minimum duration of imprisonment is 1 day but the schools adopt different views regarding the maximum period of Taazir imprisonment.

8. Banishment (Al-Nafy) is also a variant of this form of Taazir punishment. The Hanafi School applies this as an additional Taazir punishment for fornication. Along with the crime of fornication, banishment is regarded as a Taazir punishment and is administered to offenders who could encourage others to copy their deviant activities (Ibn Farhun 1301) .

9. Flogging (Al-Jald) : Flogging is a common form of punishment under the Sharia. It is referred to as the form of punishment for the crime of committed by an unmarried person.

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10. Death Penalty (Al-Taazier bil Qatl): Taazir punishments are meant to deal with the less serious offenses. The death penalty is normally imposed for the most serious crimes

2.5 Conclusion

From the above brief survey, though the Muslim law of crime would appear to be very severe on its face, as it sanctioned some cruel punishment like mutilation and stoning, yet as a system the Muslim Law of crime is mild as the law seems to have been framed with more care to provide for the escape of the criminals than to found conviction on sufficient evidence and to secure the adequate punishment for the offender. The Muslim law of crime contained many illogical ties. It was based on some of those concepts of state and social relations whom the Western thought had already discarded long ago. It suffered from complexities and lack of system.

Muslim law drew no clear distinction between private and public law. Criminal law was regarded more as a branch of private law rather than of public law. Its underlying principle was that it existed mainly to afford redress to the injured; it had not much developed the idea that crime was an offence not only against the injured individual but also against the society as such.

The Islamic system of punishments has the power to uproot crime and create an amazing atmosphere of peace and security. The attempt to introduce the Islamic penal code in a Muslim or non-Muslim society which is ignorant of Islamic values, restrictions and prohibitions, would be like attempting to grow strawberries in the desert. Even in a country or society which is predominantly Muslim, introducing the Islamic penal code successfully

would not be possible until that society has not within reason immersed in the spirit of Islamic values and morals. For example, if in an Islamic State falsehood is rampant, as unfortunately is the case today, and in reality most of the witnesses are liars, if the punishments of cutting hands for stealing and the punishment of a hundred stripes for adultery is imposed, it would be probable that the hands of many innocents will be cut and by giving false witness cause many pious souls to receive the beating of a hundred stripes.

Loyal and faithful following of the Holy Prophet (Peace and blessings of Allah be upon him) is possible only on the condition that first with vigorous effort and sacrifices, such a society should be established which truly deserves to be called an Islamic society, then of course the Islamic penal code would be an integral part of that society

3 CLASSICAL HINDU LAW APPROACH TO PUNISHMENTS

Daṇḍa (Sanskrit:) 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 daṇḍa which is prāyaścitta, or atonement. Whereas daṇḍa is sanctioned primarily by the king, prāyaścitta is taken up by a person upon his or her own volition. Furthermore, daṇḍa provides a way for an offender to right any violations of dharma that he or she may have committed. In essence, daṇḍa functions as the ruler's tool to protect the system of life stages and castes.[16]Daṇḍa makes up a part of vyavahāra, or legal procedure, which was also a responsibility afforded to the king.

3.1Purpose of Daṇḍa(punishment)

There were two main purposes for punishment in Hindu society. Incapacitation was the first purpose and was used to ensure that an offender would not be able to commit the same crime again. For example, the hands of a thief would be cut off. Deterrence was the second purpose of punishment. Criminals were punished to set an example to the public, in hopes of preventing future offenses.[17] Although these were the two main purposes of Hindu Law,

[16] Davis, Donald Jr. The Spirit of Hindu Law128-129
[17] Doongaji, Damayanti. Crime and Punishment in Ancient Hindu Society149

other purposes such as rehabilitation were used as means of punishment and correction. Retribution is another theory of punishment; however, it does not have a prevalent role in Hindupunishment.

3.1.1)INCAPACITATION

Incapacitation is a way to prevent the commission of a crime. An offender punished with death, banishment, imprisonment or mutilation prevents them from being able to repeat an offense permanently or temporarily. Manu urges the king to cut off the offending limb of a thief to prevent them from stealing again. In the case of cutting off a limb it has both a preventative effect and ensures that the same crime will not be committed again.[18]

3.1.2)DETERRENCE

One reason for punishment is to prevent or discourage commission of crimes or unlawful behavior through deterrence. It can prevent people from committing a crime or from re-offending. According to the Mahabharata, people only engage in their lawful activities for fear of punishment by the king, in the afterlife, or from others. The main way to deter potential criminals from committing a crime was through the example of offenders suffering. Manu recommends the king place prisons near a high road where the "suffering and disfigured" offenders can be clearly seen, making imprisonment both deterrent and preventative.[19]

3.1.3)REHABILITATION

[18] Das Gupta, Rama Prasad. Crime and Punishment in Ancient India p16
[19] Supra note 18p14-15

Rehabilitation is yet another goal of Hindu punishment. Someone who breaks the law should be punished in a way that improves his character and conduct and places the offender on the correct path. The Mahabharata recommends the king reform or correct criminals by punishment[20]

3.2Types of punishment

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.[21]

3.2.1ADMONITION AND CENSURE

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. Censure is a stronger disapproval than

[20] ^ Das Gupta, Rama Prasad. Crime and Punishment in Ancient India p. 16-17
[21] Lahiri, Tarapada. Crime and Punishment in Ancient India p. 169

admonition.[22]

3.2.2FINES

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.[23] According to the ancient Indians, the King must pay a heftier 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.[24]

3.2.2.1FINES 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

[22] Doongaji, Damayanti. Crime and Punishment in Ancient Hindu Society152-153

[23] Supra note 24p153

[24] Doongaji, Damayanti. Crime and Punishment in Ancient Hindu Society154

used to determine the amount of the fine. It was thought that an individual should have a lesser amount imposed upon him because he did not conspire to commit the crime with others[25]

3.2.2.2FINES 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.[26]

3.2.2.3FINES 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."' [27] 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

[25] Supra note26
[26] Supra note26 154-155
[27] Doongaji, Damayanti. Crime and Punishment in Ancient Hindu Society 155–156

damaged.[28]

3.2.2.4FINES IMPOSED ON RELATIVES

If there is a connection between the offender and the victim, the fine could be lesser than if no connection exists. This connection could be one of four types: between master and servant, between people having mutual dealings, between people from the same village, or between kinsmen. "Thus if a kinsman sold the owner's property the former was only to be fined 600 panas, but if he was not a kinsman, nor had any excuse he would be guilty of theft.[2]:156[29]

3.2.3 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 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.[30] 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

[28] Supra note 20 p156

[29] Supra note 30

[30] Doongaji, Damayanti. Crime and Punishment in Ancient Hindu Society158

Brahmin could be made to do menial labors instead such as cleaning dirty dishes.[31]

3.2.4MUTILATION

Mutilation of body parts is a remnant of the ancient Hindu punishment. It was used when an offender caused injuries to the victim. Mutilation was seen most typically as a punishment in cases of theft, robbery, and adultery as a way of making the criminal an example to the public because the mutilated body was a horrifying sight. Typically, whatever limb was used by the person of the lower caste to hurt a man of a higher caste would be cut off. 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.[32]

3.2.5 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. The next action, which is punishable by death, is the encouragement of a mutiny which is committed in consequence thereof. The death penalty is also prescribed when someone gives false evidence that results in the defendant being convicted of the crime, sentenced to death and the punishment being carried

[31] Supra note 32 p161
[32] Doongaji, Damayanti. Crime and Punishment in Ancient Hindu Society163–164

out. The fourth reason someone can be sentenced to death is murder, under the notion of an eye for an eye. Again, the death penalty is allowed for someone who encourages the suicide of a minor, someone who is insane or a person who is intoxicated. The sixth reason a person can be sentenced to death is if a convict attempts to commit murder and harm is caused. The last reason the death penalty can be inflicted is if murder is committed during a robbery by a gang. 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. 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

3.6OTHER FORMS OF PUNISHMENTS

3.6.1WHIPPING

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.[33]

3.6.2BRANDING

Branding was often reserved for Brahmins who had committed one of four acts: the murder of another Brahmin, incest, one who had stolen gold, and one who had drank wine. If one had killed another Brahmin, he would receive the brand of a human trunk on his forehead. For a Brahmin who committed incest, he was often reserved for Brahmins who had committed one of four acts: the murder of another Brahmin, incest, one who had stolen gold, and one who had drank wine. If one had killed another Brahmin, he would receive the brand of a human trunk on his forehead. For a Brahmin who committed incest, he would receive the brand of a female organ on his forehead. The Brahmin, who stole gold, would have the brand of a dog's foot on his forehead. Finally, the Brahmin, who had drunk wine, would bear the brand of a banner on his forehead. After being branded, the Brahmin would be made an outcast of his own country, and he would not be welcomed anywhere else due to the brand on his forehead. For all four castes, branding could be avoided if the offender performed the proper prāyaścitta. Men of other castes could be branded if they had an affair with the wife of

[33] Doongaji, Damayanti. Crime and Punishment in Ancient Hindu Society169

another; after, the offender would be banished as well.

3.6.3 BANISHMENT

As indicated in the section on branding, one who had been punished by being branded would be banished from his particular community. The idea of banishment after being branded probably originated with the King. No respectable king would want to have offenders displaying such brands in his Kingdom. Besides being banished concurrently with branding, there were various other crimes that one could commit which would warrant being banished. For one, who is a Sudra, Vaisya, or Kshatriya, that gave false evidence would be fined and banished; however, a Brahmin, who committed the same crime, would only be banished. If a man, who belonged to a corporation situated in a village, broke an agreement due to greed, his punishment would be banishment. The Dharmaśāstras also proscribe breaking the bone of another, gambling, "...dancers, and singers, cruel men, men belonging to an heretical sect, those following forbidden occupations, and sellers of spirituous liquor"[34] lest one should be banished. If one was to intentionally commit a crime, he would be banished as well. If one, who was able, was to sit idly by as a "village is being plundered, a dyke is being destroyed, or a highway robbery committed,"he would be banished with his belongings. For those who damaged a town wall, broke a town gate, or filled a ditch near town would instantly be banished. For a lower caste man, who through deceit, survived by working in an occupation, belonging to one of a higher caste, the King ought to confiscate property and banish the lower caste man. A defendant, who had lost and denied the due owed, was to be banished. People who cheated others, took bribes, or gave wrong judgments,

[34] Doongaji, Damayanti. Crime and Punishment in Ancient Hindu Society172

if they were assessors, would also be banished. Visṇu and Nārada outline that those who hypnotize others or play foul should be branded and banished.[35]

3.6.4CONFISCATION 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. In ancient India, there were seven kinds of crimes that warranted confiscation of property. The first crime was for an official, who accepted money from suitors, with poor intentions. A Sudra who had intercourse with a woman of a higher caste was another crime that warranted confiscation of property. The property of a Vaisya could be taken if he were to have intercourse with a Brahmin. A trader, who exported goods that the King had a monopoly over or exporting an item that is forbidden, could have his property taken. The furniture of a woman, who disrespected her husband who is a drunkard or diseased, could be taken. An official, who is supposed to administer public affairs, but is also corrupted by wealth and has disrupted the business of another could have property taken. The entire property of a person, who is not a Brahmin, could be taken if that person had unintentionally committed a crime.[36]

3.3Castes and punishment

In ancient India, the nature of punishment varies with the caste of the offender and offended. As a general rule when a person of a higher caste inflicts injury on another of a

[35] Supra note 36p172-173 Daṇḍavivéka p. 108, 115
[36] Doongaji, Damayanti. Crime and Punishment in Ancient Hindu Society 174-175

lower caste, the punishment is less severe than when a person of a lower caste inflicts injury on another of a higher caste. Therefore, the highest caste, Brahmins, were the most favorably situated and the Sudra caste, the lowest caste, least favorably situated.[37]

The criminal law is not always so discriminatory. Many crimes have the same or similar punishment prescribed irrespective of the caste of the offender. An exception is the Brahmin class, being exempt from corporal punishment even in severe cases. Instead Brahmins were banished from the community and branded. In the case of theft, robbery, cheating, murder and treason, there was little distinction in punishment between non-Brahmins. The distinction between punishment for the Kshatriyas and the Vaisyas, was slight. The severity of punishment then was the most severe for the Sudra caste and progressively less as you went up the castes.[38]

3.4 The King

The King played a major role in the punishment of his subjects and his duty is discussed in the Code of Manu. Manu says the duty of the King is to render those likely to compromise the public order, unable to do so. The only way for the King to maintain the order is with punishment. It is the sole object allowing the King to perform his function and daṇḍa was created in the interest of the King to better his subjects (M., VII. 27-29). A common theme, "the logic of the fish", illustrates this idea well. Without a King to maintain order, the big fish

[37] Davis, "Centers of Law: Duties, Rights, and Jurisdictional Pluralism in Medieval India" p. 7.

[38] Davis, "Centers of Law: Duties, Rights, and Jurisdictional Pluralism in Medieval India" p. 7.

would devour the little fish and it is through the King's punishment that the state is maintained.[39]

There is no complete list of what is punishable and to what extent, but the King has the full discretion to decide it. Manu recommends that the King consider the circumstances of the crime and of the offender's ability to bare a specific penalty. The Dharmaśāstras say that because punishment is such a powerful tool it can't be delivered by the king without the advice of Brahmins; however, the King still has the ultimate decision. In the case of sins, Brahmins were in charge of delivering the penance, but often a sin constitutes a crime. According to Manu men who are punished by the King go to heaven like those who performed a good deed. There is much debate though on the way penance and punishment worked together.[40]

3.5Other punishing authorities:

Aside from the king, there are two other locations of law: the Brahmins/other community leaders and corporate groups. During the 17th and 18th centuries, a network of Brahmins dealt with disagreements related to the Brahmin community. In most cases, these councils had some relationship with the king, but yet were still able to remain autonomous as well. Rather than dealing primarily with disagreements that were already underway, the Brahmin institutions worked with questions about the law itself. A learned Brahmin is said to have

[39] a b Lingat. Classical Law p. 207-72
[40] Supra note 41

knowledge about the Dharmaśāstras and therefore they "represented the living translation of Dharmaśāstra principles into real world legal matters..."[41]

However, their power was not limited to resolving disputes solely within the Brahmin community. Brahmins also provided legal guidance to other communities and became a model for corporate governance. Corporate groups in ancient India included villages, castes, military associations, among many others.[42]These individual groups produced laws for their members and the group to which one belonged was essentially predetermined by birth. lawmaking activities of numerous corporate groups was quite prevalent. These groups are

3.7 Progression of Danda over time

There are some very notable differences between the way ancient punishment was to be administered and how modern punishment is administered in Hindu societies. If a criminal were to confess to a crime, he would received half of the prescribed punishment in ancient India; however in modern India, confessing does not mitigate one's punishment. In ancient India, one's caste would affect the punishment that he would receive. In modern India, caste does not play a role, which furthers the idea of equality among men. Modern law, in India, dictates that only laws that have been conceived and that are written down may be punished. In ancient Indian law, a person could be prosecuted for a crime that has not been written down if a Sishta, a Brahmin who had studied the Veda, declares the act to be a crime. One other punishment that could be incurred in ancient India was the confiscation of a Sudra's

[41] ^ Davis,Donald R. Intermediate Realms of Law: Corporate Groups and Rulers in Medieval India p. 93

[42] Davis, “Centers of Law: Duties, Rights, and Jurisdictional Pluralism in Medieval India” p. 11.

wife if he had an affair with a woman of a higher caste, which would be inconceivable in modern India

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