Chapter VI

THE BUDDHIST AND THE HINDU VIEWS OF PENAL JUSTICE

"Discipline is the ethos of Buddhist monasticism, the trail head of the path of purity leading to Nibbana and the fiber of the communities soul, a means to salvation and the nucleus of communal identity."¹

Buddhist view of penal justice is something different from the Hindu view of penal justice. In Buddhist penal justice, morality is strictly observed in comparison with Hindu penal justice. Even in religious sanctions also Buddhist views of penal justice are more strict. Vinaya governs the entire life of monks and nuns of Buddhist Sangha. To maintain the monastic life, some basic rules were necessary. So Vinaya rules are some codes of conduct, not penal laws, which are very common in Hindu penal laws. The basic codes of conduct which are available in Vinaya pitaka, have changed from time to time to meet the development of the society. Vinaya rules were specially prescribed for the monks and nuns, not for the layman. On the other hand though Buddha functioned as the supreme authority like the present day sovereign authority, he never prescribed severe penal sanction to a delinquent monk, like the kings of his time. In Austinian sense, we can't say that Buddhist law is same with positive
law, as the Hindu rulers believed in those days. As it is aptly mentioned by John C. Holt, "Even though, the Buddha can be understood as functioning in the same manner as a sovereign authority, his role in that capacity does not provide us grounds to argue that Buddhist law represents the type of positive law that Austin argues for. The validity of Buddhist law does not abide, ultimately in the fact that the law is commanded by sovereignty. Rather, its validity and applicability rest upon consistency with a higher norm, conclusive to realising the soteriological goal."²

Though, Buddha functioned as the sovereign authority, his aim was to attain the highest goal, the Nibbana, upholding the moral ideas and condemning the evils in a person's life. Everything was oriented towards that end in view.

Buddha was more concerned in maintaining the special identity of the Sangha, as such he was not at all interested in ruling of a state, though he was friendly with many kings at his time, and gave various suggestions to the kings from time to time. Another difference is, Vinaya govern only a particular community of the society, but the secular penal laws govern the entire society. So, in Vinaya scope of positive law is very limited. According to modern legal scholars justice never discriminates one's age, sex, colour, class etc. But Buddhist idea of penal justice is to some
extent narrow, because it is mainly concerned with the monastic life.

As it is aptly mentioned by the John Rowls, "Justice is the first virtue of social institutions as truth is of systems of thought."  

In India, the idea of justice originated from the Vedas, and it has taken a definite shape during the Buddhism recognizing the equality among caste, sex etc. In Hinduism the concept of justice was maintained in theory; caste and sex discrimination was widespread in ancient time, and more or less, it is available in modern day society also. But Buddhist idea of justice is above all these discriminations, despite the feudal system prevailing in those days. Justice in those days was an ideal and realization of truth. Legal justice and orderly principles are the later development.

Buddhist view of religions and penal justice:

The entire Vinaya text deals with the code of conduct of the Buddhist monks. Though, Buddhist views of penal justice have many similarities with both Hindu penal justice and modern Anglo-Indian penal justice, but Buddhism gave maximum importance on destructions of all sorts of
evils, denying some individual happiness, like owning private property, abstention from sexual happiness, abstention from perfume, garlands etc. There are so many restrictions that individuality is completely denied, because individual happiness is the root cause of all evils. So, when a person wanted to enter into the Buddhist Sangha, he was given three reguges and five precepts. Apart from that, he has to shave his hair, take proper bath, and use the traditional yellow robe, to destroy individual ego, and to lead a pious life, free from all evils, including the criminal activities.

Killing of living beings is forbidden for the Buddhist monks. Even supporting speech to kill others is also prohibited.

"The use of speech in killing others is also equally serious. A sramanera should not praise death with a mind to make others commit suicide, nor should look for the services of a murderer, not appoint any one also to kill another person." 4

Here, it is clearly described that, one should not by anyway take part in killing an animal directly by him or through some one. If he kills a living being indirectly through some one, responsibility would definitely fall upon him. In Buddhism, always mental element is taken into
consideration in comparison with other systems of thought. Essential ingredients were specifically mentioned by the Buddha himself, like the present day penal system of any civilized country. Even previous arrangement to kill any living being was also held illegal.

"Not only with these methods a sramanera is forbidden to kill others, but he is not allowed to make use of even purgatives, poisons, weapons, etc., for the purpose of killing living beings."5

To meet the growing demands of the society, the Buddha, in this way prescribed various rules "to do" or "not to do" the acts. It was possible for the Buddha because he never prescribed rules and punishments for the entire society. He prescribed rules and punishments for the violation of rules, and the monks were so few that it was possible to cover the whole range of the crime and punishments for a delinquent monk. Apart from that, there was no clear distinction between crime and tort. So every civil and criminal offence was treated as crime. But most of the Buddhist penal laws are confirmed with the modern criminal laws. Hindu penal philosopher prescribed both religious and secular offences separately, but Buddha prescribed only the religious offences. Secular offences did not take place in Buddha's code of
conduct. Retributive system of punishment has no place in Buddhism. They never think in terms of revenge or vengeance. On the other hand Buddha gave much importance on the reformatory type of punishments. Buddha clearly mentioned some special circumstances, where a monk cannot be held guilty for the offence committed by him. Some "excepting" like confuse stage of mind, Abstentions of deliberate, intuition etc. were specially mentioned by the Buddha like the modern day penologist.

"If a Srmanera kills someone else due to confusion in recognising the man intended to be killed, there is no offence involving abandoning of the vows (Sanvara-tyaga)."6

Here is a difference between the modern penologist with the Buddha. In modern penology there is no specific difference between a person intending to kill or any other person. But in Buddhism, if the monk intended to kill him, then he has to suffer sanvara-tyaga offence, otherwise the monk is simply guilty for committing a minor offence.

Apart from that criminal abetment, instigation etc. were also nicely described by the Buddha. He forbids various ways and means of killing a person. So instigation to kill a person was held a great offence, as it is clearly mentioned in the text, srighanacharasangraha tika.
"He should not point out dangerous place like bathing place on the bank of the river where there lies danger from snakes and water currents, to others with a mind to cause them death."  

As the activities of the Sangha advanced, rules framed by the Buddha became more and more complex, so a clear distinction was drawn between intention to murder and murder, and also the various ways of murder. So punishment was also different for offences relating to human body. Punishments prescribed in Buddhism, not only for striking a man, it includes animal also. Buddha distinguishes different kinds of hurt committed by a monk to some one. Prevention of crime or the precautionary measure was recognised by Buddhism. In Hinduism the measure was taken by the king through his spies. Buddha clearly mentioned various punishments for instigation and conspiracy like the modern penal systems. Buddha mentioned about various offences and punishments so minutely that even modern day penalologists are also ignorant about it, and lack of various penal provisions in penal code shows their inability. Apart from that, in comparison with modern penologist, Buddhism stress greater importance on morality. Like other legal system, there was no any difference between law and morals. Every murder, attempt to murder etc. were held immoral acts. Morality was the rule, standard of
behaviour in those days. As it is aptly described by Dr. S. N. Dhyani:

"Morality, therefore, is not merely a body of abstract ideals but of living rules which are sanctioned by the moral codes of a community and guide and control human behaviour in the ordering of society."\(^8\)

All Buddhist rules were regarded as living laws in those days, and their interest was to protect the Buddhist society. The basic aspect of the Buddhist law is to realise, protect, promote and serve the Sangha. Buddhist law developed on the community itself, not from the legislation or judicial decisions like any other modern law. It was based on consent of the people and whole heartedly followed by the people. Buddhist laws are much wider in comparison with the secular laws.

The distinctions between Sanvar-tyaga offence and minor offence clearly shows the depth of Buddhist laws in those days. Murder was regarded one of the most heinous crime in those days, and different kind of murder and its punishments have been clearly mentioned in various Buddhist text. Various exceptions of murder are also provided in Buddhist laws, like modern days, penal provisions of exceptions to murder. In Hinduism, capital punishment was one of the most common
punishment, even for a minor offence like, insult to a Brahmin by a Sudra. But in Buddhism, they never regarded capital punishment as a form of punishment. In fact, the highest punishment in Buddhism is expulsion from the Sangha of the delinquent monk. Though capital punishment was not regarded as a form of punishment, but like modern penal code, in Buddhism also various ingredients are clearly mentioned to charge a delinquent monk for the offence, murder. As it is clearly mentioned in various Buddhist texts.

"While killing a man, five factors appear there. These are Upakrama, arsanjna, narah, vadakachetana and Jivitaksaya." 9

Like modern penal code, Buddhist penal code also is full of relevant ingredients. Upakrama means preparation, while killing a human being, preparation must be there to fulfil the various ingredients of killing. In this way arsanjna means the person, some one is preparing to kill him, must be a human being, or some one should not be confused that he is other than human being or from the class of human being. Narah means human being, he must be sure that the person he has already killed or he is going to kill is a human being. Vadakachetana means mens rea or guilty mind. In this way Jivitaksaya means completion of the offence of
death. The offence of death has already been completed. In case of punishment of death, Buddhist in ancient India gave much importance in religious administration of penal sanction and the secular idea of penal sanction did not find place in ancient India. The punishment for this type of offence is samavara-tyaga. Samvara means who possess the vows, and tyaga means sacrifices or renounce. Buddhist laws are not like lawyers law in a strict sense. Buddhist law is full of ethics and morals. So, not only killing man is prohibited by the Buddhist law, but killing other animals is also prohibited by Buddhist law. So preparation of meat specially for a particular monk is also prohibited.

"A sramanera should not take meat or the like, which is specially prepared for him, for he may, due to greed roused by it, do the act of killing."^{10}

In Buddhist law, other crimes like theft etc. is also properly explained, giving various ingredients of theft like modern penal laws. In modern penal laws the necessary ingredients of theft are -

1. Dishonest intention to take property,
2. The property must be movable,
3. It should be taken out of the possession of another person,
(4) It should be taken without the consent of that person.

(5) There must be some moving of the property in order to accomplish the taking of it.

So, in Buddhist law also various ingredients of "theft" were also mentioned. In Srijhanacarasangraha tika various ingredients like intention to steal, consciousness of stealing and the sense of gain etc. are specially mentioned by the author.

Various acts consisting of slight harm were also recognised in those days by the Buddhist law. It was recognised in those days as trifles like the Roman maxim "de minimus non curat lex" law takes no accounts of minor offences which are negligible. It is mentioned in Buddhist law also that one should not take into account very minor and negligible offences. "If the thieves do not return the stolen bowl or robes, he should threaten them (should rouse in them fear). But he should not go so far as to report the matter to the king or his court."11

Sex offences like rape, adultery etc. were also dealt with according to the customs and their own rules. Every sex offence, taking delight from women, men or other animals explain differently and dividely. All this natural
or unnatural sex offences was technically called Kṣatasarvara and the person concerned ceases to be a Yati.

Apart from various sex offences and its punishments, Buddha also prescribed various norms for both male and female to maintain dignity and honesty in the society. So praising various organs of women, lustful gestures etc. were also prohibited. Sex offences were analysed by the Buddha vividly, even modern penology is also not very clear in this regard in comparison with Buddhist penal philosophy. Buddha even restricted the beautification of body and face to control the mind and to minimise the sex offences. Apart from that, beautification causes untoward lust, indiscipline, anger etc. In this way in Buddhism, the concept of individuality is to some extent deviated. Buddha restricted on owing of private property also, because greed is the root cause of all evils. Buddha was generally concerned with the religious sanction, not with the secular penal sanction of law. Of course, according to various Pali literature Buddha was friendly with many kings of his time and had given advice from time to time regarding the administration of penal Justice by the king.

As it is mentioned earlier also, that Buddhist penal code enforced to purify the Sangha, so that monks keep themselves clean in their daily way of life. Buddhist laws are holy laws for the believers of Buddhism, that is why the
validity of Buddhist laws can't be questioned. Another important aspect of Buddhist laws are law and religion overlapped each other, and law is considered as the branch of Dharma. Buddhist regarded religious and criminal laws as body of speculative ideal which cannot be changed. Moreover, Buddha was sure that severe punishments can't help in reducing crimes. Similar nature of punishments are available in Hindu penal philosophy also, which is technically called "Prayascitta". Both Buddhist and Hindu way of punishment is the way of purification by realising the past misdeeds. It checks the criminality in society. The aim of Buddhist laws are confession of the past misdeeds, begs pardon from the Sangha, and final determination not to do the same misdeeds in future. Buddhist system of confession and Hindu system of Prayascitta is so popular among the people that it is regularly practised in every Buddhist and Hindu countries even today also. The system is still popular among the general people because, complete co-operation of the mind of the wrongdoer is possible only in the system of expiation and confession in Indian thought. But in the system of punishments wilful co-operation from the part of the criminal is impossible.
Hindu views of religious and penal justice:

Hindu views of penal justice not only regulate the relationship between man and man. It also regulates the relationship between God and the common people. Because of these divine relationship between God and law, according to Hindu religion, it is valid law. So, it can't be violated by any Hindu. Like every other religion, in Hinduism also we get a distinction between rule of law and rule of religion. Religious code try to remove the sin from the society, but the penal code only try to remove the crime from the society. Manu, the great Hindu law giver classified sin into four divisions, Mahapataka, Anupataka, Upapataka etc. Mahapatakas are the highest form of sin, like killing Brahmana violation of bed drinking wine etc. Anupatakas are similar type of sin with Mahapatakas. Upapatakas are the smaller offences like killing cow, assaulting one's father, mother, teacher etc.

Pataka: Pataka or sin is a very complex phenomena. It is very difficult to define, simply we can say that, violation of law laid down by God is sin or pataka.

In Rgveda, it is mentioned that, "Sin is due to fate of human being, due to intoxication anger etc."
In Bhagavad Gita also Krishna answered to Arjun that "It is lust and anger spinning from the element (Guna) of Rajas (Passion) that are the enemies of the man in this world.13

In early periods acting contrary to Dharma was regarded as sin or pataka. Pataka or sin disturbs one's personality in relationship with his own Dharma, i.e., his relationship with God, Varna etc. So, it may not disturb in the smooth running of the society.

In Rgveda a clear distinction was drawn between various sins and it was divided into seven grades, for example, theft, violation of bed (of the guru) murder of Brahmana, murder of bhruna, taking wine, repentance of the same sinful act and telling lie.

Prayascitta : Prayāscitta means the self inflicted punishment by the wrongdoer himself, and to remove the sin the wrongdoer prayed for mercy before God, Brahmana and the assembly of the people. Apart from that, there are various other ways of reducing sin. For example, confession before the assembly of the people or while begging alms. Repentance by the wrongdoer for his own misdeeds. Pranayama, Tapas, Homa, Japa, Dana, Upavasa, Tirtha Yatra etc. are the various ways of prayascitta. In prayascitta complete purity of hurt,
detachment, abstinence from food and drink etc. are necessary to purify his body, mind and soul. Generally a well-versed assembly of Brahmanas can prescribe the vidhis of prayascitta to a wrongdoer. Of course, the assembly of the Brahmanas can reduce the prayascitta to a wrongdoer, if it appears that the person is weak, old or child of tender age etc. But the prayascitta can't be reduced out of fear, greed etc. In prayascitta system, no physical punishment is mentioned, but pecuniary imposition are mentioned everywhere. Generally the term "Dharma Danda" is applied for the pecuniary imposition.

"Prayascitta or penance should be given after taking the Dharma danda, whoever violates this rule he will also be a sinner."14

Prayascitta system is against the physical punishment, but instead of physical punishment, fine and confessions are regarded as the way of deterrent and reformative methods of punishments. The assembly of the Brahmanas should be well-versed in all Shastras to prescribe the real 'Danda' to the wrongdoers. Of course, while prescribe punishment towards wrongdoers they have to take into consideration the varna and caste system of Hindus. In some cases punishments towards Brahmanas was always high, and in some cases punishment towards Sudras was always high. In this way punishment towards Kshatria and Vaishya were also according to their own
In this way "Dharma Danda" differ from one to another according to his Varna or caste. But "Dharma Danda" is must for everyone. If some one prescribe prayascitta without taking the "Dharma Danda" he is also regarded as sinner. The imposition of "Dharma Danda" or Fine was not uniform to all persons. The economic condition of the wrongdoers were also taken into consideration. During the time of the imposition of Dharma danda, it has to see that the person impose the Fine is rich or poor. If the wrongdoer is a rich person, then he has to pay more in comparison with the poor person.

In early period the fine impose for prayascitta was known as "Dhenu". Dhenu means cow. The wrongdoer has to give cow or the value of cow to the assembly of the prayascitta imposing authority. But the danda or the fine giver to them were divided into four divisions. The danda giver gets one portion, the religious assembly get one portion. One portion is divided among the common people and the last portion is for the king.

"For a rich person, the pecuniar value of prayascitta is Rs. one and twenty five paise, who has no much money for him twelve annas and for a poor person four annas for one Dhenu of prayascitta, and this Dharma danda has to divide into four divisions, one for the Danda giver, another division for the religious society, one another division for
the king and the last division should donate to the layman.  

For those persons, who can't provide Dharma Danda, 
alternative arrangement are also made for them. Fast is one 
of the alternative way of prayascitta. 

"In the fasting of prayascitta, one can eat only 
early in the morning for a day for three days. For another 
three days one can eat in the evening only without begging he 
can eat for three days. Fasting, for complete three days, one 
should avoid meat, fish and sexual intercourse for this 
period of fasting. In this way, if one can complete twelve 
days of fasting, then he has not to go for one dhenu 
prayascitta." 

The ingredients of various offence, like common 
intention, mens rea etc. are also specially mentioned by the 
Hindu law givers. The main ingredients, according to Manu 
can be divided into five divisions. They are "Vadhi" who 
kills, "Prayojika Karta", who gives order to kill, "Anumanta 
Karta", who has clear idea regarding the offence, "Sakshata 
Karta", who himself kill by taking the weapon in his hands, 
"Anugraha Karta", who helps the offender in killing, "Nimita 
Bhagi" for whom the offence was committed. For all of them 
prayascitta must be in proportion to their crime.
According to Manu -

"Sāksata prayojakam caiva tatranugraham kila,  
Anumanta himantasca khyata pance vidha vadhi."¹⁷

Hindu customary laws considered special circumstances,  
and circumstantial evidence, while awarded prayascitta. So,  
the nationality, time, age and the nature of the offence was  
taken into consideration, while awarding prayascitta to the  
wrongdoers. So, due determination of various circumstances  
was essential in Hindu customary laws.

According to Vishamitra -

"Penance has to be enjoined after due determination of  
the circumstances, the age of the sinner, the gravity of the  
sin committed, the physical and financial capacity of the  
sinner etc."¹⁸

In Hindu customary laws, liberal punishment was  
awarded to the Brahmins, but in comparison with Brahmanas  
severe punishments were awarded to Sudras, because Brahmins  
were regarded as the superior class and the Sudras were  
regarded as the lowest class in the Hindu Varna system. The  
punishments awarded to Khetriya and Vaishya were also not so  
much severe in comparison with Sudras. The reason behind
the liberal punishments towards Brahmanas may be because of the fact that, Brahmanas during ancient times were regarded as the most honest and virtuous class of the society.

In Hindu customary laws, the system is still continuing. So, killing a Brahmana was regarded one of the highest punishments in ancient Hindu customary laws, and today also it is valid in the Hindu customary laws.

According to the Great sage Yajnavalkya -

"A killer of Brahmin has to undergo penance for 12 years, otherwise the sinner be expiated by giving away 360 cows."\(^{19}\)

Brahmanas were regarded as the highest class in ancient India by virtue of the honesty and virtuousness, but surprisingly the punishment awarded to a Brahmana, who kills a Sudra was "Mundana" or shaving of the head. Of course, in some cases imposition of punishments towards Brahmana were very severe.

The personal laws of Hindus, which are confronted today in our society may not have been thought by an ancient law giver. Of course, solution to these problems are available in various Hindu Shastras, and it gives us clues to future revision of Hindu personal laws. Hindu personal laws
deals not only with what the personal laws is, but it deals also what the personal law ought to be. The Hindu views of personal law is now rapidly displaced by Western legal institutions and culture. Buddhist personal laws have some similarities with the Hindu personal laws, because the origin of Buddhist personal laws is the Hindu personal law.

"Rules of conduct were specifically laid down for the monks who were followers of the Buddha. Most of these were borrowed from Brahmanical tradition and consisted of such prohibitions everywhere familiar in India, as not killing, not stealing, not committing adultery, not fornicating, not lying."\(^{20}\)

Both the Hindu and Buddhist personal laws, sins can be overcome by accepting the Jurisdiction of the law of nature or law of God, and repentance and expessions is the only way to achieve the judgement from the God. So, for the Hindus and Buddhist sin are those activities which takes a person away from the purity within that very person. Of course, the ideas of morality or purity change from time to time. Interestingly the prayascitta system prescribed in the Hindu Dharma Shastras and the procedure of repentance prescribed in the Vinaya pitaka for the Buddhist are remain the same from ancient times. Of course some modification of personal laws
of Buddhist and Hindu laws are allowed, if it is based on appropriate reason. Both in Hindu and Buddhist personal laws mere allegation of sin or crime was not sufficient. Due investigation and enquiry was one of the essential conditions, while awarding punishments to the wrongdoers. In Hindu personal law, classification of punishments among various caste or varnas was not arbitrary. Reasonableness was one of the most essential conditions while awarding prayascitta. The object of the classification of Hindu personal law was always lawful. It was made on good faith. Now in the light of present day social condition we may criticise the prayascitta system, but in early periods, Hindu law givers were correctly understand and appreciates the need of its own people. The discrimination to which we are pointing were based on adequate grounds. Classification may not be always scientifically perfect and logically complete, which is recognized by our present law also. The classification made by them were mostly on historical reason. In community from both civil and criminal process is still recognized in most of the countries in world, to those persons who belong to the royal or priestly class. Hindu classification of punishments was not based on caste system only. Hindu law givers considered other objects also like age, economic conditions, social position etc. Thus young offenders were classified from the old offenders. Economically poor offenders were classified separately from
The four divisions of Hindu varna system was not common among the general people. The divisions were among Gods also. Commenting on Aitareya Brahmana I.2.3 Sayanacaryya observes -

"There are four caste among Gods as well. Among them Agni and Brihaspati are Brahmanas. Indra, Varuna, Soma, Sudra, Orahabta, Yama etc. are Ksatriya. Vasus, Adityas, Visvedevah, Maruts etc. are Vaishyas among the Gods. Pusana is Sudra." 21

The minute division of Gods were not based on political reason, like the varna system of common people. It was based on temperament and various nature of the Gods.

Hindu system of division or classification were so common that they differential between various classes of animals also.

"Not only among Gods and men but in the animal world and the vegetable kingdom as well this caste distinction is met with. Thus the goat is Brahmana, the horse is Ksatriya, and the ass is both Vaisya and Sudra." 22

So, ancient Hindu philosophers divided even animals and vegetables also according to their nature and temperament.
Divisions on caste lines among general people, we can say it on political reasons, or their must have some vested interest on it. But divisions on caste lines of animals and vegetables is not at all for political reason, and we cannot say that their is vested interest also.

Ancient Hindus tried to divide the whole universe and its creatures, according to their nature, quality and temperament.

"In the vegetable kingdom palasa (Butia mono-sperma) is Brahman and Durba (Sacrificial grass) is Ksatriya."\(^{23}\)

Lord Krishna himself answered to Arjuna in Gita that "It is lust and anger springing from the element (Guna) of rajas (passion) that are the enemies of man in this world (Gita, III.37). So naturally due to lack of "Sat Guna or good quality, there may arise raja-guna, and those raja and tama gunas are the enemy of the people. So the prayascitta, system of ancient Hindus were according to the nature and temperament of the offender. The Brahmanas were considered one of the most sober class people full of Sat guna or good quality. Contrary to that the Ksatriya, Vaishya or Sudra classes of people were considered as full of Raja and Tama Guna. So the degree of prayascitta were different according to their own nature and temperament of the people."
Personal laws of Buddhist and Hindus were so important for the common people, even the king had jurisdictions in this regard.

"The King had jurisdiction to punish sinners if they did not agree to undergo the prayascitta prescribed by the parisad."

On the other hand the main instrument of the community against the wrongdoers is they may, at any time excommunicate the wrongdoer, if the wrongdoer does not undergo the prayascitta system. Contrary to that, the highest punishment awarded in Buddhism or Buddhist personal laws are the expulsions of the delinquent monks from the Sangha. The worst offences, according to Buddhism are known as parajika, parajika offences are similar with Mahapataka of Hindu penal philosophy. But in Hinduism, killing of a Brahmana is regarded as the highest offence, but in Buddhism as there is no any class distinction killing of a person is regarded as the highest offence or parajika.

Parajika offences are those offences like, lack of self-control. Buddhism regarded self-control as one of the most important way of realizing Nirvana and it helps himself to curtail the needs of a physical person and remove every trouble. Theft is also regarded as parajika offence in
Buddhism. Murder or conspiracy of murder etc. are also regarded as the parajika or the highest offence in Buddhism. The second category of offences regarded in Buddhism are known as sanghadisesa. If a monk commit any sanghadisesa offence, in that case the monk may be suspended temporarily from the Sangha. It mentioned various offences like false accusations, illicit relations among monk and nun, obstinacy etc. Apart from that, the other offences are Aniyata, Nissaggiya-pacittiya, pacittiya, patidesaniya, Sekhiya, Adhikarana-samatha etc. We are going to discuss these offences in details in other chapters. There are many differences between Hindu personal laws and Buddhist personal laws, but Buddha never contradict with the Hindu personal laws and philosophy. On the other hand he excepted some doctrine from Upanishad of Hindu origin. But Buddha raised his voice against the domination of Traivarnika.

Hindu personal and penal laws also borrowed many ideas from Buddhism. In the concept of Sila, Buddhist classified physical and mental action separately, for example, the three physical acts are killing, stealing and adultery. The four vocal facts are, lying, malicious speech, vocal speech, frivolous speech etc. which I have discussed in the second chapter in details. In Manu's code of conduct, we can notice many similarities with the Buddhist idea of personal
law and its concept of Sila.

"When we look into Chapter XII of Manu's Book of law, we are struck by the close affinity between its ideas and terminology and those of Buddhism. The Book of law, while explaining the ten varieties of the unmeritorious act says, "Coveting the property of others, evil thought and vain attachment are the three acts of mind; harsh words, false speech, malicious talk, and frivolous are four acts of the tongue, stealing, killing, and intercourse with another man's wife are three acts of body. Again in verse 10, the definition of tri-dandin, the mercant with the triple staff, is given in true Buddhist fashion. The person who has been able to bring under control all the three violences (dandas), vocal mental and physical, is called the tri-dandin. This fact is ample evidence of how Buddhism and Buddhist ideas influenced ancient Hindu writers. Such cases of the borrowing of ideas can be multiplied."25

Both in Hindu personal and penal laws, some types of arbitrary punishment was prevailing in ancient time, because the high caste Hindus did not give any type of opportunity to protest against the arbitrary punishments with the development of Buddhism, these types of arbitrary punishments were completely checked not only in Buddhism but in Hinduism also.
With the development of time forms of punishments have also taken different shape. Harsher forms of punishments were ignored by the ancient law givers probably it is because of the influence of Buddhism in Indian society. Manu, the great Indian law giver systematically prescribed four forms of punishments.

"Vak-danda or (warning), Dhik Danda (Censure), Dhara- danda (fine or forfeiture of property), Vadhadanda (all sorts of physical punishments)."^26

Except the Lokayata philosophy, all system of Indian philosophy believes in Karma phala. Indian people are mostly concerned not with this world, but with other world. Every Indian people have a great faith in the theory of Karma vipaka and punarjarma or rebirth. So, both in Hindu and Buddhist society the theory of rebirth and Karma vipaka tried to prevent the criminality in the society. According to Indian philosophy, the present life is the result of our past life. Specially, Hindu philosophy believes that soul is immortal, and there is a chain of birth and rebirth till one attain the highest goal the 'Moksha' or salvation. According to Hinduism, the present birth is not important, the only important thing is Moksha. According to Veda, the soul is immortal, only the human body is mortal. A person obtains pleasure and pain through Karma in the present birth, but
through knowledge (Jnan), one becomes pure and attain the "Moksha" or liberation. Hindu philosophy, apart from the Karma-phala, believed in destiny also. Our present life is running in the interaction of both Karma and destiny. Bhagawad Gita also propounded the theory of Karma, and according to Gita complete inaction is death. So Karma is necessary in our life, but one should not wait for fruit of action or Karma-phala. The fruit of action is in the hand of the God. So one should not be mindful about his Karma.

Indian law reflects all the theory of ancient Indian thought. "It is a comprehensive code to regulate human conduct in accordance with the unalterable scheme of creation and to enable every one to fulfil the purpose of his birth. The whole life of man considered both as an individual and as a member of groups (small or large) as well as man's relations to his fellow men, to the rest of animated creation, to superhuman beings, to cosmos, generally and ultimately to God, come within the purview of the Dharma Shastra. Among the duties that it lays down are both self regarding and altruistic, those to the living and to the dead to those who are alive and those who are yet to be born."27

In this way, all duties were also binding, and it does not matter whether it is a legal duty or other duties,
and under these duty norms, it may be the legal norms or other norms. But, under it emerged the secular laws. So, in the later period a clear distinction was drawn between rule of law, and rule of religion. So, according to Hindu Shastra debt is both a legal obligation, as well as a pious obligation. Though Hindu law is not coming from a sovereign authority in the Austinian sense, but people obeyed the law at all cost. While dispensing justice in Hindu law, maximum importance was given in Nyaya (justice) and Yukti (reason). Nyaya and Yukti are two independent elements in Hinduism. Judgement devoiding Nyaya and Yukti has no moral value. Mimansa Shastras are the best example of it. The concept of interpretation or interpretations of statues, is not a new conception for the Hindus, and the same idea interpretation is available in Buddhism also, and patimokkha sutta is the best example of it.

The only difference between Hindu law and Buddhist law is, Hindu law givers mentioned regarding the secular laws clearly. But Buddhist law mentioned only the religious laws, and the offender who committed serious crime was handed over to the king and the king may punish the offender, according to the procedure established by law. Buddhist law is not at all concern, what is the procedure established by law in secular laws.
In Hindu law, the establishment of court system or the constitution of the court was the duty of the king, and the great Hindu lawgivers Manu, Yajnavalkya, Narada, Parasara etc. were behind the idea of court system. According to this system, the king is the supreme judge, and the king may take assistance from the councillors. Both the king and the councils should be well-versed in Vedas and other Shastras concerning lawyal matters. Apart from that it was the practice of the time that they should be impartial towards their friends and enemies. The constitution of the court was also in odd number, three, five, seven etc. were the number of Judges in the court to get the proper judgement. People thought that the judgement awarded by the king or the appointed judges were inspired by the God, or according to Sir Henry Maine, the judgement were divinely dictated by the Goddess of justice. Though the Hindu legal philosophers believed in the supernaturalism, but they were not dreamers. Their practical insight regarding legal thought and philosophies are being appreciated by most of the legal philosophers of the world. Hindu law arose for the benefit of the people, so that injustice never arise in future in the society. For the Hindu law justice may be done at any time and at any place. So, for them justice is an ever green synthesis.

In most of the societies, most of the crime and other like nature offences were treated as tort, and the
wrongdoer has to pay the compensation to the injured party.
In the Hindu system of law also, specially in the prayascitta system, money was given for compensation and the money was divided (in case of prayascitta) among the king, Brahmana, and among the assembly of the people, and the wrongdoers own community. It was prevailed in other system of law also. But, contrary to that in Buddhism, the system of compensation was not prevailed among them. They thought that repentance was the only way out to eliminate the prevailing crime among the Buddhist community. In the Hindu system of law, specially in case of personal law, the wrongdoer has to pay the value of a cow, i.e., 'Dhenu' and the pecuniary value of the Dhenu were determined according to the nature of the crime. The 'Prayascitta' system and fine imposed through prayascitta is nothing but a tortious action, and physical punishment was not imposed upon them. Even in case of 'homicide' according to the 'Prayascitta' system of the Hindus fine imposed upon the wrongdoer is sufficient and physical punishments has no place here. In the later period apart from the fine imposed by the king and the assembly of Brahmanas, the king awarded some physical punishments also. The physical punishments awarded by the king was sometimes very harsh, for example, in some cases, corporal punishments, mutilation of limbs etc. were very common to them. Apart from the time imposed upon the wrongdoer, the physical punishments imposed upon the wrongdoer,
was regarded as a duty of the king. It was regarded that, if the king do not administer justice properly, he will be regarded as a sinner in this world.

However, the tortious laws occupied a less important position in comparison with the penal laws of India. On the other hand the scientific tortious laws are of foreign origin, and it is developed in our society in the modern period. In ancient India, if the injury was the personal injury then it was regarded as torts and if the injury was of the public importance, and violate the right of the public as a whole, it was regarded as a crime. Of course, Hindu law never regarded the tortious liabilities as a serious offence, as it is regarded in the law of torts in England. Law of torts in England is systematic study, and we are following the same principle in India.

Tort may be defined in this way -

"Tort as civil wrong which is redressible by an action for unliquidated damages, and which is other than a mere breach of contract, or breach of trust.

Thus, it may be observed that:

(1) Tort is civil wrong.

(2) This civil wrong is other than a mere breach of contract or breach of trust,
(3) This wrong is redressible by an action for unliquidated damages."

So, law of torts in India was prevailing from ancient time in India. But the systematic development of law of torts is the western origin and the systematic development of law of torts, borrowed by India in recent times. In modern times, it is clearly discussed what is the difference between tort and breach of contract or breach of trust. What is liquidated damages and what is unliquidated damages? Liquidated damages means the damage which has been previously determined and unliquidated dame is not previously determined etc.

The wrongs which are comparatively less serious are regarded as law of Torts and the wrongs which are more serious are regarded as crimes, and it is considered to be a public wrong.

The difference between modern law of torts and the ancient Indian civil wrong is, Hindu law did not take a serious view regarding mere in fringement of a private wrong. Whereas the modern law of torts are taking a serious vows in this regards. Even it allowed to pay compensation in such case, even if the person have not sustained any real injury or damage. Our law givers totally ignored the commercialism in law. So instead of money compensation, they
placed more importance in honour and reputation. In ancient India for minor offences, e.g., injury to property, domestic animals, cutting trees and destroying crops, fraud etc., the injured party was awarded compensation or damages. On the other hand the law of crimes had taken an important role in ancient Hindu law. In law of crimes instead of damages, the offenders were awarded punishments by the king. Four kinds of punishments were very popular among the ancient Hindus, e.g., censure, rebuke, pecuniary punishment, and corporal punishments. Censure is the lightest form of punishments and the corporal punishments are the most severe punishments. Punishments were awarded according to the gravity of the offences, and various other circumstances were also taken into consideration while awarded the punishments like nature of the offence, time, place, age, social condition etc. Ancient Indian law givers did not support the equality of punishments. Of course, there are many reasons behind it. Practical experience and practical reasoning were behind the unequal treatments of punishments.

Hindu laws in ancient India were harsh towards Sudras and also to other low caste people, while the punishments towards Brahmins were not very harsh. In fact, generally corporal punishments were not awarded to the Brahmins. There may have many reasons for example, Brahmin by varna or caste is a superior person. So, a man may not fell angry, if the
person insulted by a Brahmana, or a man may fell angry, because he is insulted by a Sudra or any other man of low caste. So, according to the injured person himself, the Brahmana deserved less punishments and the other low caste man should get severe punishments. Of course in some cases, the Brahmanas were awarded the highest punishments, for example, in 'Prayascitta' system, for the same offence, the Brahmanas had to undergo severe 'Prayascitta' in comparison with other caste people.

The offences were also divided according to gravity or degree of the offences. First degree of the offences were treated lightly, second degree offences were treated slightly in comparison with the first degree offences, third degree offences were treated very severely. But for a Brahmana, the punishments were imprisonment, banished or mark of disgrace in his body etc. instead of the third degree or the corporal punishments. From major to minor offences, most of the offences were enumerated by the Hindu jurists. Trespass, encroachments on another's property or land etc. were regarded as a minor offence, and the punishments for the minor offences were generally fine and not imprisonment. In some minor cases also though, it seems very minor, for example, try to destroy the evidence, or giving false evidence, production of forged documents etc. were regarded very serious
Corruption among the Judges was also taken very seriously. In case of any bribe taken by the Judges came in the daylight, then stern actions were taken against the delinquent Judges. Minors were regarded as immune from criminal liabilities, according to some Jurists a minor up to twelve years is immune from criminal liabilities, and according to some ancient Jurist he is immune up to fourteen years of his age. The punishments prescribed by the ancient Indian Jurist for Brahmans, minors, other offenders etc. though seem to be inequal, yet many reasons are behind the idea. Because the primary object of the law is to protect the people from the anti-social elements. They regarded the punishments as a source of purification of mind. Through punishments one purifies his mind, and can go to heaven. Punishments satisfied the retributive, deterrent, and reformative ideas of the people in the society.

In ancient Indian society, the same principles of punishments were followed by the people. Though in religious field, in Hindu religion people followed the préyascitta system, in Buddhism, monks followed the path of patimokkha rules, and purified their minds accordingly. In case of secular punishments, king awarded the penal provisions to
them, and Buddhist monks found involved in serious offences, disrobed by the Buddhist ecclesiastical tribunal after proper investigation and handed over to the king for the secular punishments awarded by the king.
Notes and References


2. Ibid., p. 57


4. Sanghasena, *A Study of the Sphutartha Srijhanacarasangraha Tika*, p. 15

5. Ibid., p. 15

6. Ibid., p. 15

7. Ibid., p. 16


9. Sanghasena, op.cit., p. 16

10. Ibid., p. 17

11. Ibid., p. 21

12. Rig.veda, VII.86.6

13. Gita, III.37

14. Yama, quoted in *Vyavahara Darpana* by Bhattacharyya; Mohi Ram Deva Vidyaratha, pp. 1,2

15. Sattrinro Smatang, Ibid., p. 2

16. Manu, Ibid., p. 2
17. Manu, Ibid., p. 3
18. Vishwamitra, Ibid., p. 4
19. Yajnavalkya, Ibid., p. 4
20. Riepe Dale, The Naturalistic Tradition in Indian Thought, p. 150
22. Aitareya Brahmana, 6.4.4-12 to 6.4.4-15 quoted in India of the Age of the Brahmanas by Basu, Jogi Raj, p. 10
23. Loc.cit.
25. Bapat, P.V. (ed.), 2500 Years of Buddhism, p. 309
26. vāgdandam pratham kuryaddhig dandam tadānamtaram, trtiyam dhanadandam tu vadhadandamatāhparam. (Manusmṛti, VIII.128)
27. Rangaswami Aiyangar, K.V., Some Aspects of Hindu View of Life according to Dharma Shastra, r. 62