THE CONCEPT OF PUNISHMENT UNDER MANU SMRITI

Concept of punishment under modern jurisprudence :

The concept of punishment under modern jurisprudence is usually associated with the law of crimes.[1] In early English Law there was no clear distinction between criminal and civil wrongs. The earliest reference to the term 'crime' may be traced to the 14th century. Prior to this it was only a law of torts.[2] It was in the year 1846 the law of deodands[3] was abolished. Now of course the law of crimes is well developed and it is an independent branch of law. However, the term 'crime' has not been satisfactorily defined. And it is admitted on all hands that it is not possible to discover a legal definition of crime.[4] But the characteristics of a crime are not in doubt. They are (i) that it is a harm, brought about by human conduct, which the sovereign power in the state desires to prevent; (ii) that among the measures of prevention selected is the threat of punishment; and (iii) that legal proceedings of a special kind are employed.[5]

The theories which are usually advanced in justification of punishment are (i) Retributive : This justifies punishment on the ground that it is a retribution for wrong doing. Here punishment is viewed more as the satisfaction of the society in the infliction of punishment. This interest of the society is usually backed up by the state otherwise it is quite likely to face a public revolt. (ii) Deterrent : By this the state aims to protect the society by inflicting punishment which is meant to act as deterrent on offender in his future behaviour and also on the like minded members of the society. This theory was very much in vogue in the 18th and 19th centuries. (iii) Reformative theory : The advocates of this theory believe in preventing crime by reforming the criminal. They view punishment as a reformative measure. Since the 19th century there has been a considerable shift in the penal policy and reformative theory is gaining more ground. This, along with moral considerations, has resulted in the abolition of capital punishment in some legal systems and also led to the removal of certain barbarous punishments which were very much prevelent in the early days.

However it may be noted that no system of law adheres entirely to any one theory.[6] Nor can it be true to justify punishment by referring to any one of the theories. Prof. Hart rightly observes,[7] " A glance at the parliamentary debates or the Report of the Royal Commission on Capital Punishment shows that many are now troubled by the suspicion that the view that there is just one supreme value or objective (e.g. Deterrence, Retribution or Reform) in terms of which *all* questions about the justification of Punishment are to be answered, is somehow wrong; Yet, from what is said on such occasions no clear account of what the different values or objectives are or how they fit together in the justification of punishment, can be extracted." The present approach is utilitarian. Prevention of crime is accepted as the main function of punishment. But there is no one view as to what is the most effective means of achieving this purpose. In the present day, courts, have wide discretion in selecting punishment laid down by the parliament. Fitzgerald observes,[8] " Today it is not uncommon to find a conflict between lawyers on the one hand, who pin their hopes on deterrance, and psychiatrists, probation officers, and social workers on the other, who place reliance rather on the reformation of the offender. The choice of the appropriate penalty, however, is a matter for the courts.... The selection of appropriate penalty is no easy matter, for the courts must bear in mind the effect of penalty both on the offender and on the community." Under the modern administration of justice, it is very difficult to express any worthwhile opinion on the effect of punishment on the offender. It involves the study of the function of at least three bodies viz., the legislature, courts and the prison administration. And again the effect of punishment on the offender is a separate study by itself. The idea which we may form from what is done by the legislature, or even from the attitude of the courts that apply to law to particular fact situations can be of limited utility unless and until we commit ourselves to a system wherein the effective co-ordination of these agencies is brought into play while punishing the offender, punishment is bound to remain as a mere philosophical speculation.[9] In the absence of that our observations are going to be of limited value.

The definition offered in some of the Legal Dictionaries serve no useful purpose in explaining what punishment means. For

instance Saunders defines[10] "Legal punishment is punishment awarded in a process which is instituted at the suit of the Crown 'standing forward as prosecutor on behalf of the subject on public grounds'; the process when instituted can be stayed only at the instance of the Attorney-General acting on behalf of the Crown, and the punishment when awarded can be remitted only by the crown or parliament. Legal punishment is of various kinds, and includes death, imprisonment and fine. It is sometimes attended with disqualification and loss of civil and political rights." This approach is more useful in differentiating the criminal proceedings from civil proceedings. Of course, it emphasizes that punishment is associated with criminal law and criminal proceedings. The modern concept of punishment involves at least three things : (i) the existence of an authority which imposes punishment; (ii) and it inflicts punishment on a person who has committed an offence;[11] and (iii) the punishment is meant to be unpleasant for the obvious reason to discourage criminal behaviour.[12]

Some General Observations on Manu Smriti :

As punishment enters so very largely into the Hindu Scheme of legal remedies some general observations on the Code may prove to be useful in understanding the concept.[13]

Unlike the modern law, Hindu Law is not the creation of the State. It is of divine origin. Manu mentions that he learnt the institutes of the sacred law from the creator and that he in turn taught them to other sages.[14]

Manu seems to have believed the maintenance of order and co-existence possible by expecting the people performing their duties. The whole code runs in enumerating duties but little about the rights of individuals. Radhabinod Pal rightly observes,[15] "The practical importance of a sound basic analysis of the ultimate legal relations can hardly be exaggerated, and it is indeed, regrettable that the problem of defining the basic relations is yet unsolved. It may be of some use to know how the ancient Hindu philosopher conceived of these relations. They conceived of 'duty'; but scarcely do they speak of 'right'. They escaped the tyranny of 'duty' by making observance of duty itself essential for one's own development." Nobody is above

dharma, but everybody is subject to Dharma. All that the king had to do was to perform duties laid down in the Dharmasastras. The king has a duty to protect and not to oppress the subjects,[16] duty to punish the wicked,[17] to study vedas and Sciences,[18] to decide law-suits personally[19] and not to begin or hush up law-suits[20]. These are but a few illustrations. The Code at length enumerates the duties of people holding different posts, occupations and the duties of the people of different castes. It is true that the Code attempts to maintain order and security in the community by expecting the people to discharge their duties. But, when a breach of that duty is committed, it is the person agrieved that can bring the matter before the courts of law. This means that he gets a right to seek redress when he is affected. A duty is imposed on the king to decide law-suits personally and through judges. And thus the proper understanding of the Code is that though the subjects have rights to seek redress from the courts, but it emphasizes the observance of duties as the basis of an orderly society.

The distinction of civil and criminal law which is very common to the modern student of law was obscure under the Code. Ramaswami Iyer observes,[21] " The Code of Manu, which is assigned by scholars to a period varying from the beginning of the Christian era to five centuries before it furnishes a remarkable contrast to the contemporary laws prevalent in Europe and to Sir Henry Maine's well-known description of them. It does not countenance any right to retaliation or extra-judicial redress or any system of private composition of crimes by payment of fixed sums of damages. On the contrary, its law of crimes is fuller and more prominent than its laws of compensation for injuries, and it prescribes punishment for wrongs which would now be regarded as wholly civil causes of action, e.g. non-payment of debt, breaches of contrast." There are only a few instances where Manu provides for compensation.[22] K. R. R. Sastry very aptly explained the want of tort concept when he said,[23] " When the Hindu philosophy of punishment is kept in the background an unerring clue is got why their minds did not all advert to the private injury to the party."

The concept of crime under Manu Smriti is different. Under modern law a crime is viewed as a wrong against the society.

State on behalf of the society comes forward to prosecute the offender. But under the Code, it is the job of the person wronged to bring the offender to the courts of law. The main reason for viewing the wrongs under the Code as crimes is that it attempts to redress them by punishment. And also there is very little about the procedure except that the king should decide cases in Sabha taking up of cases in accordance with caste.[24]

The Concept of Punishment under Manu Smriti :

Manu realised that maintenance of law and order would not be possible without an effective force behind it. Of course this is true with every law. In the modern jurisprudence the sanction behind the law is the power of the state. Manu provides for a two-fold sanction. (i) To him beyond is not a myth; but a reality. He seems to have been thoroughly convinced that few people in this world act without expectation. The whole human activity is based upon the self interest. He states that those who discharge their duties in the right manner reach the deathless state and even in this life obtains the fulfilment of his desires.[25] And even the person who commits a breach of his ordained duties can go to heaven provided he is subjected to punishment. In either case the person acts in his own interest. (ii) He provides for an authority in this world itself, with a duty to punish the persons who have committed breaches of their duties. Thus under Manu sanction consists of hope and fear. Hope to get the reward in the world which he firmly believes to exist and fear because there is somebody in this world to subject him to physical punishment. This philosophy of two-fold sanction is so deep seated in his thinking, he identifies punishment with law.

> "For the (King's) sake the Lord formerly created his own son, Punishment, the protector of all creatures, (an incarnation of) the law, formed of Brahman's glory." VII-14
>
> "Punishment alone governs all created beings, punishment alone protects them, punishment watches over them while they sleep; the wise declare punishment (to be identical with) law." VII-18

Thus according to Manu the essential characteristic of law is *danda*.

Then the question is what is law ? Dharma is a word which has passed through several vicistitudes and connotes many things.[26] An attempt to equate law with 'Dharma' may not take us to any positive conclusions. However, the concept of law under Manu seems to have been based, at least, on the understanding of two things : First that everybody in this world acts in his own self-interest.[27] Law being one of the instruments of social controls, must control the human behaviour accordingly. Secondly, that all human beings are not born equal.[28] Men being born unequal, do not have similar thoughts, aptitudes and desires. And thus for the progress of the society, he designs division of labour according to castes. And so one of the purposes of law is to maintain this order.

> " In order to protect this universe He, the most resplendent one, assigned separate (duties and) occupations to those who sprang from his mouth, arms, things and feet." Manu, I–87.

In this broad context, law includes customs, traditions[29] and through law, he tried to maintain the *status quo*.

> " But to whatever course of action the Lord first appointed each (kind of beings), that alone it has spontaneously adopted in each succeeding creation." Manu, I, 28 and also see 31.

Administration of justice by the king was a process of growth.[31] Sacred law, customs and traditions must have been administered by some different tribunals of the community. It is quite likely that these tribunals might have been functioning besides the administration of justice in the king's court. Very little is known about the functioning of these courts during that period and as such even if an attempt is made it is likely to remain as a mere guess work. Dr. Sen Gupta observes[32] " The law, i.e., the lawyer's law, was gradually isolated from the great body of customs and sacred laws which were binding on society, in the course of the development of the king's judicial administration or Vyavahara. Our primary concern would be with the development of this law." It is in this sense law has been approached in this article. King's powers of administration of justice must have been gradually increased. This is obvious from the fact that the list of topics

enumerated in different Codes varies. For instance Manu talks of eighteen topics of litigation, whereas Narada says that by sub-divisions of these topics, we may get as many as one hundred and thirty-two heads. The topics of litigation[33] under Manu Smriti are :

(1) Non-payment of debts; (2) Deposit and pledge; (3) Sale without ownership; (4) Concerns among partners; (5) Resumption of gifts; (6) Non-payment of wages; (7) Non-performance of agreements; (8) Rescision of sale and purchase; (9) Disputes between the owner (of cattle) and his servant; (10) Disputes regarding boundaries; (11) Assault; (12) Defamation; (13) Theft; (14) Robbery and violence; (15) Adultery; (16) Duties of man and wife; (17) Partition and (18) Gambling and betting.

The enumeration of these topics of litigation is not based upon any scientific classification. Punishment figures so very largely in the scheme, Manu provides punishment for a plaintiff who does not speak in the court,[34] a defendant who denies the debt proved in the court,[35] fine on a hired servant who without being ill fails to perform his work,[36] panishment from the realm for a person belonging to a corporation for having broken an agreement for avarice,[37] fine on a herdsman who allows the cattle to do mischief[38] etc. Thus in the topics of non-payment of debts, duties between the master and the servant, non-payment of wages, non-performance of agreements though other remedies figure prominently punishment is used on those who intentionally fail to perform their duties. But it may be noted that the kind of punishment provided usually is in the form of fine. It is of course true that punishment forms the major part in the topics of assault, defamation, theft, robbery, violence and adultery. There is some internal evidence to show that Manu has treated these topics differently from the rest.

> " In all cases of violence, of theft and adultery, of defamation and assult, he must not examine the (copetence of) of witnesses (too strictly)." Manu VIII–72

> " The king in whose town lives no thief, no adulterer, defamer, no man guilty of violence, and no committer of assults, attains the world of Sakra (Indra)." VIII–386

> "The supression of those five in his dominions secures to a king paramount sovereignty among his peers and fame in the world." VIII–387

These have been viewed by many as the law of crimes.[39] Of course the object here is not to put all these topics into this category or the other. This is meant only to show that king as the head of the state has a greater responsibility in supressing these offences. At least the state's concern in punishing the offenders in all these five is apparent from the Code itself. Thus it may be said that though punishment figures very prominently in these offences, it was not confined to them alone, it enters into topics like contracts, torts.

The nature of punishment :

The place of punishment (danda) is very unique in Hindu jurisprudence. For the protection of mankind Lord has created king. There are very many verses in the Smriti which identify punishment with the king.

> "Punishment is (in reality) the king (and) the male, that the manager of affairs, that the ruler, and, that is called the surety for the four orders' obedience to the law." VIII–17

Punishment occupies a high position and is the master of everything, for everything depends upon punishment.[40] The object of punishment is not to inflict pain but the idea of correction is involved. It is essential even in the interests of the offender.[41] Radhabinod Pal rightly observes,[42] "With their usual *eudaemonistic* doctrines they elevated punishment itself from the position of a mere vulgar threat to that of a sublime purifier. Punishment was necessary not to satisfy the animal avenging spirit, not to threaten the future probable offenders, not even to correct the offender; it was necessary for the welfare of the offender himself; its essence lay in its utility to the sufferer himself in his whole *existence*. Punishment had thus its own ethical value."

The king[43] in whose kingdom the offender goes unpunished and the judge[44] who fails to punish the guilty are supposed to share the guilt with the offender. Thus it appears that when an offence is committed the offender must always be punished, otherwise the guilt falls on the witnesses, judges and the king.

This administration of punishment cannot be done by unimproved minds. Nor the voluptuous, partial and deceitful can administer.[45] It should be administered by the just, wise truthful and who know the values of virtues and pleasure.[46]

Kinds of punishments under the Code :

Though caste distictions are obvious throughout the Code in the matter of punishment it is shown only in a matter of degrees. Sarkar observes,[47] "As in defamation, so also in assualt nearly the whole of the law is mainly determined by reference to the question of caste....one of the most striking conception of law by the Hindu jurists including Gautama and Manu is the direct variation of punishment according to the position and learning of the offender." Punishment is not used in a sense of injury to social dignatories but as a norm of the society as a whole. The Code provides for different kinds of punishment; imprisonment, putting in fetters, mutiliation, corporal punishments, capital punishment.[48] It may be noted that besides judicial punishments there was also a scheme of expiation for special cases, e.g., theft, adultery. The different kinds provided for sudras is undoubtedly cruel, inhuman and may even seem to be out of all proportions. A glance at the provisions of the Code on defamation[49] (given below) will justify the observations : "A Kshatriya, having defamed a Brahmana, shall be fined one hundred (panas); a Vaisya one hundred and fifty or two hundred; a Sudra shall suffer corporal punishment." VIII–267

" A Brahmana shall be fined fifty (panas) for defaming a Kshatriya; in (the case of) a Vaisya the fine shall be twenty-five (panas); in (the case of) a Sundra twelve." VIII,–268

" A one-born man (a Sudra), who insults a twice-born man with gross invective, shall have his tongue cut out; for he is of low origin." VIII–270

" If he mentions the names and castes (gati) of the (twice-born) with contumely, an iron nail, ten figures long, shall be thrust red-hot into his mouth." VIII–271

" If he arrogantly teaches Brahmanas their duty, the king shall cause hot oil to be poured into his mouth and into his ears." VIII–272.

These provisions seem to be intended only as deterrent. Cutting the tongue of a person, pouring hot oil etc., are bound to act more deterrent than the capital punishment itself and undoubtedly results in the creation of a section of society, persons with no tongues, hands etc., But it may be noted that the necessity for the application of these arises only when they decline to shape their actions in conformity with the norms of the Code. There is a threat on the king who punishes the underserved and who uses unjust punishments with the loss of heaven, fame etc.[50] The king while punishing the offender should take into consideration, the seriousness of the offence, the motive of the offender, the time and place of offence.[51] And he also mentions the places (on the body of the offender) where punishment is to be inflicted.[52]

Conclusions :

The object of punishment under the modern law is the protection of the public against certain acts or omissions which the criminal policy of a particular legal system views them as crimes. Criminal Policy being vague crimes are sure to vary from time to time and from legal system to legal system. The line which is often drawn that crimes affect the society in general whereas other wrongs affect the person concerned, is only a matter of degree. A person who in his own interests commits a breach of an agreement is no less menace to the society. If the object of all law is social justice, the law of crimes, contracts or torts differ from each other in the sense, one chooses punishment while the other compensation. In the light of the importance given to punishment under Manu,[53] it might be said that it is a novel idea to use punishment in all intentional breaches of duties, whether they are of criminal nature or not.

Administration of justice, both criminal and civil in the same proceeding as was done in Manu's times results in quick disposal of both the remedies and is worthy of consideration in a good number of quasi-criminal or minor offences.[54]

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The notion of duty is a primary one as compared with that of right. If, one of the functions of law is to mould the behaviour pattern of the people to whom it is meant, Manu's emphasis on duties needs a close attention even to day.

Department of Law,
University of Poona.

R. Ramamoorthy

NOTES

1. Kent, *Law and Philosophy*, p. 286 (1970) "Judicial punishment can never be used as a means to promote some other good for the criminal himself or for civil society, but it must in all cases be imposed on him only on the ground that he has committed a crime".

Winfield defines crime as a wrong the sanction of which involves punishment. *Province of the Law of Torts*, p. 200.

2. Maine, *Ancient Law*, pp. 369--70 (1894) : I have spoken of primitive jurisprudence as giving to criminal law a priority unknown in a latter age. The expression has been used for convenience sake, but in fact the inspection of ancient codes shows that the law which they exhibit in unusual quantities is not true criminal Law.....Now the penal law of ancient communities is not the law of crimes; it is the law of wrongs, or, to use the English technical word, of Torts. The person injured proceeds against the wrong-doer by an ordinary civil action, and recovers compensation in the shape of money damages if the succeeds.

Winfield defined tortious liability in the following way : Tortious liability arises from the breach of a duty primarily fixed by the law; this duty is towards persons generally and its breach is redressible by an action for unliquidated damages", *Tort*, p. 2 (1967).

3, Stroud's Judicial Dictionary, Vol. I, p.780 (1952) : Whatever personal chattel in the immediate occasion of the death of any reasonable creature, which is forfeited to the king, to be applied to pious uses, and distributed in alms by his almoner.

4. For reasons the reader is advised to consult Kenny's, *Outlines of Criminal Law*, pp. 1-5 (1966).

5. Ibid. p. 5.

6. Paton, *Jurisprudence*, p. 320 (1964); Current Legal Problems, Vol. 10, at p. 143 : The Criminal Justice Act, 1948 besides introducing corrective training and widening the ambit of preventive detention, has changed the technique of punishment. The emphasis is upon reformation; deterrance is first equl, or a close second.

And also see, Gillin, *Criminology & Penology*, p. 218 (3rd ed).

7. H. L. A. Hart. *Punishment and Responsibility* p. 2 (1968).

8. *Criminal Law and Punishment*, p. 215 (1962).

9. J. D. McClean and J. C. Wood, Criminal Justice and the Treatment of Offenders, at p. 85 (1969). "In view of the marked shortage of factual information about the effects of penal treatment, it is not surprising that punishment has long been a favoured topic for philosophical speculation".

10. John B. Saunders : *Words and Phrases Legally defined*, Vol. 4, p. 232 and also see 10 Halsbury's Laws of England, at p. 272 (3rd ed.).

11. In cases of vicarious liability at least the offence must have been committed by someone.

The requirmement of an offence being committed excludes the preventive measures of justice from its purview.

12. Reliance has been placed on Fitzgerald, Criminal Law and Punishment for the summary given here.

Prof. Hart speaks of five elements of punishment :

(i) It must involve pain or other consequences normally considered unpleasant;

(ii) It must be for an offence against legal rules;

(iii) It must be of an actual or supposed offender for his offence;

(iv) It must be intentionally administered by human beings other than the offender;

(v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.

13. The observations in this article are based upon Buhler's translation.

Though the enquiry in this article is limited to Manu Smriti, the concept is much the same under ancient Hindu Law in general.

14. "But he having composed these Institutes (of the sacred law), himself taught them, according to the rule to me alone in the beginning; next I (taught them) to Mariki and other sages" Manu, I, 58.

"Bhrigu, here, will fully recite to you these Institutes; for that sage learned the whole in its entirety from me", Manu, I–59.

15. *The History of Hindu Law*, p. 254 (1958).

16. VII, 2–3, 35, 80, 88, 111–112, 142–144.

17. VII, 14–34; VIII, 302, 303, 310, 311.

18. VII, 43.

19. VIII, 1–8 or through judges VIII, 9–10.

20. VIII, 43.

21. *The Law of Torts*, at p. 587 (1965): and also see H. R. Fink, Crimes and Punishments under Hindoo Law, The Madras Jurist, at p. 347 (1875); P. V. Kane, *History of Dharmasastras*, Vol. III, at p. 258 (1946) and K. R. R. Sastry, *Hindu Jurisprudence*, at p. 241.

22. Manu, VIII, 288, 393.

23. *Hindu Jurisprudence*, at p. 241.

24. Dr. N. C. Sen Gupta, *Evolution of Ancient Indian Law*, at p. 56 (1953); and also see Radhabinod Pal, *The History of Hindu Law*, at p. 330.

25. VIII, 24.

26. Manu, II, 5; "For that man who obeys the law prescribed in the revealed texts and in the sacred tradition, gains fame in this (world) and after death unsurpassable bliss." II–9.

27. P. V. Kane, *History of Dharmasastra*, Vol. I, part I p. 1 (1968).

28. Manu, II, 2; To act solely from a desire for rewards is not ıudable, yet an exemption from that desire is not (to be found) in this world): for on (that) desire is grounded the study of the Veda and the erformance of the actions, prescribed by the Veda". And also Vs. 3 and 4 f the same chapter.

29. It may be noted that even the Greek thinkers like Plato have similar ɔnvictions.

30. Manu, I, 108, II, 6.

31. Dr. N. C. Sen-Gupta, *Evolution of Ancient Indian Law*, p. 10 (1953).

32. Ibid. at p. 11.

33. The chapter dealing with the topics of litigation is Chapter VIII Civil and Criminal Law". But, one will notice in this, not only the topics ' litigation, but also rules of adjudication, delegation, protection of widows, fants qualifying and disqualifying witnesses etc. Chapter IX also deals with ith Miscellaneous Punishments. This only shows that there is a lack of /stem in the Statement of Law in the Code.

34. VIII, 58

35. VIII, 51

36. VIII, 215

37. VIII, 219, 220 and 221

38. VIII, 240

39. See Dr. N. C. Sen-Gupta, *Evolution of Ancient Indian Law*, p. 286 1953).

40. Manu, VIII-18, 22, 23 and 24.

41. VIII, 318: But men who have committed crimes and have been nished by the King, go to heaven, being pure like those who performed eritorious deeds.

42. Radhabinod Pal, *The History of Hindu Law*, p. 211 (1958).

43. VIII, 316.

44. VIII, 12, 14, 18.

45. VII, 27, 28.

46. VII, 26, 30.

47. VIII, 310.

48. U. C. Sarkar, *Epochs in Hiudu Legal History*, at p. 108 (1958).

49. It may be noted that verses from 266 to 278 of the Chapter VIII late to the law of Defamation.

50. VIII, 126, 127 and 128.

51. VIII, 126.

52. VIII, 124, 125.

53. Manu, VII, 18.

54. See Section 250 of Criminal Procedure Code.

55. *Criminology and Penology*, p. 344 (3rd ed.)

56. The idea that crime is an offence against the society is not absent in anu-Smriti.