

**A Critical Study of The Buddhist Philosophy
of Penal Justice - With Special Reference
to The Vinaya Pitaka**

**A THESIS SUBMITTED FOR THE PH. D. DEGREE
OF GAUHATI UNIVERSITY**



By

Nani Gopal Goswami

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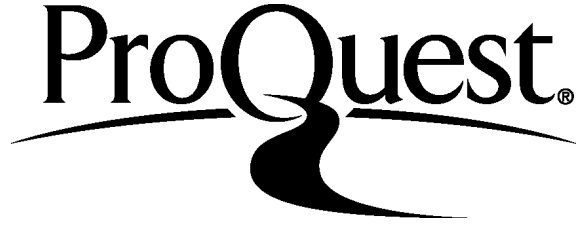
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This is to certify that the Thesis entitled "A
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"It is not the truth which any one possesses, or thinks he does, but rather the pains he has taken to get to the bottom of the truth, that makes a man's worth. For it is not in having the truth but in searching for it that those powers increase in him in which alone lies his ever growing perfection. The possession makes one placid, lazy, proud.

If God held closed in his right hand all truth, and in his left the single and untiring striving after truth, adding even that I always and forever make mistakes, and said to me : "choose!" I should fall humbly before his left hand and say : Father grant me! the pure truth is for you alone."

- Gotthold Ephraim Lessing

PREFACE

Buddhism is a universal philosophy of love, compassion and brotherhood. It is based on man's capacity to rise above selfish pursuit and lead a life of austerity and fellow-feeling. Buddhism is a rationalistic humanistic philosophy of this world rather than another world. It has more ethics than religion in the conventional sense.

Every religion has its legal, judicial and penal aspects in its own way. So has Buddhism. The whole of Vinaya pitaka is almost a legal treatise. The present thesis entitled "A Critical Study of the Buddhist Philosophy of Penal Justice - With Special Reference to Vinaya Pitaka" is an attempt to analyse the Buddhist legal philosophy and to bring to focus all its salient features. We have done this in the light of the Hindu legal philosophy as also the Western legal philosophies.

In order that a straight argument might emerge from the whole work - we have used quotations as less as possible. Sometimes the point of enquiry gets lost in the jungle of extracts. We had to do a lot of recasting of the materials in order to make the thesis as plain as possible. This explains the occasional free writing, without reference, in

the thesis.

The thesis has in all seven chapters. The first chapter is introductory and the last chapter has our conclusions. The remaining chapters form the core of the work. The first chapter introduces Buddhism and Buddhist legal and penal philosophy. Here we have discussed the origin and development of Buddhism, its ramification into several sects and sub-sects, the social milieu responsible for the formation and development of Buddhist code of conduct etc. We have dealt with the Buddhist Sangha life also, with reference to the training of the monks.

In the second chapter entitled "The Concept of Law and Morality in Buddhism and Hinduism", we have tried to understand the concept of law as available in the Hindu Shastras, the Buddhist scriptures and the Western law books. We had to do this because, the Western concept of positive law is so pervasive these days, that it is always easier to understand any concept of law in its light. And the Buddhist law, naturally, has to be understood by comparing and contrasting it with the Hindu concept of law. We have referred to various Silas, the backbone of Buddhist discipline, in this chapter.

The third chapter is entitled, "Buddhist Concept of Crime and Punishments". The materials here are largely drawn from Patimokkha sutta. Various crimes and the punishments meted out to the criminals have been discussed.

The fourth chapter is "Origin and Growth of Buddhist Code of Conduct". Material for this chapter has been drawn from the Vinaya pitaka. How starting with the formulation of code of conduct for the regulations of monks' life, Buddhism came to have possibly the first codified laws of the world has been traced.

The fifth chapter is entitled, "The Buddhist Code of Conduct with Special Reference to the Patimokkha". The Patimokkha is the best example of codification of law. In this chapter, we have tried to understand the influence exerted by Patimokkha sutta so far as the Sangha life is concerned. Various offences and the punishments have been discussed.

The sixth chapter is entitled "The Buddhist and the Hindu Views of Penal Justice". The concepts of punishment in Buddhism and Hinduism have been delineated. There are definite points of difference between the two concepts. In the process of their growth, both Hinduism and Buddhism had been influencing each other, in so far as legal issues were

concerned. We have tried to understand this aspect of the matter also. At the same time, we have shown that, unlike in Hinduism, Buddhism did not interfere with the secular life of a man. Buddhist laws were for the monks. The king was enough for the secular activities.

The seventh chapter has our conclusions.

I take this opportunity to acknowledge my gratefulness to some persons, but for whose help I could have hardly completed the work.

I express my sincere gratitude to my guide Dr. Sibnath Sarma, Reader in Philosophy, Gauhati University. I am specially thankful to him for the friendly indulgence that he gave me in spending hours on end, discussing intricate issues of Buddhist philosophy.

I also thank Professor D. K. Chakraborty, Head of the Philosophy Department, Gauhati University for his interest in my work and also for allowing me the use of the departmental library.

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Nani Gopal Goswami
(Nani Gopal Goswami)

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Chapter I

I N T R O D U C T I O N

Buddhism is a universal philosophy of love, compassion and brotherhood. As a rationalist humanist force, it deeply affected the religious, moral and social ideas in its period. There are many factors responsible for the emergence of Buddhism. Hinduism, of course, not all the sects of Hinduism, allowed animal sacrifice. But Buddhism relentlessly campaigned against the practice of animal sacrifice. The system of animal sacrifice, flourished under the active assistance of Brahmanas, and in this way, Brahmanas occupied an important position in the society. The cruelty involved in the animal sacrifice and the caste-system prevailing among the Hindus, formed public opinion against the system of animal sacrifice and caste-system. They regarded Ahimsa as the highest principle. Apart from that, they denounced all claims of superiority on the ground of birth only. On the other hand, Hinduism is an unorganised religion: but Buddhism is the first organised religion in the world. So, the organised force of Buddhism was in a far advanced position in comparison with Hinduism. Apart from the Ahimsa principle and the notorious caste-system, it was one of the main reasons of emergence of Buddhism in India. Buddha's method of organization was also unique; he never allowed two monks to

go in the same direction for preaching the dharma. The monks were allowed to teach the dharma throughout the year, excepting the rainy season.

Buddha's His method of approach to the mass people was also unique. He never tried to deliver ^{his} lecture in an uncommon ^{in familiar} language. He always used the local [^] language of the people, so that people easily understood his message. His method of formation of the Sangha shows his unique ability as an organiser. The working of the Sangha shows the democratic methods applied by the Buddha. Every member had his own voting right, and the decision of the majority was regarded as the final decision of the Sangha.

Spelling should be uniform.

Even after the death of the Buddha, he left the Dharma and Vinaya as the guide of the Sangha. He did not appoint any successor for the guidance of the Dharma. Another reason of the emergence of Buddhism is that the Buddha himself did not feel that he was establishing a new religion, and also the people of the time did not feel that Buddhism was a new religion. Contrary to that, they regarded that Buddhism was an off-shoot of Hindu religion. ^{The} Hindus believed that Buddha is the ninth avatara or incarnation of Vishnu. ^{The} Buddha did not condemn Hinduism, but he condemned ^{some of} the dirty systems of Hinduism, like caste system, [^] animal sacrifice etc. His ^{It is a practice with a good} humanism, crossed all racial and national barriers, ^{as} Dr. S.

Radhakrishnan observes, "History has become universal in spirit. Its subject matter is neither Europe nor Asia, neither East nor West, but humanity in all lands and ages."¹

Apart from his organizing capacity, his opposition of animal sacrifices etc., the main strength of the Buddha's religion is the philosophy of religion. According to him, every thing is subject to destruction, every thing is full of suffering and everything is substanceless. His theory of causation or dependent origination is one of the most valuable theories of Indian philosophy. According to this theory, the life itself is like a wheel of cause and effect. Avidya is the main reason of all of our sufferings. From Avidya or ignorance arises ^{in Sanskrit?} the action, and from action arises the consciousness, and in this way phenomena, contact, feeling, craving, grasping, birth suffering etc. arise one after the other depending on the previous link of the chain of causation. Hence, we have to destroy the ignorance or Avidya which is the main reason of human existence and suffering.

The theory of dependent origination as outlined above is a part of the Second of the Four Noble Truths which comprise of the essence of the Buddha's teachings. The Four Noble Truths that have become a universal celebrity are : (a) There is suffering, (b) There is a cause of suffering, (c) There is a cessation of suffering and (d) There is a way leading to the

cessation of suffering.

The Buddha like a good physician gave the way, how someone can remove his sufferings. According to Buddha, the only way of salvation is Nirvana. It is the highest goal, according to Buddhism. According to the Buddha, the way that leads to the Nirvana is the eight-fold noble path. The eight noble path means one has to avoid the two extremes and should only follow the middle path. The first step of middle path is the right view. The second one is right mental resolve. The third one is right speech. The fourth one is right action. The fifth one is right livelihood. The sixth one is right effort. The seventh one is right mindfulness. The last one is right concentration.

Apart from the Four Noble Truths Buddha recognised the theory of Karma in his own way. The reason of inequality prevailing everywhere, according to Buddha is Karma-phala, or the fruit of action. Hindu philosophy believes in Karma and atman or soul, but Buddhist philosophy believes in Karma without any reference to atman or soul. In Hinduism, unconscious acts are also regarded as Karma in some cases, but in Buddhism unconscious acts are not treated as Karma. Though the concept of Karma is of pre-Buddhist origin, the theory of Karma had been developed by the Buddha in his own way. He suggested that the best way is freedom from the Karma.

Ultimately it leads to the Arhatship and the attainment of the Nirvana. The main difference lies here between Buddhist and Hindu philosophy of Karma. According to Hinduism, Karma is the source of life and the ultimate result of the Karma is, in the hands of the God, and according to Buddhism freedom of Karma means, the way to attain the highest Buddhist goal Nirvana.

His concept, or philosophy of Nirvana, requires constant spiritual exercise and determination. The aspirant of Nirvan has to cultivate his own mind by various ways for example the Brahma-viharas, it will give a taste of life in the Brahma world. Mewa or universal love, compassion etc. Upekha, mudita etc.

According to Buddha, Dharma is ancient and it is re-adjusted by the religious men from time to time, from age to age, and in Hinduism also Vishnu, the creator of this universe comes from time to time for "Dharma sangsthapamarthaya" or to establish the Dharma. So realising, this fact, the monks should follow, the silas and rules of conduct, given in the Vinaya pitaka. Morality takes an important part of Buddhist Vinaya. In fact, Buddhist law is a kind of moral sanction and injunction. According to them the Vinaya Pitaka laid down the cultural rights to be observed, and it helps the people to transform a person from lower level to the higher level of

conduct.

"There is a blending of ethico-religious obligations with legal obligations and, at times, they lay more emphasis on the former than on the latter."²

Apart from the ethico-religious obligation, Buddha's legal philosophy was based on secular and democratic values. He never believed in capital punishment.

In Dhammapada some reference of murder and punishment of murderer is found; but it is not in this world; it is only in the other world. On the other hand the Dhammapada maintains that people can overcome anger by love, falsehood by truth etc.³ In this way unlike other religion, Buddhism never believed that its laws are of divine origin. On the contrary, Hinduism believed that its laws are of divine origin and in this way these are revealed laws. The later development of law, though it developed through human agencies, e.g., smritis, digest and commentaries etc. the origin of it are Vedas, the revealed laws, and in this way the law is sacrosanct and the validity of it cannot be questioned. But the validity of a Buddhist law can be questioned in a democratic process, because the Buddhist law is based on democratic values and ideas. In both the Hindu and Buddhist legal systems they do not give any clear cut distinction between rule of law and rule of religion. They do not mention even how it is enforceable

and according to them, the people will get reward according to their own actions, may be in the present life, or it may be in the next life, because both the Hindu and Buddhist philosophy believe in Karmaphala or the fruit of action and the continuity of life from past to future through the present.

The Vinaya pitaka is veritable store-house of legal philosophy. Vinaya leads a person to purification, because Buddhist law is a kind of moral sanction and injunction. There is a marked difference between Buddhist concept of crime and punishment and other concepts of crime and punishment. The Buddha did not mention of a particular person, or particular monk to supervise his teaching, contrary to that he instructed his followers, to follow the principles of Vinaya Pitaka.

The Vinaya Pitaka is divided into five parts -

(a) Khandhaka as (i) Mahavagga, (ii) Cullavagga; (b) Sutta-vibhanga as (iii) Parajika to Nissaggiya (iv) Pacittiya to Sekhiya and Bhikkhuni-vibhanga and (c) (v) Parivara.

The main book of the Vinaya Pitaka and one of the most important works of Buddhist religion is Patimokkha. It was written like the present days' codified laws. It consists of two parts - (i) Bhikkhu Patimokkha and (ii) Bhikkhunipatimokkha.

Bhikkhu patimokkha is related to the rules and regulations of the monks or Bhikkhus and Bhikkhunipatimokkha

is related to the rules and regulations of the nuns or Bhikkhunis. The various offences are nicely codified in both the Bhikkhu and Bhikkhuni patimokkha, according to the seriousness of the crimes. The offences which are more serious are known as parajika offence and the punishments of the parajika offences are expulsion from the Sangha. Though the Patimokkha suttras are like the present days codified laws, but various doctrines of non-Buddhist origin influenced the Patimokkha laws. For example, the development of Tantrayana, had a deep influence upon the monks and the entire Buddhist society. According to Tantrayana, the Buddha is full of love and compassion. So, he will surely forgive any monk, even if he enjoys women, wine etc. Hence, Tantrayana had a tremendous impact on the Buddhist society.

There are various sects of Buddhism as a religion and schools as a philosophy. All these grew in the course of several hundred years of the development of Buddhism. The Theravadins, the Sarvastivadins, the Mahisidakas, the Haimavatas, the Vatsiputriyas, the Dharmaguphikas, the Kasyapiyas, the Santrantikas, the Mahasanghikas, the Madhyamikas and the Yogacarins are the principal schools and sects of Buddhism. Though essentially based on the teachings of the Buddha, they differ in the details of their philosophy of life, religion and the world. These sects give us some valuable informations regarding the changing conditions of the society and the

consequent changes in law. The two most important and influential Buddhist schools are the Madhyamika school and the Yogacara school and both the schools have tremendous influence upon the Buddhist law also. Both the schools belong to Mahayana Buddhism. Nagarjun was the main exponent of the Madhyamika school. According to Madhyamika school, Sunyata is absolute, and like the middle path of Buddha, it avoids the two basic ideas existence and non-existence. According to Dr. Radhakrishnan : "By Sunyata, therefore, the Madhyamika does not mean absolute non-being, but relative being."⁴

The Madhyamika school was one of the most important schools of Buddhism and had a tremendous influence upon Buddhist legal thoughts. The other important school is Yogachara. Yoga or the meditation is the only way of achieving the highest Buddhist truth, the 'Bodhi'.

Apart from the doctrinal teaching on legal thought, special training was also given to the monks, so that they can follow real path to attain the highest Buddhist goal, the Nirvana. So, the monks, who joined the Sangha, were given some special training and it was known as Nissaya, which means dependence upon the teacher and the teachers were respectively known as Upajjhaya and Acarya. The teachers' discourses were generally on the Vinaya Pitaka. However, besides the monkish learning on the Vinaya Pitaka, many philosophical discussions

also took place in the debates or in the teachings, which were later on collected in one book and the book in the later period is known as Abhidhamma Pitaka. Of course, it was mainly the discourses of the Buddha himself.

"These Kathas or Debates on doctrines seem to have been an important and significant feature of monastic education in those early days. Out of these debates a methodology seems to have evolved, it is known as Abhidhamma which is explained as the doctrinal implication of the special meaning of the texts. The substance of these Kathas was collected in the Abhidhamma pitaka of the canon."⁵

Unrestricted freedom was given to the monks to debate on the disputed matter in their learning period. The aim of unrestricted freedom given to the monks was that the monks should strictly follow the principle of Vinaya and intellectually they must be capable of defeating the counter claims. In the early period of Brahmanical culture and religion, sages like Gautam, Apastamba, Brihaspati etc. prescribed some rules of conduct for the three privileged classes of Hinduism and they secretly guarded the knowledge only for these privileged classes. Buddha raised his voice against this view. According to him the ultimate truth should be open to all.

Buddhism treats crime and punishment in a humanistic and optimistic manner. Vinaya Pitaka and specially the patimokkha Suttas are the best example of it. Though, Buddhist

legal norms or the ancient Indian legal norms have a vast difference from the Western concept of legal norms, undoubtedly, we can say that it is only in India where idealist theory of law had developed which was based on spiritual and material idealism. This is reflected in the concept of purusarthas or the aims of life - as dharma, artha, kama and moksha which gives equal stress on the material as well as spiritual needs of men. However some misunderstanding was created by some Western jurists regarding Indian Jurisprudence. According to them the contribution of India towards legal development is nil. The concept of rule of law, prerogative writs, independence of Judiciary etc., though are of western origin, but we cannot deny the contribution of India towards rule of law, independence of Judiciary etc. because in some cases the instances of king being punished were also available.

"Generally ignorance and sometimes prejudices made us to ignore and even condemn our rich composite legal heritage, customs, traditions and ideas in the moonshine of English legal philosophy. The present tensions in Indian legal theory are also due to conflicts in western Jurisprudence which stem from the controversy on the fundamental question of nature of law and social system. Such conflicts are basically the product of diverse philosophies of life, political ideologies and political organizational systems which largely determined the ultimate values and purposes of life in such societies."⁷

Of course in India, unlike in the Western concept of law, the distinction between rule of law, rule of religion, rule of morality etc. were not clear. During the Muslim period, they either applied the Koranic law, or the old concept of natural laws of the Hindus. A conflict arose during this period regarding the applicability of personal laws, and finally with the advent of the British, the English law was applied everywhere in the country. However the English people were also ignorant regarding the native laws, and in some cases they discriminated against the Indians and resorted to the arbitrary acts of suppression and repression. In post-independence period, Indian Constitution guaranteed the rule of laws with the Supreme Court as the highest Seat of law which upholds human dignity, natural justice and other rights and privileges enshrined in the Constitution. One of the great Juristic development after independence of India, is the establishment of both the Parliament and the Courts for the good of the poor and backward classes. Both the legislator and the Judges are trying to achieve a desired goal, i.e., welfare of the country, distribution of land among the landless people, preferential treatment towards Scheduled Caste and Scheduled Tribes, trying to remove the backwardness of the people, protection to oppressed women, protection to the bonded and child labour etc.

Though, we have some rich heritage of ancient Indian Jurisprudence, we cannot ignore the influence of Western

Jurisprudence in Indian society. The concept of Jurisprudence in the modern society comes from Roman concept of law, and the concluding remark of the Roman twelve table was "Salus populi suprema lex" that means, law should be for the welfare of all. Though, the Jurisprudence of law is an old concept, but the term legal theory is of recent development. However, the influence of legal theory in framing of laws in a particular society is tremendous. Friedmann explains the legal theory in this way.

"Legal theory is linked at one end with philosophy and at the other end with political theory. Sometimes the starting point is philosophy, and political ideology plays a secondary part as in the theories of the German classical metaphysics or the Neo-Kantians. Sometimes the starting point is political in legal theories of socialism and Fascism. But all legal theory ideology, as must contain elements of philosophy - man's reflection on his position in the universe . . . the ideas entertained on the best form of society. For all thinking about the end of law is based on conceptions of man both as a thinking individual and as a political being."⁸

The new era of legal philosophy or legal theory arise when the professional lawyers confronted the problems of society and social justice. Before the nineteenth century, law was an inseparable part of religion and philosophy of

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nature etc. and it was understood and judged accordingly. In this way, the concept of Jurisprudence originated in the Western countries as a method of controlling the human behaviours with the help of ideal and abstract laws. Later on, after the Greek legal philosophers, it was developed by the Roman jurists and philosophers. Of course, it was only the development of natural law theory. For the first time Jeremy Bentham, and later on John Austin, rejected the idea of natural law theory and provided a scientific theory, which was known as positive law theory. The basic idea of this theory was "Law is command" or "Law is a set of norms enforced by the State" etc. Another theory of Western Jurisprudence is historical school and the main exponents of this school were Savigny, a teacher of Berlin University and Sir Henry Maine an European legal philosopher. According to Savigny : "Law is a product of the people's life. It is manifestation of its spirit. Law has its source in the general consciousness.(Volk & Geist) of the people. Law is pre-historic. In all societies it is found already established like their language, manners, and political organisation."⁹

Apart from the Positive and Historical schools, some other schools of law had also developed like sociological school, Realism etc. Both the schools claim that law is the synthesis of philosophy, science, sociology, etc. But the only difference with the Realist school is that realists believe in the practical idea of law. They are more interested in the

use of law than in its theory. They are pragmatic.

The impact of Western Jurisprudence on the Indian legal thought is tremendous. After the advent of British, they imposed the English law in India. Thereafter, the British law has a tremendous influence upon the Indian people. The court system and the criminal justice is also based on the English idea of law. Though the pure criminal law originated with Hinduism, and the Dandaniti and the Artha Shastra are the best example of it; but mainly it depends upon the English law of criminal justice. Buddhism occupied a small place in secular criminal justice, though "mens rea" or the guilty mind originated in the Buddhist concept of law. Buddha was mainly concerned with the personal law or the religious law. There is every possibility that Hindu system of criminal and civil justice was in force during Buddha's period also. Though he had many royal friends, there is no direct evidence that he interfered in the secular administration of justice. We can only analyse the Buddhist concept of law from the religious point of view, and not from the secular point of view and it is nicely described in the Patimokkha sutta of Buddhism. In Hinduism, sages like Manu, Yajnavalkya, Narada, Brihaspati etc. were concerned with both the secular administration of justice and the personal or religious laws. But Buddhism was concerned only with the Buddhist personal laws.

Both in Hinduism and Buddhism, absurd punishments were totally avoided, for example punishment of animals, trees etc. But it was very common in the Western countries. Tripathi says, "In ancient Greek law, animals and trees were tried in courts for their wrongful acts. In Roman law also, in some cases, inanimate objects were considered as having rights and subject to duties."¹⁰

In Hinduism and also in Buddhism, the retributive and deterrent punishments did not find favour, that is why punishment of animals, trees etc. was an absurd idea to them. They believed in prayascitta or cittasudhi or the purification of mind. Our ancestors were guided by the higher idea of Dharma, for the welfare of the entire mankind. Their logical consistency is one of the most important factors in the development of the Dharma law or the secular law. Apart from the logical consistency, for the Hindu, the law is directly coming from God, and for the Buddhist it is directly coming from the Buddha. So for both the communities it is directly coming from God or from the Supreme source, it may be the God or Buddha. According to Austin, law means "A rule laid down for the guidance of an intelligent being by an intelligent being having power over him."¹¹

Here, there is no question of morality. The only question involved here is command, command from the superior authority to the subordinate authority. But in both the

Hindu and the Buddhist law maximum importance was given to morality. Indian law was a moral law, not positive, or imperative law in the Austinian sense. Indian law acquired religious character to fight against injustice, oppression etc. The importance of moral law, in the later period supported by Nyāya (equity) and Yuktī (reason) and in both the Hindu and the Buddhist religions it was an established practice that if there arises any conflict between dharma shastras then reason will prevail.

Buddhism believes that only the moral code of conduct cannot solve the problems and the spiritual realization is the only way to solve the problems of human miseries. The Buddha was the outstanding spokesman in this regard. During his life time two types of government prevailed in the Indian society; one was monarchical form of government and the other was the republican form of government. But he did not show any interest to any form of the government, and contrary to that he expressed his opinion, in the Digha-nikāya, in the following way -

"Assemble repeatedly and in large numbers, just so long their prosperity might be looked for and not their decay."¹²

However, in one point, Buddha was clear that the Government, whatever might be its form, must uphold the concept of Dharma and moral laws. But in accordance with his teaching,

it is clear that he wanted a government which should be democratic in its form and aristocratic in its nature, so that bestand intelligent people might come to form the government. Buddhism regarded that it is the duty of state to help in building temples, and financed the similar institutions for the welfare of the people.

Monks who violated the criminal law of the land were dealt with very severely. "Monks suspected of committing offences against the civil and criminal law should, in a Buddhist state, first of all be tried by an ecclesiastical tribunal. If found guilty they should be disrobed and handed over to the civil Court for further trial and punishment."¹³ ✓

Apart from the legal and moral development, the influence of Buddhism upon the Indian social, political and cultural life is tremendous. At the centre of the Indian national flag, and other important Governmental establishments shows the historic symbol of Ashoka and the victory of Righteousness. In the foreign policy of our country also, we followed the principles of Pancha Sila, or the five rules of conduct, for peaceful co-existence among various people and countries despite our political and geographical differences.

The emergence of Buddhism on Indian soil was a great phenomenon of universal importance. It gave India its first and coherent rational outlook on life. Though subsequently

Buddhism almost became extinct in its birth place, the legacy of the Buddha continues in various spheres of India's body-politic, in Indian Constitution, in modern India's secular and humanistic attitude and above all in the Panchashila which is the foundation of India's foreign policy. But the Buddhist concept of law and concepts of crime, punishment etc. are equally captivating. We shall make a survey of them in the chapters to follow.

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Chapter II

THE CONCEPT OF LAW AND MORALITY IN BUDDHISM AND HINDUISM

"Caratha bhikkhave cārikam bahujanahitāya
bahujanasukhāya lokānukampāya atthaya hitāya sukhāya
devamanussānam, desetha bhikkhave dhammam ādikalyānam
majjhakalyānam pariyosanakalyānam sattham savyamjanam
kevalaparipunnam parisuddham brahmacariyam pakāsethā."¹

The Indian concept of dharma as religion is different from the western concept. As a matter of fact, what is morality for the west is religion for India. Dharma, in the sense of morality, is one of the four purusarthas (aims or objectives of a meaningful life) advocated by the Indian thinkers.

The modern term for morality in India is naitikata or adherence to the nities or regulations for a good living. In this sense naitikata is only another name for diplomacy as when it is said "arjavam hi kutilesu na nitih (simplicity towards the crooked is no diplomacy). Thus, there is a variance in the concept of morality from the terminological point of view. Niti and dharma both have a claim for morality, but niti is worldly morality bordering on cleverness and dharma is the real sense of morality bordering on spiritualism.

There has been a steady growth in the concept of dharma. It has taken on a lot of connotation and characteris-

tics along with the growth in Indian civilization. There is the extreme form of dharma in mimamsa where ritualism is identified with religion. Buddhism, on the other hand, supports a rationalistic form of morality based on practical world view.

The original conception of Hindu law was almost wholly religious and philosophical. The genesis of this juristic and theological speculation must be sought in the conception of Rta or natural order presided over by the vedic deity varuna.*²

The aim of law is to reconcile and harmonise the wishes of the individuals who form a society. It disciplines the entire society, for the welfare of mankind. In ancient India, there were two prominent law systems, viz., the Buddhistic and the Hindu, which were quite different in nature. Uniformity of law is the modern development of law of our society. There are various reasons for this diversification of law. Earlier societies mainly depended upon their religious customs. Their outlook was very narrow. Lack of Scientific and secular studies of law was also one of the main reasons for this multiformity of law in ancient society. But interestingly both for Buddhism and Hinduism the concept of law and morality has an integral outlook, because it contains a minimum standard of fairness useful in all times and in all society. Specially, the concept of law and morality in

Buddhism is full of love, affection and understanding, not like the law enforced by the modern courts of law. With the growth and development of civilisation law has taken a definite shape and the new idea like condification of law developed in the later period. Both in Hinduism and Buddhism in early period, law and morality overlapped each other.

The relationship between law and morality is one of the important problems of enquiry for a legal philosopher. In earlier societies much importance had been placed upon morality, because it is wider than law. "Life of a Hindu, including that of a king, was a burden more of duties than of rights."³

Instead of positive law, morality was regarded as a supreme law of the land because of the divine sanction upon morality. Morality regulates the life of human being in the society. However maintenance of peace was in the hands of the king, so that the king's duty was to award punishment to the wrong-doers. And in this way the king performed his duty as the agent of God as well as the agent of the people in the society. Dhayani says, "Hindu state or king was subservient to dharma. He was only a custodian, executor and servant of the law and had no direct authority to make law, to interpret law."⁴

Hence, in the ancient Indian society both *prayascitta* and *Danda* had the equal importance. The king was regarded as sinner if he never performed his duty properly. In ancient India the caste system was very rigid. The society was divided into four castes - the Brahmins (the priestly class), the Ksatriyas (the warrior class), the Vaisyas (the business class), and the Sudras (the lowest or servant class/the so-called untouchables). (In the caste-based society, administration of law was also in keeping with the caste-system.) So, in Hinduism, punishment many a time was softened towards the higher castes and harshened for the lower castes. But in Buddhism there was equality of punishment for all. To adjust with the society, a clear-cut idea of punishment was necessary for them. But Buddha was against the theory of deterrence or retribution in punishment. He believed in expiatory and disciplinary idea of punishment. So much of importance was placed on the evil mind (*mens rea*) of the wrongdoers.

Both the Hindu and Buddhist legal literature still today do not attract much attention from the legal scholars and lawyers. It is surprising to note that such rich legal systems like Hindu and Buddhist legal systems have not received the closest attention from the modern legal scholars. It, in a sense, is a national disgrace that we are not using such a rich and old Indian legal literature.

A proper understanding of the Hindu and Buddhist legal literature would help us in avoiding so much of social tensions and feuds. Whereas it is undoubtedly true that the Hindu caste system is at the root of many social evils and injustices, yet the spirit behind the system definitely observes an academic inquiry. It also can further coherence among segments of people. Also a proper study of the Hindu and Buddhist legal systems which might not be quite so legal in the modern sense of the term will be very rewarding in so far as it will help us be more acquainted with our past as also with a great many things that are quite prevalent in family laws at the present.

But unfortunately we take pride in studying the English and Roman literature. It is not to hesitate the English or Roman legal history; they are surely great. But we, after all, have some responsibility to unravil the increases of our own legal history. Jurisprudencial ideas are essentially the Roman origin. Ancient Indian legal ideas are completely different from the Jurisprudencial ideas of the West. Though Hindu religion is the dominant religion of Indian, but the legal ideas of Mughal and Britishers are followed in everywhere and our country. Hindu law has its own originality. So Hindu law may be an exception of the Anglo-sexan rule of law. But the superstition in Hindu law is one of the biggest hazard in this afford.

In India the Vedas are the original source of law. But Vedic laws are the² positive laws, it is just a moral injunction. However law took a definite shape in the Smriti period. As remarked by Dr. Sarkar, "The juristic writings of the authors of the Smritis attained a great degree of perfection at a very early date."⁵ In Smriti period possibly the conflicting texts had been harmonized. In this way a liberal view had taken during the Smriti period. During this period most importance has been placed upon "reason". The conflicting ideas of laws which were more reasonable were readily accepted. Custom is also regarded as an essential ingredient of Indian law. Various customs like local customs, family customs etc. were recognised by the law-givers. In this way self-satisfaction was also regarded as the source of law in India.

In Buddhism the three branches of Buddhist faith regulate their own code of conduct for themselves. The Vinaya rules were modified from time to time, according to their own convenience and suitability of their own ideology. Mahayana Buddhism regarded Buddha as a divine being. Similarly the Hinayana Buddhism concentrated their energy in realising Nirvana. In this way the Tantrayana Buddhism regarded Buddha, full of love and compassion, so there is nothing wrong in taking wine and women. So according to their own faith, various Buddhist branches fixed their own

law and religious code of conduct. Buddhism always avoided severe punishments. The highest punishment in Buddhism is the expulsion of the delinquent monk from the Sangha. Surprisingly, Buddha did not specify rules towards layman or the common followers of Buddhism, only he has mentioned some social code for the lay followers of Buddhism.

Both Hindu and Buddhist law regarded that observance of sacred law leads to the salvation from this world, and its disobedience leads to misery. Sources of both the law revealed from God or some supernatural sources which is superior to the king. High sense of duty among the people for observance of sacred law is a remarkable event in the world.

Mimamsa Shastra of Hindus and the Patimuktha Sutra of Buddhism is one of the best example of logical consistency of ancient Indian laws. The Mimamsa system of Indian philosophy is famous for its exegesis. It means inquiry or investigation. The main objective of the Mimamsa system is to establish the authority of the Vedas and to make out that the Vedas teach rituals.⁶

As dharma used to govern the lives of individuals in a big way - including litigation - Mimamsa has a great importance for any scholar of law. As Dr. Radhakrishnan has

aptly pointed out "The scriptures which govern the daily life of the Hindu require to be interpreted in accordance with the mimamsa rules. Modern Hindu law is considerably influenced by the Mimamsa system."⁷

Of course the notion of law and justice in India is entirely different from that of the Western countries, because in early periods Indian law was looked with reverence and its validity was unquestionable. The 'ethical element', 'duty norms in the society', 'Karma phala', and the path of Bhakti makes the Indian law entirely different from its western counterpart. The rule of law is another important aspect of Indian law. Repentance and confessions were also regarded as one of the way of reducing crimes.

Though law morality and religion overlapped each other, the great sage Jaimini in his Mimamsa Shashtra made a clear distinction between the obligatory idea of law and non-obligatory ideas of law. So, sages of ancient India made a clear difference between the positive law and the morality in the Austinian sense of law. Interpretation of law or mimamsa is as old as a civilization. Mimamsa divided the Vedic laws into two divisions, one is religious sanction and the other is penal sanction. Later on a clear line of distinction was made by both the systems of Dayabhaga and

Mitakshara. Hindu law itself was a process of assimilation and arose for self-necessity. Upto the British period, Hindu law was alive. Some people argue that both Hindu and Buddhist laws are static and lack the capacity of growth. But it is not at all true, because upto now both Buddhism and Hinduism are making their own personal laws to meet the various social circumstances. So both Hindu and Buddhist laws still today are also living laws in our country. It is not the legislation, which help to continue both Buddhist and Hindu laws. So, customs and usages are helping in continuing the sacred laws of Hindus and Buddhist. "Custom is frequently the embodiment of those principles which have commended themselves to national consciousness as principles of justice and public utility."⁸

During British period also, Hindus were allowed to govern themselves by their own personal laws like, successions, inheritance, marriage, religious institutions and caste. During this period specially Hindu laws were harmonised and modified to meet the new social changes and interpreted accordingly. English judges introduced some new principles also whenever they had decided the cases. Like Roman law, both Hindu and Buddhist laws have no authentic history. Our history about ancient Indian laws is based on uncertainty. Apart from these difficulties, English judges

gave much importance in the Mimāmsā, rule of interpretation of law. In Buddhism, Buddha emphasises upon moral character and ideal life. Disputes regarding any rule or regulation were solved by the Sangha, like members of the communities or representatives of village or the localities in Hinduism. In many cases, Buddhist law did not ignore the Hindu rules of interpretation. Though some ritualistic check was there, Buddhist of ancient India had some reservation to follow the laws of Manu, as they were based on orthodox Hinduism. But they had no reservation to follow the rules of Yajnavalkya and Mitakshara rules, as they were based on humanity. That is why Buddhist king followed many Hindu rules and regulations which were based on liberty and humanity. Many books written after the Buddhist period, in India, present the same picture of law as it was in the early Hindu period. No special change had taken place during Buddhist period, though some minor Buddhist rules were firmly established in the later period. It is interesting to note that, though Muslim rulers of Medieval period were intolerable towards Hinduism and Buddhism, yet they did not interfere the personal laws of Hindus and Buddhists. During that period, the Zamindars had a direct relation with the raiyats and the Zamindars had their own courts. Many disputes were solved by the village communities. It was often seen that Akbar, the noblest king of Mughal dynasty, many times followed the Hindu laws, instead of

following Muslim laws. Hindu pandits, assisted in settling the disputes, specially in civil matters. The documentary evidence regarding the functioning of Hindu law in Mughal period is very limited, the only source available is the "Todaramala's vyavahara saukhyas" which was written by "Todamal" a minister of Akbar's period.

Law and Morality: Morality is an evergreen concept in every society. In every civilized society, the establishment of morality is a continuing process.

"When state came into being, it picked up those rules which were important from the society's point of view and the observance of which could be secured by it. The state put its own sanction behind these rules and enforced them."⁹ So it is not possible to separate law from morals and morals from law. The result of moral crisis in law may lead to barbarism in the society. Though both Hinduism and Buddhism gave much importance in establishing morality in the society, still today discrimination in caste, sex, status etc. are very much there. From the ancient period, it was realised by the social thinkers that both law and morality are inseparable. So both law and morality are essential ingredients of social engineering.

Morality means some norms based on virtuousness, rightness, good conduct etc. In ancient India, both law and morality were administered in the name of Dharma, because, during that period there was no distinction between law, morality and religion. Law, morality and religion overlapped each other. So in ancient India the duty of the king was to safeguard the dharma. Morality or the Dharma was the principal idea of law. Indian concept of morality arose from the core of Indian culture and society, not out of fear or reward. Morality regulated the entire Indian society, whether rich or poor, powerful or ordinary people. The concept of ahimsa is an evergreen idea for the Indian society, and it involves high moral ideas, which is propounded many Indian philosophers like Buddha, Gandhi, etc.

Concept of morality was so high in ancient India that moral and religious obligation was regarded the supreme obligation in comparison with the legal obligations. Throughout the ages, in Hindu and Buddhist legal history, there was not even a single instance, where law was based on command in Austinian sense. Indian law throughout the ages was based on moral ideas because during these days, the law makers and law interpreters were the risis (saints) and not the kings. In comparison with the modern Indian moral ideals, in ancient India, sanction behind the moral ideas and moral duties was

more strong. Only in the nineteenth century, positivist neglected the essence of morals in law, ignoring the recognition of morals in law by all ancient civilization. Of course in the present century, the essence of morality in the law is being re-established. In the present society morality is getting an important place because lack of morality in law and administration is one of the main reasons of revolution. So, the aim of morals is the establishment of proper administration in the society. In modern society morality acts as restriction and in some cases source of legislation while enacting the laws. In modern days also morality has so much influence that life of every member of society is passing smoothly without the intervention of law. Morality is playing an important role in both the international politics and law also.

Concept of morality in Buddhism: Buddha dealt with morality more systematically than with law. In comparison with Hinduism, Buddhist concept of morality was more systematic and concise. Buddha had taken some special measures to tackle the ego sentiment of general people. Buddha suggested to his disciples and lay devotees to practise "Sila" to purify one's personality. In ancient times law, morality and religion overlapped each other. So, morality had its own source in

both law and religion. That is why there was no clear cut division between law and morality. So in ancient India most of the human conducts were determined by morals, not by laws. People in every time and in every society are addicted to pleasure, ignoring the realities of life. Ordinary people are the victims of natural desire. So, Buddhist practice of Sila is an essential requirement to deal with this natural enemy. According to Buddhism there is only one way to remove this natural enemy, that is practice of "Sila". In Visudhimagga, a Buddhist text, the concept of Sila has been nicely described for the followers of Buddhism. In the Visuddhimagga the Buddha had explained the Sila with the following two Slokas, as to how the people are confronted with the various problems of life, and how one can remove the problems of life. The person who is following the path of Sila, is free from all these bondages. The Visuddhimagga has quoted from Samyutta-nikaya (I.13) :

"anto jata bahi jata jataya jataya puja,
 tam tam gotama pucchami ko imam bijataye jatan.
 sile patitthaya nako sapajno cittam papenca bhavayam,
 atapi vipako bhikkhu so imam bijataye jatan."

Sila has been divided into nine heads -

1. Pancha Sila
2. Attha Sila

3. Mangala Sila
4. Disapujana Sila
5. Indriya Samibara Sila
6. Santosa Sila
7. Ajivaparisuddhi Sila
8. Dasa Sila
9. Patimokkha Sambara Sila.

1. Pancha Sila

Pancha Sila was prescribed by the Buddha for both monks and layman, but the only difference is that a lay-devotee can take part in sexual activities. Strict restrictions were imposed upon monks in this regard.

The five precepts or pancha silas are -

- (a) Refraining from killing (panatapata virati)
- (b) Refraining from stealing (Adinnadana virati)
- (c) Refraining from sexual misdeeds (Kamesuniccha cara virati)
- (d) Refraining from telling lie (musavadvirati)
- (e) Refraining from taking intoxicants (Suranevaya majyappanamada tiha virati).

It removes physical, vocal and moral misdeeds accordingly, e.g., the first three remove the physical mis-

deeds, the fourth one removes the vocal misdeeds and the last one is the restriction upon both mind and body.

2. Attha Sila

Attha Sila or the eight moral precepts are prescribed for monks as well as the lay devotees to purify both body and mind. After successful performance of pancha sila, a man can perform the other three precepts. The other three precepts are - (a) Refraining from untimely meal (vikala bhojana virati), (b) Refraining from dance, music and vulgar show (Nacca gita vadita visuka dasana virati), (c) Refraining from the use of garland, perfumes and other cosmetics (mala-gandha-vilepana-vibhūsatthana virati).

3. Mangala Sila

Mangala silas are those silas, which are beneficial in nature for the entire society and morally appreciable. They are, friendship or good relationship with the virtuous and noble men. Good behaviour to others, realising and understanding four noble truths, soft behaviour and truthfulness.

4. Disapujana Sila

Buddha had advised to his disciples to worship various directions like east, west, south, north, upper and lower symbolically. The parents represent the eastern clime, the teachers represent the southern clime, the sons and wife represent the western clime and the northern clime for the friends and relatives. The lower clime is the direction of the workers, and the upper clime represents the Brahmans and recluses. This type of worship helps in maintaining the social balance and harmony in the society.

5. Indriya Sanibara Sila

The six senses of human body and mind are called indriyas. They are the eye, ear, nose, tongue, body and mind and their objects are respectively visible object, audible, odorous, sapid tangible and identical object. Sense organs are one kind of enemy for an ordinary person. Attachment, lust, etc. arises, when the sense organs have contact with the objects. Ordinary people take delight from these objects, and that is the root cause of suffering. Those persons who can control their own sense organs never suffer from the attachment of ordinary objects.

6. Santosa Sila

Buddha advised his disciples to remain happy with whatever amount of things they got in the ordinary course of life.) Because the greater is the desire, the greater will be the unhappiness and dissatisfaction. So minimisation of desire is the way of happiness. Hence, Buddha suggested to his disciples to minimise their desires.

7. Ajivaparisuddhi Sila

Ajivaparisuddhi is the good conduct of a person in earning his livelihood in a dignified and noble way without committing any harm to other persons.) There are many ways where a person may earn his livelihood affecting other people; for example, Kuhana, Lapana, Nipesikata, Namittikata, Labhena labha, Kansakuta, Manakuta, Tulakata, etc. So, Kuhana is the way of attacking other people by using sweet words. Nipesikata means earning livelihood by using harsh and rough words. Lapana is another way of earning livelihood by cheating, or using fraudulent words.

8. Dasa Silas

Dasa silas or the ten moral precepts are followed by those persons who have left the household life and lead the

life of novice or monk. Apart from the attha sila or eight moral precepts, the remaining two silas are -

(a) Refraining from the high and lofty beds (Uccasayana mahasayana virati)

(b) Refraining from receiving silver and gold (Jatarupa rajatapatigahana virati).

The idea behind these two moral precepts refraining from the bodily comforts as well as refraining from the habit of taking both silver and gold is to make the monk bear rough life and learn contentment.

✓ Apart from that, for a lay devotee or a householder another ten moral precepts are also available. They are - Dana, Sila, Bhavana, Apacayana, Veyyavacca, Patti Dana - pattamumodna, Dhamma savana, Dhammadesana and Ditthi-ujj-karana.

9. Patimokkha sambara Sila: Various rules are available in patimokkha for both monks and nuns. It is the main part of Vinaya pitaka. Patimokkha consists of two parts. One is Bhikkhu patimokkha and the other is Bhikkhuni patimokkha. There are two hundred and twenty seven rules in Bhikkhu patimokkha and they are grouped into eight sections. The eight sections are -

1. Parajika
2. Sanghadisesa
3. Aniyata
4. Nissaggiya
5. Pacittiya
6. Patidesniya
7. Sekhiya
8. Adhikarana Samatha.

"There are five things leading to lust which are called in the Discipline of the Noble one a "chain" and a "bond". What are the five?

Forms perceptible to the eye, desirable, agreeable, pleasant, attractive forms that are accompanied by lust and cause delight. Sounds of the same kind perceptible to the ear. Odours of the same kind perceptible to the nose. Tastes of the same kind perceptible to the tongue. Substances of the same kind perceptible to the body by touch. These five things predisposing to passion are called in the Discipline of the Noble one a "chain" and a "bond". And these five things predisposing to lust, vasettha, do the Brahmanas versed in the Three Vedas cling to, they are infatuated by them, guilty of them, see not the danger of them, know not how unreliable they are, and so enjoy them."¹⁰

Apart from the concept of sila, Buddha advised his disciples to beware of the five things which cause birth and rebirth in the world. We reproduce below an interesting discourse on the concept of Sila, or about an ideal person. This shows how people felt in ancient India.

"Gotama the recluse holds himself aloof from causing injury to seeds or plants. He takes but one meal a day, not eating at night, refraining from food after house (after midday).

He refrains from being a spectator at shows at fairs, with nautch, dances, singing and music.

He abstains from wearing, adorning or ornamenting himself with garlands, scents and ungrents.

He abstains from the use of large and lofty beds.

He abstains from accepting silver or gold.

He abstains from accepting uncooked grain.

He abstains from accepting raw meat.

He abstains from accepting women or girls.

He abstains from accepting bondmen or bond women.

He abstains from accepting sheep or goats.

He abstains from accepting fowls or swine.

He abstains from accepting elephants, cattle, horses and mares.

He abstains from accepting cultivated fields or waste.

He abstains from acting as a go-between or messenger.

He abstains from buying or selling.

He abstains from cheating with scales or bronzes or measures.

He abstains from the crooked ways of bribery, cheating, and fraud.

He abstains from maiming, murder, putting in bonds, highway robbery, dacoity and violence.

Such are the things, brethren, which an unconverted man, when speaking in praise of the Tathagata, might say."¹¹

In Bhikkhuni patimokkha there are altogether three hundred and eleven rules and it is divided into seven parts. According to patimokkha rules both monks and nuns have to celebrate there "Upasatha" ceremony, and confess their misdeeds on the day of fourteenth and also in the full moon day of every month. So it is one of the ways of expiation in a very simple way in the assembly of Buddhist monks. All the relevant rules are generally recited in the assembly of monks. A monk or a

nun is bound to follow the rules whole heartedly and such whole heartedly following rules are called Patimokkha Sambara Sila.

The Upasatha ceremony of the Buddhists can be compared with the confession ceremony of the Catholic Christians. Confession is the public act of assurance to the Church of one's sincere repentance. This is supposed to expiate sins.¹²

The functions of sila is not strictly regulated by law, but it is regulated by morals, and sila is the determining factor, whether an action is moral or immoral. So, by performing Sila one should be free from all the immoral actions, and develop moral actions like Alobha, Amoha etc. There are some other associates also which function together with Silas. They are Saddha, Sati, Viriya, Hiri, otappa, etc.

(a) Saddha: Saddha inspired people for higher realisation of Dharma. It purify the dirty mind of person. It helps a man to clean himself from all the evils of this world. So, it is one of the way of purification of mind.¹³

(b) Sati: Sati is also one of the psychic factors which create an awareness to a person. Through this psychic factor a person realises some mental conditions like enjoyment, compassion, mental strength, etc.

(c) Viriya: Viriya is also one kind of psychic factor and it creates mental strength and it arises during a person's mental depression, unhappiness, etc.

(d) Hiri: Hiri always helps in the development of right understanding. It condemns the immoral actions. So a person feels bad to do an immoral action.

(e) Otappa: By developing this psychic factor a person feels ashamed to do some socially immoral action. It is freeing oneself from all kinds of shameful activities.

Buddhist concept of Sila is one of the most interesting and relevant ideas for the entire mankind. Perhaps no religious system has developed such a pure idea of morality so systematically like Buddhism. As observed earlier, there was no difference between law and morality in Buddhism. So the idea of sila was very much relevant during those days. And it is relevant in the present day society also for the purification of the society. As it is not possible to regulate all human conduct by law, some of them have to be regulated by morals only.

"If a Bhikkhu should desire, Brethren, that he could be victorious over (spiritual) danger and dismay, that neither danger nor dismay should ever overcome him, that he

should master and subdue every danger and dismay, let him then fulfil all righteousness, let him be devoted to that quietude of heart which springs from within, let him not drive back the ecstasy of contemplation, let him look through things, let him be much alone.*¹⁴

*If a Bhikkhu should desire, brethren by the destruction of the great evils (Asavas), by himself and even in this very world, to know and realise and attain to Arhatship, to emancipation of heart, and emancipation of mind, let him then fulfil all righteousness, let him be devoted to that quietude of heart which springs from within, let him not drive back the ecstasy of contemplation, let him look through things, let him be much alone.*¹⁵

Such are the lofty ideals envisaged in Buddhism. Sila is the nucleus, the backbone, almost everything of Buddhist concept of morality.

Crime and penal justice in Hinduism

In ancient India both Hinduism and Buddhism believed in removing the sin from the society. Hence, so much of importance was given towards that end. Hence, criminal administration got less importance in comparison with the religions administration or the religious sanctions. Of

course, in ancient period there was no clear cut division between sin and crime, as it stands today. Actions which were regarded as contrary to religion, in later period were regarded as sinful acts. However with the passing of time religious sanctions are regarded as static concept whereas the penal and criminal laws are regarded as a dynamic concept. In every society crime and criminal activities arise with the dissatisfaction of the society. In Hindu society, crime arises due to dissatisfaction in the varna system of Hindus, though there are many other reasons also. Instances are available where both Kshatriya and Sudra people directly or indirectly destroyed the "Yajna" by stealing flowers, fruit, etc. and sometimes destroyed the whole "Yajna" performed by the Brahmins in ancient period. The Brahmins tried to destroy the rights of the other caste, on the other hand the people of other caste also tried to establish their rights. So, the natural result was the conflicts between Brahmins and non-Brahmins in the society.

It is interesting to note change in the pattern of punishment in the Hindu society along with the change of time. Earlier, severe punishments were imposed upon Brahmins; but afterwards, severe punishments were imposed upon Sudras. It is an admitted fact that in every society, in ancient period, punishment was more severe in comparison with modern

society. So in ancient Hindu society also punishment was very severe towards the offenders, perhaps, to terrify the offenders. Heavy penalties were imposed upon the Sudras during those days. Corporal punishments were common to those people. According to some scholars, punishments towards Sudras were severe due to many reasons. The Aryans who conquered the non-Aryans, in the later period who were regarded as Sudras, were involved in many conspiracies against the Aryans, who became the rulers or priests of the state. So, severe punishment was necessary to suppress the treason and felonies committed by the Sudras. Though severe corporal punishments were imposed upon Sudras, yet in case of religious sanction severe punishments were always imposed upon the Brahmins, because Brahmins in those days, even today also are one of the most prestigious classes of the society. That is why they were well-versed in all Shastras and knew the nature of laws. So, where only eight "dhenu" prayascitta's were imposed upon Sudras, contrary to that sixteen dhenu prayascittas were imposed upon Vaishya and thirty two "dhenu" prayascitta were imposed upon Kshatriyas and sixty four "dhenu" prayascittas were imposed upon Brahmins. So ancient Indian law givers were not biased towards upper class people. This type of discriminatory treatments were for the benefit of the society.

However the low-caste people reacted sharply against this discriminatory treatment and the influence of Buddhism and Jainism had shaken the entire Brahmanical culture. Specially the Buddhists were against the caste-system. So, the discriminatory legal system of Hindus was badly challenged by the influence of Buddhism. A new secular penal system was the urge of that period. That is why, Yajnavalkya Smriti, which was composed when Buddhism was flourishing in the country, is moral and liberal in comparison with Manu Smriti. A distinction was made between spiritual offences and secular offences. For spiritual offences religious sanction was available for the wrongdoer. But for the secular offences punishment or Danda was prescribed for the wrongdoers. Punishment like mutilation of limbs, death sentences, fine, imprisonment etc. were the common mode of punishment in those days. In ancient Hindu society, there was no discrimination between an offence done by the king, or an offence done by an ordinary person. Instances are available where a king had done some offence and for which he was punished more severely in comparison with ordinary people. It is quite contrary to the maxim that the king can do no wrong. For the Hindus, nobody was above law.

Hindu penal system gave much importance on the purification of mind of the wrongdoer. If a person committed

murder, after undergoing the secular punishment, he had to undergo another kind of punishment which was according to shastric law known as "prayascitta" or the purification of mind, which is still continuing in our society. But the only difference is that in ancient times a person, after getting the secular punishment was bound to undergo the "prayascitta". But in the present time, a person is not bound to undergo the "prayascitta" system.

Thus ancient Hindu system of penal justice recognised two systems of punishment. One was secular and the other was religious form of punishment.

The ancient Hindu system of religious sanction or "prayascitta" is an unique system of India, and it is today also a unique system for the entire world. Because there is no other system of secular and religious law, which can compare with the Hindu system of prayascitta. In Indian society, it is interesting enough that whoever commits an offence, he may try to escape from secular punishment, but he will never try to escape from the religious sanction or prayascitta, because religious sanction never imposes severe punishment upon the wrongdoer, and the other reason is, the wrongdoer through prayascitta purifies his body and mind for this world and for the other world also. The prayascitta

system satisfies the social, moral and religious sentiments of the society. It also roots out sins from the society.

Crime and penal justice in Buddhism

During the time of Buddhism, the supremacy of Vedic culture, and Brahmanism had been badly challenged by the oppressed people. The old system of penal justice was very harsh towards the Sudras. So to adjust with the new society and socio-religious philosophy, Buddha prescribed some new form of penal codes for the monks, and to the lay devotees of Buddhism. Buddhist kings of ancient India followed the new penal codes, prescribed by the Buddha, and they were very successful in this regard. But the storehouse of the Buddhist legal system "Vinaya Pitaka" has provided a very little source of lawyers' law. The main aim of the Vinaya pitaka is to lead the human being for gradual purification of his body and mind. For the Buddhist the concept of crime and punishment is an ordinary matter, because of the prevailing harmonious social system in those days. That is why for the Buddhist monks, the highest punishment was expulsion from the Sangha. Buddhist kings also awarded very mild punishments for the ordinary citizens. The Buddhist kings also followed the Vinaya rules, as it is evident in the Ashokan minor edicts at Sanchi, Sarnath and Kausambi, we find that Ashoka issued orders to

expell the troublesome monks from the Sangha. Buddha advised his disciples to maintain social harmony, otherwise some kind of troubles like bodily pain, disturbed mind, destruction of gold etc. would fall upon them. He did not prescribe any severe punishment for the wrongdoers for practical use. His punishment was not for this world, rather for the other world. So "Dharmapada mentions murder as the major offence, for which punishment is the torture in hell."¹⁶

On the other hand from practical legal point of view, it is interesting to note that, the highest penalty for heinous crimes, for a member of the Sangha, was the expulsion of the delinquent monk from the Sangha. Sangha is one of the most important organizations, after the Buddha and Dharma propounded by the Buddha. According to Buddhist law "The Sangha was, from a Juristic point of view, the corporate person in whom property was vested, and while no bhikkhu had legal property rights."¹⁷

So, where property right was not at all recognized, there hardly arose any question of criminality, except some natural offences like sex-offences or any other natural offences of this type. In the Sangha, always some types of democratic rights were recognised, for example, right to speech, right to life etc. were the most fundamental rights

recognized in those days also. The peculiarities of the administration of the Sangha was communistic in their outlook, though it was a religious organization. On the other hand Buddha laid down many instructions as available in various Buddhist scriptures which guide the rulers of the states to rule the state, according to the rule of law and like Manu the great Hindu law-giver he had also suggested the rulers to act righteously. According to Buddha, the king who administered justice according to Dharma is the right king for the society.

Buddha had a friendly relation with many kings of his time like Bimbisara of Magadha and Pasanjit of Kosala etc. The concept of righteousness, though it was thoroughly recognised by Hinduism also, was Buddha's contribution to political administration of our country.

In various stories of Buddhist literature he upheld the ideal Govt. and its legal policy for the administration of the state. Buddha emphasised on the economic growth of the society, because economy has a direct relationship with the causation of crime of a state. Interestingly, Buddha advised his friendly kings that instead of giving punishments, the king should remove the economic difficulties of the economic offenders. Because lack of economy is the main

reason of his economic offences like, theft, robbery etc. Of course, Buddha was not in favour of removing punishment, but the root cause of the crime should be removed from the society.

According to Buddha retributive and deterrent method of punishment, hardened the criminals mind, and they become more violent for the entire society as also to the law enforcing authority. Hence, the Buddhist concept of law is more humanistic and borders on morality.

Notes and References

1. Mahavaggo, I.2.5

The meaning of this celebrated deshana of Buddha could be :

"O mendicants, you take to the path of saints for the welfare of many, for the happiness of many and for the sympathy of the people and for the prosperity, goodness and happiness of Gods and men. O mendicants, you spread the light of this Samttiness which is good in the beginning, in the middle and also at the end and which is meaningful, sonorous, full and perfect."

2. Sarkar, U.C., Epokes in Hindu Legal History, p. 2

3. Ibid., p. 3

4. Dheyani, S.N., Fundamentals of Jurisprudence, The Indian Approach, p. 37

5. Sarkar, U.C., op.cit., p. 3

6. Madadevan T.M.P., Invitation to Indian Philosophy, Arnold Heinemann, New Delhi, p. 239

7. Radhakrishnan, S., Indian Philosophy, vol. II, George Allen, 1966, pp. 375-6

8. Tripathi, B.N.M., Jurisprudence - Legal Theory, p. 186

9. Ibid., p. 125

10. Max Mular, Sacred Books of the East, vol. XI, Buddhist Suttas, p. 181

11. Ibid., vol. II, pp. 5, 6
12. See, Under penance in Ferm, V, Concise Dictionary of Religion.
13. cf. Sraddha vān labhate jnanam.
Bhagavat gita, IV.39
14. Max Mullar, op.cit., p. 212, vol. XI
15. Max Mullar, op.cit., p. 218, vol. XI
16. Bairat edict, p. 226
17. Trevorling, The Buddha, p. 126.

Chapter III

BUDDHIST CONCEPT OF CRIME AND PUNISHMENT

Crime can be differently defined. "In general, it can be said to mean the violation of a right when considered in reference to the evil tendency of such violation, as regards the community at large."¹

In England crimes were divided into three divisions : treason, felonies and misdemeanours. Treason means the offences which were committed against the king. Felony means those offences which were punishable with death, and misdemeanour means the small offences.

In India pure municipal law originated with Hinduism. The Danda-nitti and Artha (royal) Shastra are example of it. In Jataka also the term "Artha" has been used in connection with one government. According to Mr. K.P. Jayaswal "it is not unlikely that some of the early works on artha-sastra existed at the time of the Jatakas."² The Dharma and Artha laws overlapped each other, and the Artha law followed many principles of Dharma law. For example, no one shall be punished in case of doubt. The king may punish after proper investigation of the case etc. The rise of Buddhism, re-asserted the need of Artha laws, because the Buddhists are beyond the control of Dharma law (Hindu Dharma Law).

Apart from the Artha (Royal) law, the secular municipal laws were called the Vyavahara laws. Both the Dharma and Vyavahara laws originate from Veda. But the only difference is, the Vyavahara law is mainly concerned with the political governance and the king. Vyavahara laws can be termed as Dandaniti also.

The Buddhist concept of crime is not different from that of Hinduism. Buddha was mainly concerned with the Dharma laws. Though he had many royal friends in his life, he did not try to influence the governance of the king. Buddha was a religious teacher. The ultimate aim of his Dharma was to achieve Nirvana. Probably the Artha and Vyavaharika system of laws of Hinduism continued in the Buddhist period also. K.P. Jayaswal, the eminent indologist observes "In the time of the Buddha the royal judge is called the Vyavaharika. He is called so, I think also in Ashoka's inscription distinguishes between Vyavahara and vidhi. The former, no doubt, means municipal law and the latter Dharma. At the same time dhama is occasionally used to denote law generally in Buddha literature and also in Kautilya."³

Now, it is clear that, the Vyavaharika law means the king's law. Though, Buddha was mainly concerned with his personal law, the Vyavaharika law was also regarded as

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the highest law of the land. There were many kings throughout the history of Buddhism who followed the Buddhist principle, and they were the royal patrons of Buddhism. For example, Ashoka was one of the great royal patrons of Buddhism. Only because of his efforts, Buddhism occupied a prominent place, not only in India, but in the entire world. As mentioned earlier that Hindu system of Artha and Vyavahara laws, continued during the Buddhist period also, so only the missionary works of Ashoka's are available in the Buddhist literature. For example, Ashoka appointed religious officers in different provinces to maintain pious life by the people. So moral living was insisted on during the reign of Ashoka. Kaniska's reign is also a landmark in Buddhist history. In this way, though throughout the history of Buddhism, many rulers followed Buddhism as their state religion, yet they did not develop any Artha (Royal) or Vyavahara laws. The same Hindu system of Vyavahara laws continued. So, the Vyavahara laws of Buddhism are not available to us to use as a piece of evidence of Buddhist Vyavahara laws. The Buddhist customary laws are the only source of Buddhist concept of crime and punishment. But the customary laws are applicable to Buddhist monks only. Buddhist Vyavaharika laws roughly corresponding to the Hindu Vyavaharika laws, are available in the Vinaya pitaka. The patimukkha sutta which is the store-house of Buddhist law was written in a method of present day

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case law. But the patimokkha rules are not enforceable by the king or the royal courts. Contrary to that, it was enforceable only by the Buddhist Sangha. That is why we can say that the Buddhist laws are not Artha (royal) or Vyavahar laws, and we have to analyse the Buddhist concept of crime and punishments from the religious point of view. Various examples of minor crimes to major crimes are enlisted in the patimokkha. We have already mentioned in the previous chapters that the Patimokkha Sutta can be divided into two divisions : Bhikkhu patimokkha and Bhikkhuni patimokkha. Offences committed by the monks are again classified according to their seriousness. The difference between the Vyavahara law and the Dhamma law is, for the severe offences the punishments are capital punishments, and for the violation of Dhamma, what ever may be the type of offence, the punishment is expulsion from the Sangha.

The worst offences are known as parajika offences, and the punishment of the parajika offences is the expulsion of the delinquent monk from the Sangha. The serious offences are lack of continence, theft, murder or abetment of murder and exaggeration of one's power to perform miracles etc. The Sangha had the power to punish a wrongdoer, because it was the compulsion of the time and society, which witnessed a remarkable change in the social structure. In the Buddhist

religious list both sins and crimes were enumerated; both the secular and non-secular offences were enumerated in the list. The Buddhist way of punishments are not only a way of purification, but it is a mode of punishing the wrongdoer. For a monk in some cases, it was possible to avoid secular punishments, but it was impossible to avoid the religious sanction. But one basic difference with the Hindu religion is that a person, who becomes the member of a Sangha ceases to own any property. The articles used by the Bhikkhus were also regarded as the corporate property of the Sangha. "From the Juristic points of view the Sangha is a corporate person in whom the property was vested, and Bhikkhu had no legal right to the property."⁴

From this point of view we can draw inference that a clear distinction was there between the Buddhist and Hindu criminal Jurisprudence. Probably, Buddhism inherited some method or organisation system from ancient tribals, and it has also some influence upon the Buddhist community, specially on the Buddhist Sangha. From the various pali literature it is evident that the king of Kosala and the king of Magadha were his personal friends and his disciples. So in many times, he was always in constant touch with the kings, and the kings also took advice in case of Administration. But he did not develop any secular code like the code of Manu,

the code of Yajnavalkya etc. which are still available in the Hindu system of laws. Though there was no secular Buddhist code of conduct, tradition and custom took an important role in fixing the laws. Absurd punishments were totally unknown to the ancient Indian Jurists. For example, trial of animals, punishment of animals etc. were common in the Western countries. The concept of Mens rea or guilty mind was known to Indian Jurist since the ancient times, but the concept of Mens rea is a totally new thing for the Western countries. Punishment of animals are the best example of it. In the Medieval period and later in the 18th century, classical school of criminology had developed in England. The penal philosophy of this period is based on hedonism. The aim of this theory is to maintain the balance between pleasure and pain, i.e., to maintain the balance between crime and punishment. However, in India, no such type of theory developed in early period. Our ancestors were only concerned with the purification of mind of the common people as well as the mind of a wrongdoer. But surprisingly, today in our society, we never give any importance in the purification of mind of a wrongdoer. The result is, now-a-days a person himself acts as a protector of a society, and he may act as a member of a group of organised criminals. For example, a white collar criminal sometimes acts as a protector of the society, and sometimes he himself acts as a criminal. The assimilation of criminal and immoral

activities are dangerous for the entire society. The system of purification of mind in the Buddhism, and prayascitta in Hinduism have an important role to play in our society.

The next serious offence according to Buddhism, after the parajika offence is Sanghadisesa, and the punishment of Sanghadisesa is temporary suspension of the offending monks. The delinquent monk can be readmitted in the Sangha after proper enquiry by twenty monks. There are all total thirteen offences mentioned in the Sanghadisesa. The offences arise mainly from the relationship between monks and women, construction of hermitage, false accusations etc. The crime rate is not very high in Buddhist societies. The probable cause could be that self and selfishness are thoroughly looked down upon in Buddhism. Crime rates are always high in a society where much emphasis is given in individual wealth and black money. In Buddhism, however, there is a religious sanction for only a delinquent monk. Sanction is required to control the human instinct. Human instinct can only be controlled through some injunctions. Mental defectiveness is one of the reason of crime, and most of the criminals are mentally defective. Probably, the defectiveness comes from the id, which is also a psychological problem. According to Freud, mind is the composition of id, ego and super-ego. Generally criminal behaviour is the urge of id, or the

instinct, but only because of the super-ego, it is not possible to do the crime. Due to lack of super ego crime is more common in the lower socio-economic society. Though in Buddhism, individuality is completely denied, probably, they maintain their ego in the sense that they are the most purified men in the society. Lack of super-ego is mostly common among the non-religious persons. Interestingly, though Buddha classified various offences and their punishments, the crime rate among the Buddhist community were much lower. Now-a-days, lack of religious training may be one of the causes of criminality. Religion always emphasises importance on morality. Religious feeling creates discipline among the people. So, in a religious society crime rates are much lower than the non-religious society. Religion is one of the main instruments in preventing crime in the society. The Buddhist Sanghas not only spread the religious message, they are some of the most important places where moral trainings are given to the monks for the higher achievements of spirituality. Through this institution, delinquent monks take the correct path. Buddha realised that deterrent way of punishment is not the only way to reform the delinquent monks.

The same thing is realised by the social reformer like Lenin. Lenin replied how criminals are dealt with in the communist countries, and how only the mixture of deterrent

and reformative way is the only way of removing the crime from the society, because new criminal techniques are common among the general criminals. Professional criminals and white collar criminals are the new problem of our society. In order to deal with these criminals. With a view to removing the criminality, Lenin had said, "This will be done by the armed people itself as simply and readily as any crews of civilized people, even in modern society, parts pair of combatants or does not allow a woman to be outraged. Secondly, we know that the fundamental social cause of excesses which consist in violating the rules of social life is the exploitation of the masses, their want and their poverty with the removal of this chief cause, excesses will inevitably begin to witer away."⁵

Buddha did not take much interest about a specific theory of law like Manu and Yajnavalkya, because Buddha knew that once the idea of Buddhism was established in the society, the criminal activities will wither away. Buddha paid special attention to reform the caste-based Hindu system of laws. The country was well-acquainted with the caste-based system of punishments. The code of Manu was a source of controversy among the lower caste people. Instead of law as a subject of crime, it creates controversy after controversy for its ferocious nature of casteism. Buddha, not only as a religious

teacher but as a social reformer, changed the whole concept of caste based punishments of Hindu religion. In this way, he succeeded in giving a code of punishments which is based on equality. Like our present day case law, Buddha classified the offence, and laid down systematically the form of punishments. He prescribed certain punishments for the Buddhist community, which is above any controversy. He completely denied various reasons of ill-treated punishments towards the Sudra, or the lower caste Hindus which were formulated by the various smritikars like Manu, Yajnavalkya, Brihaspati, Parasara etc. Buddha formulated the code, without any fear or favour, sometimes contradicting the whole Hindu system of laws. Buddha, boldly cured the injury done to the society by the Hindu system of laws. He prescribed uniform laws for the Buddhist monks, and in this way removed the social drawbacks. Even eminent Brahmin, like Asvaghosha etc. revolted against the class of Brahmin superiority by birth and caste system. He was one of the most ancient social reformer who arranged the whole social system and saved the society from high-caste dominion. His punishments were milder forms of punishments. The highest punishment was expulsion from the Sangha. For the next serious offence, the punishment was suspension from the Sangha. The punishment of suspension from the Sangha also was reviewed by at least twenty monks.

The next comparatively less serious offences are called Aniyata. For Aniyata offence, circumstantial evidence is necessary to ascertain the facts. Circumstantial evidence has a great value in criminal law. Buddha realised the necessity of circumstantial evidence long before the Christian era. This is being realised today by the modern criminologists. It is generally observed that "witnesses may lie but circumstances do not." The only difference with circumstantial evidence, presumptions etc. with the Buddhist religious law and the secular law is, in the secular law, person who was previously convicted of theft, or arrested before for some other reason, is presumed to be a thief, but in the Buddhist customary law, until and unless, it is proved that the person concerned has done something wrong, no action is taken against him. Like circumstantial evidence, presumption etc. divine trial was also very popular in the ancient Indian society. In the Buddhist law, the idea of divine trial is unknown. The purpose of the divine trial was to get the real proof of the incident, painting out the good and had effect of the ordeals. Of course, some minor form of ordeals was admissible in the later Buddhism. Some kind of Hindu forms of ordeals are available still in our society, specially in the villages. Explaining the ordeals as a form of punishments and its preparation, Demayanti Doon gogi observed :

"As to the preparations necessary for undergoing an

ordeal also there were specific rules. Before sunrise the person prepared to go through the ordeal had to be summoned. Such a person had to fast from the previous day. He had to be bathed and clad in a wet cloth and made to go through the ordeal before the court presided by the king and the Brahmanas.

The ordeal by the balance was intended for women, children, old men, blind and lame persons, the Brahmanas and the diseased. Fire and water ordeals were for the Sudras as also poison of the quality of seven barley grains. So also in transactions of less than a thousand panas there was to be no ordeal of fire, poison, or weighing. However, persons anxious to prove their innocence could always go through ordeals in case of treason, or other heinous crimes."⁶

Thus a peculiar method was adopted by our ancient to determine the guilt. However, ancient Buddhists did not adopt the ordeal. They mainly depended upon the circumstantial evidence of the offence.

The other Buddhist offence mentioned in the Buddhist patimokkha is called Nissaggiya-pacittiya, or unauthorised use of another's articles. In modern sense, we can term it as criminal misappropriation. But the difference between ancient and modern offence is, in ancient Buddhist law, the

delinquent monk had to confess about his misappropriation, and prayscitta must be performed for his misdeeds, and also he had to return the article. But in the Indian penal code for the offence of criminal misappropriation, punishment is specifically mentioned. Most of the cases of misappropriation were regarding wearing clothes. Only a few cases were there regarding begging bowls. The aim of the provision Nissaggiya pacittiya is that the Bhikkhus should maintain proper discipline and that they have to maintain their life within limit. They should not take things for any unauthorised purposes. Because it may create hindrance in the way of attaining the highest Buddhist goal, Nirvana. On the other hand, if somebody donated something in the name of the Sangha that could be accepted and maintained carefully. Misappropriation of things by Bhikkhus is against the moral conduct and culture of Buddhist Sangha.

Buddhist laws are, in a sense, some kind of moral code of conduct, though Buddha prescribed punishments for murder, theft etc. He prescribed punishment for some minor offences also which are today in our society and which we do not regard as crimes. For example, one of the chapters in the patimokkha is pacittiya. It enumerates ninety-two offences, relating to some minor acts. For example, insecticide, lack of respect towards Buddha, Dharma and Sangha etc.

Buddhism regarded a failure or refusal on the part of a monk to live up to the standard of conduct deemed binding on the rest of the Buddhist community constituted an offence; because the Dharma Shastras of Buddhism laid down some cultural and religious rites to be observed by all the Buddhist monks. And non-observance of it degraded the monk and it was considered a hindrance in attaining the highest Buddhist goal, Nirvana. Apart from that, small offences like insecticide, lack of respect towards Buddha, Dharma and Sangha etc. are also regarded as sins. Buddhism paid special respect towards the discipline of the Sangha and also the moral obligation towards the religion and society. The modern criminal law draws a special line between the offences - what is punishable and what is not punishable. But Buddhism did not draw any distinction between what is punishable and what is non-punishable offence. According to it insecticide is also not a small offence, because in a non-vegetarian society they were the propounder of non-violence. Now-a-days all crimes are regarded as immoral, but all the immoral acts are not crimes. In this way now-a-days insecticide is not regarded as crime, and also disrespect towards Buddha, Dharma and Sangha also are not regarded as crimes. For spiritual people, specially for the Buddhists, good acts were regarded as Dharma. Any act in contradiction with dharma was adharma, and for the act of adharma there was penance or prayscitta

and punishment. So, there is a vast difference between modern concept of offence, and ancient concept of offence. That is why, they regarded insecticide also as an offence. "That action is sin or crime which takes the individual away from the Divinity resting within him."⁷

Buddhism regarded non-violence as the way of achieving divinity. In this way paying proper regard towards Buddha, Dharma and Sangha is also the way of achieving divinity on the part of a monk. So, Buddhist concept of law is clearly different from the modern concept of law.

The patidesaniya section of offences has a vast difference from our modern concept of criminal law. Patidesaniya section is also related with some moral injunction and punishment prescribed for the violation of these moral injunctions. The delinquent monk must control his greediness which is the root of all evils. If a particular monk takes sufficient food which has not been directly offered to him then he commits a patidesaniya offence. A formal confession regarding the offence is required before the Sangha. Buddhism did not regard these types of offences as a crime. It was regarded as a law of wrongs. It is similar with the English concept of law of Torts, but monetary compensation did not arise here. The important difference between the English concept of law of Torts and Buddhist

customary law is, in law of torts, payment of money is necessary, but in Buddhist customary laws, confession, repentance etc. are sufficient as the offence of the delinquent monk has already been committed. Of course, for some serious offences the highest punishment was expulsion of the delinquent monk from the Sangha.

But a completely different picture is seen in case of Hindu law. In Hindu law punishment of crimes occupies a more important position than compensation for wrongs or confession, repentance etc. "Neither theft, nor violence, nor any other form of serious injury to person or property could be condemned on mere payment of compensation to the party injured but it was regarded as the duty of the king to punish the culprit for his offence against the law. It may, therefore, be safely pronounced that the penal law of the Hindus was the law of crimes in the strict sense, and the law of torts occupied a comparatively subordinate and less important position in that system."⁸

Though in Hindu law, secular penal laws occupied a more prominent place, but like Buddhism, Hindu customary laws also occupied important place in the society; because the wrongdoer had to purify himself through prayascitta for himself and for the satisfaction of the Hindu society. We

do not know whether Buddha imposed any secular penal provisions for the wrongdoers in the Buddhist dominated kingdom, like Manu, Yajnavalkya etc. who imposed secular laws in the Hindu dominated kingdom in their times, and which were followed in the later period also.

It is seen that Buddhism condemned the crime, because it is against the morality and it is a hindrance in achieving the highest Buddhist goal, the Nirvana; but Hinduism gave much importance in the security, and tranquillity of the people at large. Of course, they did not ignore the purification of minds of the wrongdoers through prayascitta. It is interesting to note that Hindu law-givers many times tried to commercialise the idea of Hindu customary laws by imposing pecuniary value, or value of a cow in coins. But in Buddhism, commercialisation of Buddhist customary laws was not allowed by the Buddha himself. Of course commercialisation of laws by way of compensation was allowed in English law also in the name of Tort action. Ancient Indian laws overlapped with religion. So, unlike English laws, Indian laws were not direct. "For our ancients there was only Dharma and Adharma. Acting contrary to Dharma would amount to committing a sin or a crime, and in both cases there was penance and punishments."⁹

Law was considered as a branch of Dharma. According to Medhatithi, dharma stands for duty, which is contrary to

adharma. So, dharma means an aggregate of religious, moral, social and legal duty. Buddhist personal law regarded law as a moral injunction which was based on religion. Buddhist personal law was generally not concerned with the social and legal duties of a monk.

The Sekhiya, section of Patimokkha sutta, gives only some instructions to the monks in their daily life, for example, how a monk should enter into a village or a town, way of taking food etc. The rules of law and rules of religion and morality were dealt with one and in the same place. Buddhism regarded that the matters of morality and religion have the reward in the present and the next life also. Buddhism believed that there are some interlinking of religious, ethical and legal principles, and it is also not denied that it is deeply rooted in the society, because the social norms arose out of the need of the society. In Buddhism, the sources of law are custom and morality. So, all the Buddhist laws had their origin in the heart of the people, and they originated from the people. People accepted the moral injunctions. The refined moral injunctions were added by the Buddha, and later on these were collected in the Vinaya pitaka.

"The code of morality of the Buddhist is mainly founded on the Buddha's word, while the Buddha himself repeatedly says

that the Dharma is ancient and passed on by the risis or holy men from age to age. The rules of conduct for the monks and nuns are definite and are given in the Book of Discipline."¹⁰

Buddha did not claim that he established a new religion. He himself confessed that the Dharma was ancient and he was just prescribing some norms to follow the Dharma, and urged the people to give up superstitious rites and ceremonies. He preached the dharma for the welfare and happiness of mankind. In the Sekhiya section of patimokkha sutta, some instructions are prescribed for the daily life and activities of a monk; but it is interesting to note that Buddhist law is strictly concerned with the criminal intent of an action or mens rea or guilty mind of human beings. Morality takes an important position in Buddhist Vinaya. Buddhist law is a kind of moral sanction and injunction. A clear distinction was made between intentional act and an unintentional act. Apart from the intentional and unintentional mind, he gave importance to some other sides also, for example negligence. In negligence both intentional and unintentional act is absent, but negligence is there. So, special attention was paid so that a monk was not negligent in his work, while entering into a village, taking food etc.

These types of negligent acts were not as severely punished as those committed with the intention and knowledge

of causing any damage. Only formal confessions were sufficient in such cases.

To prevent the crime or the wrong doings was one of the important functions of both the state and the society. Earlier moral injunctions, concept of sin etc. arose to prevent the crime in the society. Probably, Buddha was in a dilemma regarding the need of municipal law or the positive law. However, his customary laws are very scientific in their approach. Tradition, custom and necessity of time, took an important role in fixing the traditional laws. Hindus fix their customary laws, e.g., how much praescitta they were to impose for killing a cow or stealing etc. In this way, Buddhists also fixed their own customary laws, what will be the punishment for killing, stealing, etc.

The Adhikarina Samath or the means of settling disputes within the sangha is also a moral injunction, so that dispute may not arise in future. So, in the strict sense, we cannot say that it is a criminal law, and in this way it is very difficult to study the Buddhist customary laws as Buddhist Jurisprudence. Because the Buddhist religious books, which are the principal sources of Buddhist laws do not confine themselves to the Juristic rules only. Besides, moral and religious injunctions and also the strict legal ideas are overlapping with each other in these books. No

clear line of demarcation was maintained in the customary laws and the municipal laws. Some secular laws or injunctions are also mixed up with the customary laws.

The notion of criminal jurisprudence is basically of the Western science and not of Eastern science. It had its origin in Roman law. The preconceived ideas of Roman laws are not suited to the ideas of Indian laws and society, specially to the sober ideas of Buddhism. So, there is every possibility of dissimilarities of Buddhist concept of crime and punishments with the western concept of crime and punishments. We have to study the Buddhist Jurisprudence as a comparative study with its western counterparts but not as a similar branch of law.

The establishment of Buddhist code of conduct was for the regulation of the conduct of the monks and also to reconcile and harmonise the desire of the human being. The conditions of different societies or the various stages of its development may not be similar. So, the dissimilarity of western laws with the Indian laws is quite possible. Of course, the scientific development of western Jurisprudence began earlier in comparison with the Indian laws. The difficulties of studying Buddhist jurisprudence, specially the Buddhist criminal Jurisprudence, are many. The first one is Buddhist law. It did not confine itself only in the analysis of jurisprudence, but it overlapped with human conduct, moral,

religious injunctions etc. Buddha was not serious regarding the strict principle of laws. "It was, of course, not possible for the Buddha to lay down all the rules in anticipation of what the unrighteous monks might do to evade or misinterpret them. Hence, the Vinaya pitaka, as it stands today, is a growth of centuries out of the basic rules formulated by the teacher himself."¹¹

So, to establish the strict principle of criminal Jurisprudence, the legal rules must be separated from the religious views, but not completely detached or isolated from religion. Of course in modern days also, it seems that in case of marriage, some secular and religious laws are mixed up, for purpose of the convenience of the society.

The next difficulty regarding it is, that we are already biased by the idea of western criminal Jurisprudence, specially with the Roman criminal jurisprudence. We always look from one point of view regarding jurisprudence ignoring the idea of eastern concept of jurisprudence. So, one should not have preconceived notions regarding the concept of Jurisprudence. Roman jurisprudence is not the only jurisprudence in the world. Apart from that, Indian concept of jurisprudence is more ancient and more humane also. Mayne, the great Indologist, himself confessed, "Hindu law, has the oldest pedigree of any known system of Jurisprudence."¹²

Indian Jurists have an inferiority complex regarding the Indian Jurisprudence, that the great Indian law givers Manu, Yajnavalkya, Buddha etc. just prescribed some ethical norms, and not rules in the strict sense, but the western jurist are preconceived with their own ideas of Jurisprudence and ignored the Indian concept of Jurisprudence. According to them, the contribution of Indian Jurist is nothing in the development of legal history and Jurisprudence.

Our forefathers were mainly concerned with the violation of moral and religious rules, and it was also within the limit of the society. For example, the problem of white collar criminality is a modern problem. It was unknown to the ancient law givers. If the problem had arisen in those days also, they might handle the problem within the limit of the society. In modern times it is established that crime is caused by a combination of various circumstances. There may not be just a single cause of a crime. It may have many more causes. In early societies, many devices of crime were unknown to the criminals. The circumstances were more harmonious. But in modern society a child has to face various circumstances from its very beginning. Competition, conflict etc. are common to a child in modern days. Now-a-days a person acts as the guardian of the society as well as a criminal of the society. For example, the white collar criminality is well known to all persons.

Individual competition is one of the most important factors in case of crime causation. Because, individual wealth means increase of reputation in the society, and poverty means disgrace in the society.

All the reasons of crime-causations are not new. Individual competition, conflict etc. are not new problems. Even wearing the Buddhist traditional dress Civara, Devadatta, one of the main competitors of Buddha, had done many criminal activities. So, causation of crime is not a modern problem. It is as old as our society. The only difference of crime in ancient society from that in the modern society is that in ancient period, many techniques of crimes were unknown to the criminals. But the techniques of crime causation is not unknown to modern criminals. The story of dreaded criminal Angulimal is well known to all. Only the Buddha had taken him to the proper way of life.

The period of Buddhism was known as the period of peace and prosperity. Of course, a conflict arose between the Buddhist and Hindus regarding the establishment of their own culture. Cultural conflict is also one of the reasons of crime causation. Many modern criminologists believe that many other factors are also responsible in case of crime causation. For example, Geographical, Biological etc. According to some criminologists, crime against property is

common in winter, and in the same way certain crimes are common in mountain areas. But, like the modern criminologists, Buddha did not mention anywhere that Geographical, Biological reasons are responsible for crime causation. Only the mind of a person is responsible for his good or evil acts. According to him, man is the composition of mind and matter. The entire philosophical work of Buddha, specially the Abhidharma pitaka dealt with the mind of the people. Only the mind of the human being is the subject matter of Buddhist philosophy, because only the pure mind can attain the highest goal of Buddhism, Nirvana. The composition of Vinaya pitaka itself had some social reasons that the unlawful activities in the absence of Buddha may again arise in the society. It is recorded in the cullavagga that a thera called subhadda, expressed happiness at the death of Buddha.

"Since they were treated as so many school boys by the master, who often admonished them for their unbecoming conduct, they would now be free to do as they thought fit without let or hindrance."¹⁴

The remark of Subhadda is also an indication that, there was every possibility of violation of the norms which were specially prescribed for monks and also for the lay devotees.

Though much effort was taken by the Buddhist monks and the master himself so that Buddhist code of conduct remained intact in future also, but it is not possible to prevent the social unrest and its influence upon criminality.

The development of Hinayana, Mahayana and Tantrayana is a case in point in this regard. The strict moral sanctions and injunctions prescribed by the Buddha were ignored by the Buddhist monks. According to them, the Buddha was full of love and compassion, and there was nothing wrong, if they enjoyed freely wine and women, because the Buddha, who was full of love and compassion would forgive them.

✓ "Corrupt practices like the use of five ma-karas, i.e., words beginning with the letter 'ma' such as madya (wine), mamsa (flesh), matsya (fish), mudra (woman) and maithuna (sexual intercourse) were encouraged and practised even by men who were supposed to be leading a religious life."¹⁵

Vikramasila was the centre of Tantric faith, and soon, it spread to Orissa, Bengal and Assam. The Tantric faith is very much strong still in the three states Assam, Bengal and Orissa, and perhaps it was the direct influence of Hindu Tantricism.

In our view also, it was the direct influence of Hindu Tantraism, because it is natural that Hindu philosophy

believed in Dharma, Artha, Kama and Moksha, as the ultimate aims or purusartha. But Buddhist philosophy, which believed only in Nirvana. Diversion of their attention to wine and women is not believable.

But according to some author, Tantricism is basically the Buddhist philosophy in later period. "It is possible to declare, without fear of contradiction, that the Buddhists were the first to introduce the Tantras into their religion, and that the Hindus borrowed them from the Buddhists in later times, and that it is idle to say that later Buddhism was an outcome of Saivism."¹⁶ The main difference between the Hindu and the Buddhist Tantrism is, Hinduism believed in Shakti as a divine power, but Buddhism believed in Prajna (knowledge, wisdom). Only in the later period, the divine idea of Tantrayana had taken an ugly turn and they thought that wine and woman is the only way of salvation. With the development of new ideas and thought, the causation of crime had also taken a definite shape. Monks were not only taking pleasure from wine and women, but they left the habit of practising the Buddhist rules and regulations, specially mentioned in the patimokkha sutta. Throughout the history of Buddhism, crime rates were higher during the period of Tantrayana.

Apart from the developments of crime causation in various period Buddhis,, the other important factor in

reducing the crime is the concept of Karmaphala or the fruit of action. The law of karma is an integral part of both Hindu and Buddhist philosophy. Both in Buddhism and Hinduism, if a sinner does not undergo Prayscitta (in Hinduism) and confession or repentance before the assembly (in Buddhism) then he has to suffer in hell and he would be born in the next life bearing the fruit of evil deeds. Karma ordinarily denotes good and evil actions. It is a general belief that in secular penal justice, the offender may escape from the eye of law. And if he escaped from the eye of law, society cannot do anything to him. But in case of Karmaphala, or according to the theory of Karmaphala, he has to suffer in his next birth, or it may be in the present birth also. The Indian society is based on religion. So the theory of Karmaphala has a great deterrent effect in the society. The punishments of secular penal sanctions are visible, but the punishments of Karma vipaka are in the hands of God, and it is invisible. But it is seen that in comparison with secular penology the theory of Karma vipaka has a more deterrent effect.

Buddhist criminal Jurisprudence in comparison with Hindu criminal Jurisprudence is more liberal. In case of any violation of the religious or customary laws of Buddhism, the highest punishment was expulsion from the Sangha. But the crime rate in Buddhist society is much lower than that in any

other religious society. One of the important aspects in this regard is that in Buddhism, the concept of individuality is completely denied. Owning of private property itself is regarded as a crime, because greed is the root of all the human evils.

Public justice always required punishments. Society, through some agency punishes the wrongdoer. While discussing the concept of punishment in modern times, more emphasis is given to physical punishments. But in ancient period, specially in the religious cases, maximum importance was given to mental pain. That is why confession, repentance, prayscitta etc. were more common in ancient Indian society. Buddhism is basically concerned with the mental punishments. The punishment systems involved two ideas; one is to satisfy the society by punishing the wrongdoer, physically or mentally, and the other one is prevention of offences, that in case of any violation of law, severe punishment might be awarded to criminals. Those punishments could be the physical or mental punishments.

In modern period, there are various theories of punishments, for example, Retributive, Deterrent, Preventive, Reformative, Expiatory etc. According to the Retributive theory, "A blow for a blow" is the natural urge of a human being. The idea behind the theory is "revenge". Buddha was

not at all concerned with this type of ideas of punishments. In fact, in modern society also the theory has no relevance in our society.

According to Deterrent theory, other persons will be deterred from doing any crime, if we impose severe punishments upon the wrongdoer. Today also in Muslim countries severe punishments are very common to deter the criminals from doing any unlawful activities. Buddhism did not regard, deterrent method of punishments are fruitful to our society.

Another important method of punishment is preventive method. Preventive method, for example, imprisonment, banishments etc. are common in our society. As Buddhism only believes in confession, repentance etc. so, it did not find place in Buddhist Jurisprudence.

The main object of the reformatory theory is to reform the criminals from the wrong-doings so that he never realised that he is a burden on the society and in this way, he can return to the mainstream of the society as an ideal citizen. The modern system like probation, parole etc. are the way of reformatory system of punishments. In ancient India both Kautilya, the great Hindu law giver and Buddha had given maximum importance in reformatory theory. Though scientific reformation was unknown to them, but Buddha prescribed

reformatory punishments to monks and laymen.

Another important theory of punishment is expiatory theory. This theory is of Indian origin. The main idea of this theory is purification of the criminals. Confession and repentance is the only punishment for a wrongdoer. The system of prayscitta is very much common still today in the Indian society. Of course, there is a difference between religious sanction or the expiation and penal sanction. The theory is mainly concerned with the violation of moral codes and conduct.

The entire Buddhist system of crime and punishment is based mainly upon the expiatory theory. Buddha believed in confession and repentance, he did not believe in physical punishments. Buddha understood punishments in a purely humanistic and optimistic manner. Perhaps because of this gentle approach towards religion society, crime, punishments etc., the age of Buddhism was the golden age of Indian art, culture, philosophy etc. There is a vast difference between punishment and expiation. "Primarily punishment is imposed from without and is therefore, involuntary whereas expiation is undertaken as a result of inspiration from within and is a voluntary process."¹⁷

The human being must be afraid not of crime alone but also of sin. The concept of prayascitta in Hinduism means the self-inflicted punishment. In Buddhism also the meaning is same, though the procedure is different. Origin of sin is generally derived from religion, but modern secular or municipal laws derived from religion, as well as it was derived from the need of the people and time also.

"The Artha-sastras of Kautilya revealed a code of law proper, purely secular, with the express provisions that the royal law could supercede the Dharma law."¹⁸

In this way, at a time the royal law superceded the Dharma law. The tendency of superceding Dharma law had started from the period of Yajnavalkya. The royal law admitted that crime and criminals not only harmed the interest of the Dharma law alone, but they harmed the interest of the state. The duty of the state is not to allow the crime to be committed. Both of the fear of God and fear of royal law only deter the criminals from doing crimes. The aim of the dharma law was to purify the heart of the criminals, but the aim of the royal law was to maintain the balance between pleasure and pain, like in utilitarianism of Bentham. The punishments always involve pain. In case of dharma punishments it is mental pain and in case of royal punishment it is both

physical and mental pains. The punishment is justified by both state and the society.

In conclusion, the Buddhist concept of law might not in all respect be a perfect law, but it is comparable with the other system of laws. We cannot deny the merit of the Buddhist Jurisprudence.

The Buddhists were guided by the higher idea of Dharma for the permanent welfare of the human beings. Logical consistency is one of the important ideas of Buddhist Jurisprudence. Buddha himself was a logical person and he always justified his position against all possible controversies. He always emphasised that the law should not be unreasonable and detrimental to the interest of the entire Buddhist community. The Buddhist community accepted the norms, because according to it the inspiration flows from the function of the highest authority the Buddha. Of course for a practising lawyer, it may not be fruitful, but for a student of Jurisprudence, it is essential to know the nature of the Buddhist Jurisprudence.

Buddhist criminology and penology may not be a lawyer's law, and it is also not suggested that we should follow the Buddhist law, for every purpose; but the study of the ancient Buddhist criminology and penology, helps us to

realize that our present system of criminology and penology has many drawbacks. It goes without saying that pure jurisprudence and religious jurisprudence will be different. As a religious jurisprudence, Buddhist jurisprudence may fall short of compactness and positivity. But if we take into consideration the fact that after all laws are for men and men are not for laws and also the fact that religion is one of the profoundest experiences of mankind - then we cannot ignore religious jurisprudence. It may not be used in all and sundry cases, but in the understanding of the basic issues involved in making, amending, enforcing and repealing of laws the religious aspect of society can hardly be forgotten.

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Chapter IV

ORIGIN AND GROWTH OF BUDDHIST CODE OF CONDUCT

Veda is the fountain-head of the code of conduct in Indian society. Veda comprises of both the Mantra and Brahmana parts. The word 'Vidhi' mentioned in the Vedas means injunctions in particular rites. In those period there existed sharp differences among the learned Brahmanas concerning what to do or what not to do. So, after detailed discussions and removal of differences, the learned Brahmanas prescribed some minor codes of conduct for future use of the society. Code of conduct in religion, and in other social matters had taken a definite shape in the later Vedic period with the development of the society. Specially, the evolution of caste system developed economic and social condition, re-ascertained the code of conduct prescribed by the Brahmanas. Establishment of Dharma was one of the basic and ultimate purpose for the learned Brahmanas. The law of rita or the law of nature are connected with the basic code of conduct or the religious injunction in ancient times. The code of conduct in ancient Hindu society arose from thinking and reasoning. Professor P.V. Kane remarks - "Vidhis are the very core of the Veda. The doctrine of bhavana is the very heart of vidhis and is therefore one of the most important doctrines of the mimansa."¹

The Vidhi or code of conduct is not the command of sovereign authority, but it is just a religious injunction or moral injunction.² Idealism is the source of Hindu code of conduct. Achara, Vyavahara and Prayascitta etc. are later development in Hindu society.

In Buddhism also, certain norms for the monks and also for the layman arose along with the development of Buddhism. "The Vinaya was the discipline governing and regulating the outward life of the monks and nuns who had entered the monastic orders the foundation of which is attributed to Gautama."³ Some basic rules were necessary to govern the monastic life. That is why Buddha framed certain rules and these rules are available in the Vinaya pitaka.

In early Buddhism, there appeared two branches of the Sangha.- Theravada and Mahasanghika. Before the third Buddhist council at Patna under the patronage of Ashoka, there developed as many as eighteen schools of Buddhism. In Dipavansa the eighteen division of Buddhist schools is described very nicely. In Buddhism both pabhajja and Upasampada ceremony have a close relationship with the establishment of the Sangha. The Buddhist monks had to repeat three determinations for the admission in Sangha. The three formulas are "going to the refuge of Buddha, Dharma and Sangha."⁴ The Buddhist ceremony

of pabbajja and upasampada developed simultaneously, but later on these two ceremonies separated from each other. When Buddha was the supreme commander and the undisputed leader of the Sangha, he himself admitted all the Bhikkhus in the order, and the pabbajja and upasampada ceremonies were performed together. With the growth of the Sangha and the passage of time these two ceremonies were separated from each other. Because, it was impossible for Buddha to admit all the monks by himself. The pali-term pabbajja means admission and upasampada means ordinations. Buddha uttered the following words :

"Come, monk, well taught is the Dhamma, fare the Brahmacarina for utter ending of the ill."

"Ahi, bhikkhu, Svakkhato Dhammo, care Brahmacariyan Sammadukkhassa antakiriyayati."⁵

As it was impossible for Buddha to admit all the monks, the powers to admit monks in the Sangha were delegated to other monks also. Buddha himself instructed, and pointed out the procedure to them. Because of the impossibility of attending the function personally by the Buddha himself, a new method was introduced. In the new method, every candidate was asked to repeat the three 'goings for refuge'. But many senior monks, even Buddha himself, were doubtful about the

efficacy of this method of three going for refuge. Some initial training and education was essential for those persons, before admission in the Sangha. Again a new method was introduced, the candidate who came for admission in the Sangha was entrusted to preceptor to train him for the admission in the Sangha. The Sangha was the final authority to admit him in the Sangha or not. In this way the Sangha came into being. Before admitting a candidate in the Sangha, it is the duty of the Sangha to see, whether the candidate is properly trained or not. Preliminary admission or pabbajja and ordination or final admission are the two stages in the admission of the Sangha. Because of the separation of these into two stages, Buddhism was more popular religion than other religions in those days. A candidate could become a novice if he was conferred pabbajja and become a monk by conferment of upasampada. Almost all candidates were admitted in the Sangha irrespective of their caste and creed. The order was based mainly on the principles of equality and brotherhood. Buddha did not recognise the caste system and he made it clear when he declared -

"As the great stream, O monks, however, many they may be, the Ganga, Yamuna, Acirevodi, Sarabhu, Mahi. When they reach the great ocean, lose their old name and their old descent and bear only one name, "the great ocean". So also

monks, these four castes, Khattiyas, Brahmanas, Vessas and Sudras, when they in accordance with the law which the perfect one has preached forsake their home and go into homelessness, lose their old name and old paternity, and bear only one designation, Ascetics, who follow the son of Sakya house."⁶

In many cases lower caste people had also taken some important position. For example, Upali, a barbar had taken the position vinayadhara and was one of the great exponent of vinaya. Regarding age also, there was no pre-condition mentioned in the Buddhist texts, but later on some types of reservation was made, while admitting the persons in the Sangha. The person admitting in the Sangha had to wear a yellow robe, after that he has to take the following three refuge.

"I take refuge with the Buddha. I take refuge with the Dharma or law. I take refuge with the Sangha or order."⁷

After taking the three refuge, the next step is the administration of ten precepts to the candidates. The ten precepts are, abstinence from (1) taking life, (2) taking what is not given, (3) indulging in sexual intercourse, (4) telling a lie, (5) intoxicating drinks, (6) eating out of time, (7) dancing, singing and seeing shows, (8) using

garlands, scents, unguents, ornaments, and finery, (9) use of a high large couch or seat, and (10) receiving gold and silver. When a candidate accepted these ten precepts, he became the full fledged samanera or novice. Generally the Sangha was open to all men irrespective of their caste and creed. Of course in some cases some conditions were imposed upon some people.

The conditions recorded in the Mahavagga are as follows :

(1) The permission for a youth to enter into the Sangha was granted when he secured the permission of his parents. During that time a serious allegation was levelled against Buddha, that he destroyed the family life of the society by instigating the person to take refuge in Buddha. A serious disturbance was arose in the society in those days. People openly criticised Buddha by saying such words like -

"The recluse Gautama gets along by making (us) childless, the recluse Gautama gets along by making (us) widows, the recluse Gautama gets breaking up families"⁸

When some sort of misunderstanding arose in the society, king Suddhodhana made a personal appeal to the Buddha, that he should make some rules, so that these types of criticism

may not arise in the society.

(2) Those persons who suffered from serious physical disabilities or defects like serious illness, bodily deformities, leprosy, boils, etc. were not admitted in the Sangha.⁹

(3) Another restrictions on the ground of admission in the Sangha are on some moral defects, e.g., a seucer of a nun was in no case ordained.¹⁰

(4) Dreaded criminals were also not admitted in the Sangha, for example, a person who kills his mother, father or an Arhanta or a perfect one etc.¹¹

(5) Buddha did not give permission for admission to a royal servant, and a debator in the order. From various instances, it is clear that, Buddha was always helpful to the kings and the chieftans of the class. In this way, his main support was coming from the feudal class comprising the business class and bankers.

Apart from these rules, there are some other minor rules also for example a person who is not generally modest, or if that person is shameless, then in that case he was not allowed to enter into the Sangha.

To ascertain the nature and characters of the pupils in early times, they were kept into the constant observation for some days, till it was known to them of the behaviour of the pupils.¹²

Probation system was so popular in those days that in Vinaya pitaka also, various kinds of probation were mentioned there.

Preliminary admission or pabbajja generally completed with the Upasampada or final ordination. It leads to the candidates for full monkhood. The Upasampada ceremonies were modified in various times till the period of the composition of Atthakathas or commentaries.

In various Pali texts, all total eight kinds of ceremonies are found -

1. Ehi bhikkhu Upasampadā
2. Sarana-gamana Upasampadā
3. Ovada-patiggahana Upasampadā
4. Panha-vyakarana Upasampadā
5. Atthagarudhamma-patiggahana Upasampadā
6. Dutana Upasampadā
7. Attayacika Upasampadā
8. Nantticaluttha Kamma Upasampadā.

In this way from time to time, the ordination ceremony were gradually changing in those days, but it had taken a definite shape in the period of composition of Atthakathas.

The pabbajjā ceremony is a simple ceremony in comparison with Upasampada ceremony. To perform the Upasampada ceremony, a special meeting should be convened, and a quorum of ten qualified elder monks was necessary, of course in certain cases specially if the state is located in border area, then the quorum may be fixed only five elder monks. In the meeting the definition of Sangha was clearly made. In the meeting the specific number of members, Minimum and Maximum etc. are also clearly mentioned.

"In order to constitute a Sangha the number should be at least four, but such a Sangha was not empowered to perform the Upasampada ordination."¹³

Some other specific rules were also specially mentioned in the Upasampada ceremony, for example, every step of Upasampada ceremony was complete, when it was decided by three readings. The voting methods of the meeting was also something peculiar. If the members remain silent in the meeting, then it was held that there were no objection in the meeting, if any objection is there, then the members are

free to discuss the issue. In some cases a sub-committee was appointed to sort out some disputed matters. In some cases arbitrator was appointed to resolve the tangle. If the sub-committee and the arbitrator failed to resolve the tangle then the matter was put to vote.

"The rule were so framed that no member was allowed to leave the meeting without declaring his vote."¹⁴

The proceedings of the Upasampada ceremony also have some peculiarities. The ceremony is quite lengthy also. The Sangha for the first time determines its constitution. The ten learned members of the Sangha had to determine each and every aspects of the constitution. One of the elder was elected to take the seat as the president. The new candidates were asked many questions in order to ascertain about their eligibility. After asking some preliminary questions, like names, instructor's (Upajjhaya) names about their bowls etc., the candidates were formally presented before the assembly of the monks. It is the duty of a candidate to present himself in the assembly of the monk in a proper and respectful manner. There are many other formalities also which were both the candidates and the members of the ceremony had to be performed. Everything was recorded at the end of the ceremony to know the candidates

ecclesiastical age. After that the candidate was taught about the four nissayas or reamisities and four akaraniyas or interdicts of the monastic life.

The four nissayas are :

- (1) Pindiyalopabhojana or eating of the food collected in the almsbowl only.
- (2) Pamsukulacivara or wearing robes made of rags collected.
- (3) Rukkhamulase asana or lodging at the foot of a tree, and
- (4) Putimuttahesajja or using cow's urine as medicine.

The four basic nissayas mentioned in the culla Vagga's are the four basic food, clothing, lodging and medicine. Without these four basic essentials, a person cannot survived without the fulfilments of these basic essentials. There are some identical causes which was forcing the Buddha to delegate some powers to the elders of the Sangha. He clearly instructed the elders of the Sangha for the conferment of the pabbajja and Upasampada ordinations on desiring candidates. Buddha formally advised to his disciples or the elders of the Sangha.

"If a person seeks pravrajya, let him approach the Sangha or order, wear the robes, salute the elder bhiksus sit down squatting, and then with folded hand utter the (trisarana)

prayer thrice."¹⁵

The Upasampadā ceremony was considered complete when the following vows and duties were performed by the candidate or the Bhikṣu.

- (1) The four nissayas or requisites,
- (2) The four pataniya dharmas,
- (3) The four srammakaraka dharmas,
- (4) The observance of the silas or precepts, and
- (5) The duties to the Upadhyaya or preceptor.

Regarding the performance and observation of Upasampada ceremony, various pali texts differ in various circumstances. So, the pali text pravrajyavastu and Mahavagga provides many similarities and dissimilarities regarding the Upasatha ceremony. But, definitely, the sources of all the Upasatha ceremonies was the palixinaya. In comparison with pali vinaya, the Mulasarvastivaci vinaya took place quite late. The main sources of Mulasarvastivadi vinaya was the details flourished in India from the beginning of Buddhism in India. The period of the composition of Mulasarvastivadi vinaya, was the early centuries of the Christian era. With the development of the time various philosophical and doctrinal change has taken place, but in comparison with the nature of various ceremonies like Upasampada and Upasatha

ceremonies are remained as it is. Of course with the developments of various doctrine and time, and to suit the society, some technical change of these ceremonies had taken place when the chinese traveller I-tsing came to India, he enquired in details regarding the various ceremonies. Because some erroneous views has taken place in China regarding the various practices of Vinaya. After details enquiry I-tsing had observed that the various ceremonies of Buddhism have remained same since their beginning.

The Institution of Achariyas and Upajjhayas is also closely related with the origin and growth of Buddhist code of conduct. Buddha made some provisions of an acariya and upajjhaya, because Buddha got many complaint from various persons regarding the rough behaviour of the newly entered monks. The new monks were very much confident that they will very easily attain Nirvana, the highest goal of Buddhism. So, to solve this problem, Buddha himself instituted the institution of Achariyas and upajjhayas, Buddha specially mentioned five kinds of acariyas and two kinds of upadhyayas.

The five kinds of acaryas are :

- (1) One who was an acarya of the sramanera, i.e., he who gave Tri saranas or Three Refuges and Dasa Silas or Ten precepts.

- (2) One who was trained in the esoteric doctrine.
- (3) One who taught how to perform a work, i.e., he who was entrusted with the duty of making formal announcement thrice.
- (4) One who was an acarya giving nisraya to his pupils, i.e., he on whom one lived in dependence even for a day only, and
- (5) One who was an acarya teaching how to read, i.e., he from whom one learnt even gatha, stanza of four padas or lines, recited it thrice and kept it in mind.

The two kinds of the Upadhayas :

- (1) One who gave the pravrajya or preliminary admission, and
- (2) One who gave the upasampada or ordination.¹⁶

The relationship between the student and teacher was an excellent one. The teachers regarded the students as their own son and the students also regarded their teachers as their own father. In Mahavagga it is clearly stated, "The acariya, O bhikkhus, ought to consider the antevasikas (pupil living with his teacher) as a son, the antevasika ought to consider the acariya as a father. Thus these two

united by mutual reverence, confidence and communion of life, will progress, advance and reach a high stage in this doctrine and discipline."¹⁷

In Tibetan vinaya also described the various qualifications of a teacher. Buddha himself described the following five qualifications of a teacher :

- (1) Completion of ten years or more since his upasampadā ordination.
- (2) Ability to nurse or cause to be nursed a saddhiviharika/antevasika at the time of his illness.
- (3) Ability to dispel or cause to be dispelled the grief of a saddhiviharika/antevasika.
- (4) Competence to remove or cause to be removed the erroneous view of a saddhiviharika/antevasika, and
- (5) Competence to remove or cause to be removed any outward expression of dissatisfaction of a saddhiviharika/antevasika.

The original teachers of the vinaya's are, according to samatapasadika of Buddhaghosa are - (1) The Buddha, (2) Upali, (3) Dasaka, (4) Sonaka, (5) Siggava, and (6) Moggaliputta Tisa. This list is the unbroken chain of the vinaya

teachers in India, before the third Buddhist council. The necessity of Acharya and Upajjaya was felt only after, when the chain of vinaya teachers was broken. Buddha emphasised maximum importance on the role of teachers in that period, because other religious teachers had caused serious problems to the Buddha and his Dharma. Other religious teachers were in the habit of attacking frequently the Buddhist sects. One of the best examples of philosophical height reaching in those days, was the discussion between King Milinda and Nagasena in Milindapanha. The role of teachers were more or less contribute in the growth of the Sangha and the Buddhist code of conduct. The same rules of vinaya, which the Buddha framed centuries ago, are still in force in most of the Buddhist countries.

Buddha's teaching in the early period of the developments of Buddhist Sangha, was a calculative one. Buddha advised to his disciples.

"Walk, monks, on tour for the blessings of the many folk, for the happiness of the many folk out of compassion for the world, for the welfare, the blessing, the happiness of devas and men. Let not two (of you) go by one (way). Monks teach Dhamma which is lovely at the beginning, lovely in the middle, lovely at the ending. Explain with the spirit and the letter the Brahma - faring completely fulfilled, wholly

pure. There were beings with little dust in their eyes, who not hearing Dhamma are decaying, (but) if they are learners of Dhamma they will grow.¹⁸

In those days education was not systematic for the common people. State was not concern with the general education of the people. So, Buddha was duly bound with the general education for the lay followers of Buddhism. For the general followers of Buddhism some sort of moral pressure were put on them, for example, the bowl was turned down in respect of the offenders. The monks were also not bound to offer any religious instructions to these types of common people. General rules for the Sanghas as well as for the new comers were strictly followed in those days. The duties of the pupils and the teachers are nicely described in the following words :

"The pupils should honour his teachers by (1) rising in their presence, (2) ministering to them, (3) obeying them, (4) supplying their wants, (5) attention to instruction. The teachers should show his affection for his pupils by (1) training them in all that is good, (2) teaching them to hold knowledge fast, (3) instruction in science and lore, (4) speaking well of them to their friends and companions, (5) guarding them from danger."¹⁹

Buddha always prescribed various rules for the monks, because of the non-obedience of the students to his teachers, and the complaints coming from the general people about the unbecoming conduct of monks. The credit of compelling the Buddha to formulate the vinaya rules were always goes to the layman. These rules were again developed with the developments of times. The origin and development of Buddhist code of conducts originates from these incidents. So, the interest taken by the laymen was very significant in the growth and developments of Buddhist code of conduct. The mercantile class did a lot for the growth of Buddhist Sangha. They have offered various stupas and viharas for the developments of Buddhist Sangha. These viharas were the great assets in the developments of Buddhist Sangha. These viharas provided not only the elementary education to the new comers, but some sort of advance guidance was also provided to the senior monks. These viharas served another two purposes firstly as the place of all sorts of religious activities, and secondly as place of Buddhist learning.

Apart of these Buddha used to assign work to the senior monks on the basis of his own studies about their nature and outlook to the Buddhist Dharma and Sangha. It helps a lot in the growth of the Buddhist code of conduct, because apart from the Buddha, other senior and respectable

monks were also involved in enacting the Buddhist code of conduct.

Many new rules were formulated on behest of many senior monks. Some vinaya rules were formulated on the veluvana vihara and are mentioned as follows :

The rules on the keeping of Vassa.²⁰

The use of food cooked in the monestary.²¹

The picking of edible (Kappiya) fruit in the absence of any laymen from who permission to do so could be obtained.²²

Surgical operations on monks.²³

The use of the kinds of dwelling.²⁴

Though Buddha himself permitted the women to enter into the Sangha, but he gave permission to them in the later period of his life, with some doubts in his mind that whether the Dharma he has preached will continue for many years, after the entry of women in the Sangha or not. The entry of women in the Buddhist Sangha was one of the most significant developments in the Buddhist history, and it has contributed a lot in the developments of Buddhist code of conduct.

Buddha gave permission to five hundred sakyan women led by Maha prajapati Gotami to enter into the Sangha, and

subsequently they were regarded as the nuns of Buddhist religion. The ordination of five hundred women as nuns was not only a significant development in the Buddhist code of conduct, but it was a significant development in the entire Buddhist history. After the entry of the nuns, many new problems arose in the Buddhist Sangha, specially education, training and discipline etc. So new rules were framed to train the Buddhist nuns, and the task was given to the efficient and reliable monks, so that they could train the nuns effectively.

Though the Buddha gave permission for the entry of the nuns into the Sangha with reluctance, on the insistence of Ananda, he did not accept them as equal to the monks. He had laid some conditions for the nuns; for instance the nuns would show respect to the monks, nuns could not spend rainy-recess in the families where there were no monks, every fortnight the nuns would get lessons from the monks etc. He is also reported to be pessimistic about the future of Buddhism because of the nuns; that, were there no nuns in Buddhism, it would last a thousand years; because of them it would last only five hundred years.²⁵

The growth of Buddhist code of conduct was continuing after the death of the Buddha also. Of course the picture

which emerged after the death of the Buddha was some what different. The death of the Buddha was definitely a setback for the Buddhist community. But the set-back was overcome by the able handling of the matters by the venerable monks like Ananda, Mahakassapa, Upali etc. Of course the change of the Buddhist rules, which had taken place after the death of the Buddha, was a minor modification, where necessity arose. In the second Buddhist council, an attempt was made by some senior monks to preserve the purity of the order and rules, which was taught by the Buddha himself. Because of their fundamentalist attitude, they were unable to preserve the unity of the Sangha. The need of the time was a basic change of some of the rules and regulation of Buddhist Sangha. That is why a split had taken place under the banner of Mahasanghikas, with the developments of time many divisions had taken place in Buddhism and every divisions had made their own rules, claiming to represent the true words of the master.

Ashoka intervened in some of the internal matters of the Buddhist Sangha during his rule. It is said that Ashoka supported only the Theravada Buddhism. So, it created a lot of problems to the other sects of Buddhism. That is why monks of the other sects shifted from Magadha to other congenial places. Various ups and downs of the Buddhist sects, their divisions in various sects etc. contributed a lot in the

growth of Buddhist Code of conduct.

Most of the Buddhist sects realised that education was necessary to maintain the balance in the Sangha. Meditation might not solve the immediate problems of the Sangha. A monk should possess every knowledge, Dharma, Vinaya and meditation. But with the developments of time, specialization of every branches in Buddhism, was the need of the hour. To meet the new situations some rules were modified. For example, monks were not allowed to practise medicine, but according to canonical literature, the rules were liberalised for the benefit of the Sangha as well as for the close relatives of the monks.

"The monks residing in the monasteries were allowed to treat their fellow monks. Certain very close relations such as parents and some other closely associated with them in their monastic life."²⁶

When F-hsien visited India, he was very much particular to see whether the vinaya rules were fully observed or not by the monks. Though various modifications had taken place in the vinaya rules, with the developments of time they always tried to follow the rules and regulation, which were prescribed by the Buddha himself.

"The disciplinary rules are strictly observed by them. The laws regulating their demeanour in sitting, rising and entering when the others are assembled, are those which have been practised by all the saints, since Buddha was in the world down to the present day."²⁷

Lately the vinaya sutra of Gunaprabha has discussed the vinaya rules in a very systematic way. In the vinaya pitaka the rules were discussed giving many instances and similies. But in the vinaya sutta of Guna Prabha discussed only the vinaya rules. The first chapter described the Pravrajya virtue. It includes the two ceremonies the pravaja and upasampada, which we have already discussed in the same chapter.

The second chapter is the posadha vastu. In posadha vastu, four parajika offences are described in the details. The prajika offences are Abrahmacarya (sexual intercourse or unchastity), Adattadana (theft or stealing), Vadha (deprivation of life of human being) and Uttara pratapa (false proclamation of super human faculties). After the prajika offences the sangha vasasa offences are mentioned. For these types of offences, the punishment was suspension from the Sangha.

The Third chapter is called varsika vastu. In varsika vastu, various rules of rain retreats are mentioned very vividly. The rules have a very close relationship with the

theory of cult of non-violence, and every Buddhist monks follow these rules. The cult of non-violence become popular in the Buddhist community, when they realised that they caused pain to the smaller insects, when they walked from one place to other place. Under the pressure of facts. That is why, it was obligatory to a Buddhist monks to remain in one place during the rainy season and that is known as varsha-vasha.

The fourth chapter is known as pravaraṇa vastu. After the varsha-vasha, the monks used to assemble at one place. Earlier, it was before the Buddha, and after the parinirvana of the Buddha, it was before the ablest monk of the order. It was a convention for the monks that, the rain retreats, were not to be spent idle. The monks have to discuss the various discourses of Dharma, specially the vinaya. The monks, who have completed the varsavasa have to make confession, of his sins, if anything was heard, seen suspected by him.

The fifth chapter is known as Kathina vastu. Kathina means the civara or the robe of a monk, and the robe was specially offered to a monk, who have already completed the varsavasa. A special function was invited to offer the kathina civara. The Kathina dana ceremony is still prevalent among the Buddhists. Devotees offer the garments and other cloths, but it is the duty of the monks to make it comfortable to use.

"The main function of this ceremony was to entrust certain monks with the eating, sewing and dyeing of the robes, and all this was to be finished in one day, when the robes were ready, they were distributed among the residents."²⁸

The Sixth chapter is the Civara vastu. The civara, which were used by the Buddhist monks, was given specific type and measurement, and in this way it has taken a definite shape. The civaras are divided into three divisions -

- (1) Antarasaka or the lower garment,
- (2) Uttarasanga, or Uttarasanga to cover one shoulder of the body,
- (3) Sanghati, a two-fold stitched garment.

Apart from these three Civaras, one-fold pratyastaroma. One kanduprati CC hana was also permitted. The rules regarding the cloths of the monks, are specifically described in the civara vastu.

The Seventh chapter described in the vinaya suttas of Gunaprabha is known as cama-vastu. In early periods, Indian saints never used any kind of shoes. But there was no any restriction on Buddhism in wearing shoes, of course, there were some restrictions also in wearing variegated colours shoes etc. Monks were restricted in wearing the wooden

sandals.

The Eighth chapter of Vinaya Sutta of Guna Prabha is known as Bhaisajya vastu. The monks are allowed to use the bhaisajya (medicine) whenever they required for that. Bhaisajya includes the herbs, ghr̥ta (clarified butter), various oils, honey etc. In these way various types of plants, flowers and fruits etc. are also mentioned as medicine. In this chapter various types of salts are also mentioned as medicine.

The Nineth chapter of vinaya sutta of Guna Prabha is called Karma Vastu. Two types of karmas are mentioned here. Some Karmas, where rules are not strictly followed and performed without rules are known as karma. The other karmas should not be performed in violation of the rules, and those rules are Upasampada. Upasampada consists of Jnapti (resolution) and vacana (repetition). In this way the recitation of patimoksa should not be in violation of the rules. There are many rules which are not strict in nature, for example, generally the Sangha consists twenty or more than twenty monks, but for performance of the Upasampada ceremony ten or more than ten monks are sufficient for that. Again in Madhya desa five or more than five monks are sufficient to constitute a Sangha, but there must be one vinaydhora (expert in vinaya) among them.

The Tenth chapter of vinaya sutta of Guna Prabha is known as pratikriya vastu. When the monks live together, there may be every possibility of committing lapses. Those lapses committed by the monks are known as "Apatti". A monk who has committed any offence should not hide his offence. A monk who has committed the offence be confessed before the Sangha. In this chapter the conduct of the monks are vividly described, for example, the highest punishment for a monk was the expulsion from the Sangha. Here, the duty of a monk towards laymen are also nicely described by the author. If a layman puts forward any allegation towards monk, in that case that particular monk should not give any religious discourses to that laity.

The Eleventh chapter of vinaya sutta of Guna Prabha is Kalakalasampata vastu. In this chapter, how long a delinquent monk, who has already punished by the Sangha, kept out of the Sangha by way of punishment. The punishment prescribed for the monks are elaborately discussed in this chapter.

The Twelfth chapter of vinaya sutta of Guna Prabha is known as Bhumyataracorana vastu. In this chapter the cleanliness and arrangements of drains are mentioned here. The monk should keep clean the floor of the viharas. They

should use the cowdung while washing the floor of the vihara etc. Provisions are made to praise the merits of the blessed one in the assembly of the monks. Provisions are made to unite the senior monks to deliver the discourses.

The Thirteenth chapter of vinaya sutta of Guna Prabha is called parikama vastu. Any work which is done with the help of any representative, and that particular work is called parikama.

The Fourteenth chapter of vinaya sutta is Kamabheda vastu. If any action is likely to cause difference in the order, then in the kamabheda vastu, it is instructed that, one should save himself from such allegation. Some special instructions are given in the sutta, for example, one should not invite such person who always indulge him in quarrels. One should not greet such person who indulge himself in quarrels etc.

The name of the Fifteenth chapter is the Chakrabheda vastu, chakrabheda or Sangha veda means split in the order. A Sangha may split when difference arises regarding Sangha.

The Sixteenth chapter of vinaya sutta of Guna Prabha is called Adhikarama vastu. Adhikarama means a type of Justice Unit the Sangha. If any quarrel occurs in them, means

among the monks, then four categories of Justice Units appear. The first category of the unit dealt with the correctness of a particular object. The second category of Justice Unit taken up the baseless allegations of a monk to another fellow monk. The third category of Justice Unit taken up the matters of sexual indulgence, and any other gross lapses, for example, falsehood in the matter of various discussions among themselves. The fourth category of Justice Unit was, regarding the split in the order. The discussion established the Unity and integrity in the order. When the adharma is realised, then it is the duty of the fourth category of Justice Unit to defeat the Adharma, and uphold the dharma.

The Seventeenth chapter of Vinaya sutta of Guna Prabha is known as sayanasana vastu. Sayanasana means to acquire some space for one's seat. In the assembly of the monks, equal treatment should be given to all. If any monk visits a monastery, the monk residing in the monastery should be greeted with all respect and equal treatments. In these way though the Vinaya sutta appears small in size, it contains the valuable suttas or aphorism.

Buddhist code of conduct, though it appears very systematic and can be compared with the modern laws, but in a

strict sense, Buddhist laws are just some influence of Buddhist ethics. We cannot differentiate Buddhist law from morality, religion, ethics etc. Buddhist norms and code of conducts are one of the most civilizing forces in past and present days society also. Rule of law was strictly followed in Buddhist religious society. The growth of Buddhist code of conduct was continuing till the period of Tantrayana. But, during the period of Tantrayana, the concept of Buddhist ethics, and code of conduct had been departed, and during that period monks were taking pleasure from both wine and women. According to them, Buddhisattava is full of love and compassion, so definitely, he will forgive them. In these way, it was a setback to whole Buddhist ideas and code of conduct. Buddhist Silas have tremendous influence, while forming the Buddhist code of conduct. Silas are the moral base of a person. So Buddhist laws are the influence of Buddhist ethics, morals etc. "Buddhist law is not a criminal law in strict sense but its intend is to keep the order pure."²⁹

An important aspect of the growth of Buddhist Sangha in the management of which, as a matter of fact, Buddhist codes of conduct grew - is its impact on the Indian system of education itself. Till the beginning of the Sanghas, the Indian education system was largely the famous 'gurukula

system'. But the advent of Buddhist Sangha and Vihara transformed that into a school-like or university-like system. The forms of university education in India can be traced to the growth of Buddhist Sanghas. The later universities of Nalanda, Taxasila etc. grew out of Buddhist Sanghas.

Hence, the impact of the emergence of Buddhist legal system (in the moral sense) meant largely for the management of the Sanghas and the monks had a wider socio-cultural effect. As far as pure jurisprudence is concerned, however, we have to admit that like in Hinduism, in Buddhism also that was not there. Pure jurisprudence is the contribution of the West only.

Notes and References

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negative command nisedha. The commands of the Veda should
not be mistaken for these of ordinary morality. It is
true that ordinary morality is required for a man before
gaining competence to perform the rituals enjoined in the
Veda. But the rituals themselves belong to the super-
natural order."

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Chapter V

BUDDHIST CODE OF CONDUCT, WITH SPECIAL REFERENCE TO THE PATIMOKKHA

The aim of Buddhist code of conduct was to purge society of sin, not like the present day concept of purging society of crime only. While purging the society of sin, the principles of equity, justice and good consciousness were adopted and applied by the ancient Buddhists. Of course, the causes of sin and crimes today are many, and the steps necessary for preventing them are not easy to formulate. Buddhist code of conduct is only an influence of Buddhist ethics, and now-a-days it is regarded as a custom. Buddhism believes that they lead to the direction of gradual purification of a person. Buddhist code of conduct is mainly codified in patimokkha rules. The word patimokkha or pratimoksha means abandonment of sin, and the pratimoksha rules must be recited twice in a month. A Buddhist monk has to follow the code of conducts prescribed in the Vinaya pitaka.

Buddhist Sangha was organised wholly on democratic basis. The Buddha advised his followers to follow the path of Dhamma, which he taught to his disciples. He did not nominate any monk to supervise the Dhamma. The Buddhist code of conduct prescribed in the Vinaya pitaka was formulated by the Master himself. In Vinaya pitaka also, it can

be clearly asserted that the Patimoksha suttas are the earliest composition among the Vinaya rules. In this way, not only the Patimokkha but the entire Vinaya pitaka is regarded as the constitution of Buddhist religion. For a pure Buddhist, Abhidharma philosophies were sufficient to follow in order to attain the Nirvana. But in the later period many notorious people entered into the Sangha and polluted the whole Sangha. That is why Vinaya rules were framed by the Buddha himself. "Hence, the Vinaya pitaka, as it stands today is a growth of centuries out of the basic rules formulated by the teacher himself."¹

The Patimokkha sutta which is the subject matter of our study is again divided into two divisions : (1) Bhikkhu patimokha, and (2) Bhikkhuni patimokha. It is the central and also the oldest part of the Vinaya pitaka. The offences and the punishments prescribed for the offences are systematically arranged and classified accordingly. Parajika offences are regarded as the worst offences of Buddhist Sangha. They are lack of self control, theft, murder etc. and the punishments for Parajika offences are expulsion from the Sangha.

Another groups of offences are sanghadisesa. In sanghadisesa are mentioned thirteen types of offences arising

out of the relation between monk and women, false accusations etc. Here, in sanghadisesa the punishment is the temporary suspension of the offending monks.

The third group of offences are called Anjyatā (uncertain). The fourth group of offences are called Nissaggiya pacittiya. It deals with twenty six offences. For example, who used only particular objects which they were not entitle to use. The fifth section is called pacittiya and it enumerates ninety two offences relating to some minor offences; for example, disrespect to Buddhist teachings, careless use of beds, seats etc. The sixth section mentioned only four offences relating to taking food by a monk, which has not been offered to the delinquent monk. The seventh chapter is known as sekhiya. It gives seventy five instructions to be followed by the monks in their daily life. For example, instructions were given to the monks as to how he was to enter into a village, the way of taking food etc.

The last section is called Adhikarana-samatha. It deals with settling disputes within the Sangha. Seven means of settling disputes are mentioned. Nalinaksha Dutta summarises them thus - The first is to place the two quarrelling monks face to face, the second to make one admit that his memory had failed in regard to the point of dispute, while

the third is to make a monk admit that he was not in his normal mind when the point of dispute arose. The fourth relates to the formality of confession, the fifth to the use of salaka (voting sticks), the sixth to prevarication and punishment for it, and the last to the avoidance of publicity to a dispute within the Sangha.²

The meaning of the Patimoksha is confession of the sin committed by a monk and determination for future, not to do the offence. In Bhikkhu patimokkha, the introductory chapter is technically known as "Nidana" which means the first duty of the patimokkha patha. In the Nidana, it is clearly mentioned that if the day is the full moon day and if it is convenient to all monks then they can recite the patimokkha. Then they recite accordingly, what is the duty of the Sangha, and whether the members of the Sangha are pure or not.

"King sanghasa pubbakiccha, parisuddhi, ausmanta, aarosetha, patimokkha uddiswami tang sabbaba santa sadhukang sumamo Manasi karam yasha seya appati so abikarasha, asantia apatiya tunhi bhabitayba tunhibhabena kho panayasmanto parisuddha ti bediswami."³

Maximum importance was given in the purity of mind, when every monk of the order has given word that, he is pure

in that case, the recitation of patimokkha would be started. If there arises any mistake in the recitation of patimokkha sutta, then any monk may clear it, before the Sangha. If there arises no mistake in the recitation of Patimokkha sutta, then the monks should remain silent. So silence is the indication of purity.

In the Nidana maximum importance was given to the purity of mind. Only the pure mind can concentrate in the Dharma. The enlightened is free, only the pure mind can enlighten a person. The enlightened can break all bonds. He gained mastery over himself. The monk should be reasonable in every sphere of life. For example, man is subject to old age, sickness, death etc.; if anybody condemns death old age etc. to other person, then he himself is unjust to him and to that particular person. In that case he is not pure himself, and the person who himself is not pure cannot attain Nirvana, the highest goal of Buddhism. So, in the assembly maximum importance was given to the purity of mind, and to a particular monk, at least three opportunities were given to confess whether the monk was pure from all evil and sins or not. If, after three times of repetition, the monk never confessed his evil and sins, then in that case, the monk was regarded as sinner and his evil action in this way would be a bond to his realization of Nirvana.

So, in this way in Nidana, which is the introduction of patimoksha, repeatedly, three times were given the opportunity to confess, whether the monk was pure from all evils or not. If nobody confessed about his evils or sin, then they were regarded as pure. To make them pure and perfect, Buddhist teachers like Upajjhayas and Acaryas had also played some important role. They taught education not like the educational institutions of our times. Their education related only with the monkish education.

"The teacher's discourses no doubt related to the monkish learning of the age - the monastic regulation (Vinaya), the holy legends (the making of which seems to have been a continuous literary industry in the convents over several centuries), the Buddhist moral fables (Jatakas) hymnology and fundamental doctrines. The teaching was reinforced by the practice of frequent recitation of the texts and their chanting by the whole congregation in chorus on special occasions (Sangiti). The object was to fix the texts of the canon in the memory."⁴

So, by reciting the Patimoksha suttas very frequently, they tried to fix it in their memory. Only that which is fixed in memory can keep the mind pure and help to attain the highest Buddhist goal. In the monastery, full freedom was given to argue and debate, and everybody was also given to

think and reason relating to Dharma and Vinaya. Maximum importance was given to make a monk intellectually perfect.

In Buddhist Patimokkha sutta the worst offences are grouped under the heading parajika. The highest punishments for the worst offences are expulsion from the Sangha of the delinquent monk. There are all total four parajika Dharma. The first offence is lack of continence, which is described in Patimokkha sutta as following :

"Ya pana bhikkhu bhikkhuno sikkhajiva sampau sikkhano upesakasaya durvalyatay anavikatya mathuna dhamma patisebashya anta maso tirasyanagatayapi, parajiko hoti asambaso."⁵

Bhikkhus related with the education which is full of morality, and teaching by the God (Buddha) himself, and who is related with the teaching and not leaving the teaching of the Buddha or without showing the weakness to the teachings of the master, indulge himself in sexual intercourse, it may be with the animals. It is regarded as parajika offence. We are not aware whether the secular laws of that time were more severe than the communal laws. But in every society and in our present society also sexual intercourse with animal is regarded as a heinous crime. Though voluntary sexual intercourse is allowed in most of the civilised countries. Voluntary sexual intercourse is permissible, but still it is

regarded as an immoral act. During that period sexual offences were regarded as worst crime, because it was totally immoral act. But today, in modern societies, murder, dacoity etc. are regarded as the most heinous crime in comparison with sexual offences. They regarded sexual offences as social evil, which led to social injustice. A monk had to control his brutal instincts to achieve the highest goal, the Nirvana, and also to purify his body, mind and the society. When Buddha was engaged in the practice of austere penances for gaining the supreme reality, various offers were made by the Mara to fulfil the worldly enjoyment including the sexual enjoyment. Buddha had rejected all the offers. In later period, clear instructions were given to all the monks that they should not engage in any sexual intercourse, otherwise it would be a parajika offence. The other parajika offence is -

"Ya pana bhikkhu gāma vā aranaya vā yadhinya thesasam-khata abiyanna, yatharupa adinayadana rajano chorān gaheta hanetu vā bandheshu va paba jesu vā chora si, balosi, mubbusi thenasi ti, taṭṭharupang bhikkhu abinaya abiyamano-ayampi parajiko hoti asambasi."⁶

Any Bhikkhu, who took anything from village or from jungle, and if it was considered as a thing which was not given by the owner, or a thing which was considered as "stolen

thing" was considered by the king "you are a thief" or saying it, awarded death sentence to him. Or, calling him looter, sent to the Jail or calling him a fool, non-sense banished him from the country. In this way the monk who took away any thing without its being given to him, was regarded as thief. This type of offence was called parajika. For this reason, he lost his ability to remain with the Bhikkhus.

In ancient period, theft was regarded as one of the heinous crime, and for the monks, it was regarded as worst kind of offence. Even in Shastras also it was regarded as worst kind of offence. According to Manu, "King must exert his utmost to punish thieves, for by doing so his fame grows and his kingdom prospers."⁷ It is surprising to note that both in Hindu and Buddhist legal literature, a clear distinction was made between robbery and thief, thief and dacoity etc. If the offence is committed in the presence of the owner then it was robbery, if it was committed in the absence of the owner then it was regarded as theft. In early period, both Hindu and Buddhist penal justice had given maximum importance on "Niyaya". Niyaya is an independent element and is equivalent with the English term "equity". It should be followed everywhere in dispensing Justice. It is against any tyranny, injustice and arbitrariness. Robbery, theft, dacoity, whatever it may be, but ancient penal philosophers

were mainly concern with the idea of *Niyaya*. Specially Buddhist penalties were mainly based on *bhabana* or thinking and also reasoning. Perhaps that was the reason why Buddhist penal Justice is so much liberal. Originally in Buddhist penal Justice, only the injunctions were prescribed, but in the later period some penal sanctions were also prescribed. The immoral action, which did not permit by the society was prescribed as moral injunction and who violates the moral injunction has to obey the religious sanction including expulsion from the *Sangha*.

The third *parajika* offence is regarding murder.

"If any *Bhikkhu* kills some one, or abet some one to commit suicide who is already frustrated from his life, reciting from the *shastras*, praised the death or abeding him, saying that what is the use of living this useless life, death is better than it. In this way, if he praise the death reciting from the *shastras*, then it is regarded as *parajaka* offence."⁸

Abetment or instigation was regarded as one of the most heinous crime in ancient India. Specially in Buddhism. Like the modern criminal law, Buddhism regarded abetment as one of the *parajika* offence. Of course in Hinduism, Hindu law givers did not pay much attention regarding abetment. The reason behind it, most probably the spies of the king,

were available everywhere to detect the crimes. On the other hand during that period things were available everywhere, people did not feel any crisis as today. Contrary to that Buddhism was more realistic in this regard. In parajika, section of patimokkha sutta, it is nicely explain the abetment and ingredients of abetment. Buddha holds the view that the whole universe is full of suffering, everything is subject to destruction, and everything is substanceless. Though everything is subject to destruction, including the human life, but it is regarded as a heinous crime, if some one praise the death with the intension to kill some one. Though, according to Buddhism, everything including the human life is substanceless, it is not proper to advise any person to commit suicide. During Buddha's life time, some one (not Buddha's six contemporary thinkers) propounded a theory that only way of salvation is suicide, but his theory did not get any place in the Indian society, though the Indian people did not regard that life is full of enjoyment, but contrary to that, they regarded their life as substanceless. In case of minor offence, if the Bhikkhu confesses his involvement in the offence, he may be excused, but in case of major offence, for example, for the parajika offences, there is little possibility of excuse by the assembly of monk, and in this way the accused monk was treated as householder. But the Sangha had punished the

wrongdoer or the delinquent monk due after due enquiry. Sangha never punished a person without proper enquiry and it was necessary for the systematic and regular functioning of the Sangha.

The last offence of the parajika is showing divine power among the people.

"If any Bhikkhu unknowingly, claims himself that, I knew the trikal, i.e., future, past and present". On the other, to become a huge holder or to become a novice, claim himself that, though I am unknown about it but I know it, though I have never seen it, but I have seen it. My words are substanceless etc., then offence, and he is unqualified to remain there as a monk."⁹

Buddhism always has regarded that, ego-problem of the human being is one of the main enemy for general people, but for a Buddhist monk it is one of the greatest enemy. The enlighten is free from all these problems, and for an ordinary monk, it is one of the great enemy. The main object of Buddhism was to bring a reformation in religion, and in this way return to the basic principles of religion. Contrary to that in Hinduism, showing miracles by the Hindu Tantrikas was the part of Hindu religion in ancient India. In ancient Indian society claiming superiority among the common people

by some religious minded people was regarded as a style. They regarded themselves as a part of God. So, to exhibit their ego, sometimes the Bhikkhus claimed that they knew about the past, present and future, and also claimed that he or they knew everything, though he or they are ignorant about it. The Buddha prescribed it as a parajika offence, because of the fact that, ego problem is the main enemy of a man. To achieve the highest goal, Nirvana, one has to remove his ego problem. Ego is the main hindrance in achieving the Nirvana. The essence of his religion is the change of mind nature. To achieve the ultimate goal, one must wake up, and harmonious within himself. Man is not a complete being, he can change himself, he can transform himself, if he overcomes his ego problem. After recitation of the delinquent monk, that he should confess his sin, if he committed any sin in this regard. If a monk is regarded as parajika offender then he has lost his ability to give company to other monks, and also he has lost his Bhikkhu status and achieve his original status of householder. After the parajika dhamma, there are all total thirteen Sanghadisesa Dhamma mentioned in the Patimokkha. The punishment for the sanghadisesa are the temporary suspension of the delinquent monks. The delinquent monk could be re-admitted to the Sangha, if the monk is found innocent or permitted by at least twenty monks. The thirteen offences arising out of the relation between monks and women

the construction of a hermitage, false accusations, dissensions in the Sangha and obstinacy.

According to the first sandhadisesa dhamma, "Apart from the dreams, knowing ejaculations is regarded as sanghadesa."¹⁰

Buddha regarded mental elements as the supreme element of a human being. The modern concept of mens rea or guilty mind was systematically analysed by the Buddha himself. In modern period, only ejaculation is not at all an offence, but in the ancient period specially in Buddhism, it was regarded one of the heinous crime. The ancients were stricter than we are, and today we can explain it in this way that in the present and modern society, some relaxation is necessary, because of the changed outlook in our modern society.

The second sanghadisesa is known as "Kaya Sansaroca", means the touching of the body.

"If any Bhikkhu with evil intention touches the hand, hair and any other part of a woman's body, is regarded as sanghadisesa."¹¹

The psychological aspect was present in the mind of Buddha. Lust is one of the most powerful incentives for crime. All sexual offences, all bestial crimes, all have their root in the nasty nature of human being. For a monk committing sexual offences or eve teasing was regarded as a heinous crime. In Buddhism maximum importance was always placed in the mind of the human being. The highest aim of the Buddhist religion, Nirvana is only possible, if a monk can overcome his worldly desire lust anger etc. So, if a monk touches the hand, hair, and any other part of a woman it is regarded as sanghadisesa offence. In modern Indian penal code also, eve-teasing is regarded as serious offence. But the main difference between the ancient Buddhist penal code and the modern penal code is, Buddhist penal code was applicable for the monks only, but in the modern penal code, it is applicable for the entire people of the nation. Though the Sanghadisesas were regarded as an offence, but it is a precautionary measure for a monk, because all sexual offences have their root in the lusty nature of human being. The aim of the Buddha was to create a pure Buddhist society by confessing the sinners of their misdeeds, began apology for the misdeeds he has already committed and to promise before the Sangha that, he will not do all those offences in future. By doing these, the delinquent monk got relief from all his previous misdeeds.

The third Sanghadisesa offence is regarding eve-teasing. "If any Bhikkhu, with lustful intention to any woman or specially painting the private part of her body, speaks any filthy words like a Juvenile offender, speaks it to a girl, who attains her puberty is regarded as sanghadisesa offence."¹²

The third sanghdisesa offence is also regarding the sexual offence, a holy person should not be indulge himself in the sexual offences. For a Juvenile offender, if it is not as heinous crime, but for a monk it is regarded as heinous crime, because he is a holy person, and he has come to the Sangha to attain the highest Buddhist goal, Nirvana. Though the sanghadisesa offence is less severe in comparison with the parajika offence, but still it is regarded as a heinous crime for a Buddhist monk. The Sanghadisesa offences are generally settled by the members of the Sangha themselves. Hindu religious offences are mostly settled by the Brahmana pandits, but contrary to that, Buddhist religious offences, specially the sanghadisesa offences are settled by the members of the Sangha only. It is sanghadisesa offence, because the members of the Sangha settled the offence committed by a monk, by themselves.

The fourth Sanghadisesa Dhamma is regarding the fulfilment of sexual pleasure. If the monk intentionally deceived a woman for the fulfilment of his sexual pleasure, then it is also regarded as Sanghadisesa offence.

The fifth Sanghadisesa offence is regarding Toutsism. A monk should not behave himself like a tout in case of matrimonial relations.

The sixth Sanghadisesa offence is regarding construction of hermitage. There are some rules available for construction of hermitage for the monks. So proper guidance should be taken when constructing the hermitage. If any monk violates the rule of construction then the offence will come under Sanghadisesa groups of offence.

The seventh Sanghadisesa offence is also regarding the construction of hermitage.

The eight Sanghadisesa offence is regarding false accusations.

The ninth Sanghadisesa offence is also regarding false accusations.

The tenth Sanghadisesa offence is regarding dissensions in the Sangha.

The eleventh Sanghadisesa is regarding support to the dissident groups of Bhikkhus.

The twelveth Sanghadisesa is regarding ignorance of good advice.

The last Sanghadisesa is regarding obstinacy.

It is clearly mentioned in the commentary the various ways, how the incidents took place, and how it is within the purview of the rule as well as those cases, which deserve exemptions. For example, in case of touch of the body of a woman it is necessary to see, whether it is intentional or accidental touch. If the touch is with one's mother, sister, or daughter then it will not come within the purview of the rule. It laid down only the religious rules to be observed and observance of the same helped to transform a person from the lower to the higher standard of conduct.

The third section called the "Aniyatā" means uncertain. Aniyatā comprises with two cases, which requires the circumstantial evidence to ascertain the offence. If circumstantial evidence ascertain the offence, then it will come under "Aniyatā" section of offence.

The two Aniyatā offences are :

(1) If any Bhikkhu talks with any woman sitting in a lonely place, and any nun framed a charge upon him that he is committing parajika, sanghadisesa and paccittya offence, and the monk also admit his fault, then it will be regarded as Aniyata offence.

(2) If the monk, instead of sitting in a lonely place, sitting in an open place, welcome a woman, but with slander words, and if any nun hears it, and framed a charge upon him that he is committing parajika, Sanghadisesa and paccittya offence, and the monk also admits his fault, then it will be regarded as Aniyata offence, and he deserved the punishments of the offence.

In ancient period, if a nun accused the monk and the monk confess his misdeeds, then it is Aniyata offence. No other evidence is required in this regard. But in case of secular law in ancient period also, if the statement of the party, with respect to time, shape, age, matter, place caste and quantity etc. satisfied the court only in that case, the evidencial value was considered.

"The party could be given a chance in all such cases to adduce evidence of other witnesses, and a fresh trial was possible for those who were defeated by witnesses or judges on account of disqualification."¹³

In case of "Aniyatā" offence, the statement made by a nun, and confirmed her entire statement, and the delinquent monk confess about the offence, then in that case the offence was confirmed to be true. In case of both ancient Hindu and Buddhist law, circumstantial evidence was required, like our present day modern criminal law, but the only difference is, our ancients believed to remove the sin from the society, whereas it is the crime in the present day society.

The fourth section is the Nissaggiya-pacitta, which deals with thirty offences that can be committed by a monk who appropriates certain articles of use which were not permissible. In the Nissaggiya pacittya offence, the delinquent monk confess his offence and purify himself through prayascitta, and in this way for the article for which he has committed the offence, has to return the same article. Most of the offences are regarding the begging bowls. The offences regarding the wearing clothes are those, if any Bhikkhu preserved sufficient wearing clothes, if any Bhikkhu begs wearing clothes to a householder in a time, which is not appropriate to ask for clothes etc. are regarded as Nissaggiya pacittya offence. In this way preserving sufficient begging bowls without any reason taking revenge on another person etc. are also regarded as Nissaggiya offence. Nissaggiya paccittya offences reminded the Bhikkhus regarding some small offences, which needs some purifications also. All the Bhikkhus have to learn the

minimum spiritual culture of the Sangha. In ancient period the monasteries were regarded as seats of learning, rather than a place of religion. Through purification, the Sangha try to remove the root of the greedyness.

The fifth section entitled *pacittiya* enumerates ninety two offences relating to careless acts which requires purification or *prayscitta* for the act done by a *Bhikkhu*. The main *pacittiya* offences are careless acts leading to insecticide. Lack of respect for the Buddhist teachings and disciplinary code and to non-compliance with the directions given in the latter, indiscreet acts in the use of beds, seats, robes etc., while dwelling in the monastery. Most of the *pacittiya* offences are not criminal offence in modern criminological sense, rather it is a moral offences which effect the religious sentiment of the Buddhist community. For example,

"Knowingly, speaking false is a *pacittiya* offence."¹⁴

People speak false, mostly to established his "ego" in the society. But in the Buddhist view, the concept of individuality is completely denied. Speaking false in the court, both in ancient and modern days are regarded a serious offence, because in this way, the person try to suppress the evidence of the particular offence. In this

way, back batting of other persons. Residing two three days or more than three days, with a person who is not conversant with the Buddhist religion, sleeping with a woman in the same bed, advice regarding miracles. Try to defame another Bhikkhu, Religious advice to Bhikkhuni, without permission from the Sangha, advice given to a Bhikkhuni with due permission from the Sangha, but after Sun set, advice given to a Bhikkhuni in her residence. Any Bhikkhu sits with a Bhikkhuni in an isolated place. If any Bhikkhu takes meat one after another, taking meat after midday (Bikala-Bhojanana) preserved meal. Taking dalicious food, Rough behaviour to another Bhikkhu, Residing in an Army cantonment, Drinking wine, playing with water in a river, terrifying another Bhikkhu, violation to animal, Injury or heart to another Bhikkhu. In this way, there are all total ninety two paccittya offences. Most of the paccittya offences are not criminal offence in modern sense of criminal law, most paccittya offences are moral offence, and most of the offences are regarding the violation of religious morals not general moral offences.

The sixth section called patidesaniya, patidesaniya offence consist with four offences, relating to a monk's taking food, which is not offered to him. Generally in the patidesaniya offences, confirmation regarding the offence can be found from the confession of the monk, before the

Sangha, patidesaniya not only includes confession, it also includes the purification or prayascitta.

The first patidesaniya offence is regarding taking food from a Bhikkhuni, who is not related with the Bhikkhu from seven generation.

"If any Bhikkhu arriving in a residence of another person takes food from the hand of a Bhikkhuni, to his own hand who is not related to him from seven generation then he should repent for his misdeeds that, I have committed a shameful, wrong misdeeds, it is excusable, I may be excused for that."¹⁵

Patidesaniya Dhammas means purification from the wrong doings. It is a way to reducing the sins. Perhaps Buddha prescribed the four Patidesaniya Dhamma to regulate the food and sexual behaviour. Here in the Patidesaniya Dhamma, no evidence or circumstantial evidence is required, on the other hand complain from another Bhikkhu is also not required, but the only requirement is confession from the delinquent monk. After confession, prayascitta or self purification is required. The first patidesaniya offence is taking food from an unknown Bhikkhuni. Secondly, knowing it well by the monk that, the householder has order to Bhikkhuni to give food to the monk, and the monk do not restrain her

from giving foods. Thirdly, taking food from the householder without invitation. Fourthly taking food in a disturb area from a householder inviting him to that area.

The seventh section, Sekhiya gives seventy five instructions to the monks, to be observed in the daily life of a monk. For example, how he must enter a village or a town, way of taking food, etc. Sekhiyas are some advice to the monks, it is not an offence, therefore punishment is not prescribed for it. Sekhiya Dhamma includes general behaviour of the monks. The way of wearing cloths, way of taking food etc.

The last section is called the Adhikarana Samatha or the way of settling disputes within the Sangha. It consisted of seven rules. The first one is to place the two monks face to face, Secondly one must admit that his memory had failed in regard to the point of dispute. Thirdly, the monk must admit of dispute arose. The fourth one is relating the formalities of confession, the fifth one is the use of salaka (voting sticks). The sixth one is punishment for the offence, and the last one is avoidance of publicity to a dispute within the Sangha.

Buddha's idea was to get life of purity, to attain the highest goal Nirvana. Though Buddha had drawn certain

guideline towards monks, but he never drawn any sharp line between the laity and the monks. Entry into the Sangha was not dependent on qualification. Of course some customs were followed in this regard. Buddha prescribed the rules to the monks, not only to maintain discipline in the Sangha or to achieve the highest goal Nirvana, but also to create a good atmosphere in the society. He had given maximum importance on begging the alms going door to door of the lay devotees.

"The daily begging excursion of the monks maintain the usual contract between them and the believing laity, and gave a natural opening for attentions of a pastoral kind. The laity also on their part come to the parks of the community near the gate of the town with gifts of every kind, with food and medicine, with garlands and perfumes, there they paid their respects to the monks and listened to the expositions of the sacred discourses and sayings."¹⁶

Buddha's experience in various places, for which he had made various rules and regulations for the Sangha, described in the sutta vibhanga, a commentary on the patimokkha sutta. For example, when Buddha was visiting Vesali, a rich banker's son Suddinna be came his disciple, one day when Suddinna went to begging alms his wife met him and requested for a child. He granted her request, but when he came back to the monastery became repented, and reported the

matter to his fellow monks, when it was brought to the notice of Buddha, he had laid down a rule that if any monk committed sexual intercourse, then he would be guilty of parajika offence. Commentators of the patimokkha sutta not only described the incident, apart from the incident, discussions were made on what female is, the probable ways of sexual indulgence etc.

The second rule of parajika offence is regarding theft, and the commentator enumerated a story of one monk, namely, Dhaniya, who collected wood without anybody's permission to construct a hermitage. The commentator described the various theft and probable ways of theft.

In this way the other two parajika offences were also described by the commentator by giving various examples of suicide, personal gain, and probable ways of suicide and personal gains etc.

The Sanghadisesa offences were also came into discussion in this way. The commentator discussed every things including, whether the touch of the women is intentional or accidental, whether the contract is with his mother, sister or with other women. Various types of girls and wives. What constitutes an offence and the exceptions of the offence etc.

Patimokkha not only carrying the ancient customary Buddhist rules, it also carried the vivid history and sociology of India from sixth century B.C. The commentator had little left to unexplain the Buddhist history, sociology etc.

In the Nissaggiya pacittiya section also, the commentator explain many illustration and similies, or what circumstances the Buddha had to formulate the rules for the monks. The Nissaggiya pacittiya open with giving one example of one Hatthaka, a Sakayan monk, who had made a false statement. That is why the Buddha laid down rules that any one who utter false words would be guilty of paccittiya offence. In this way, the commentator discussed many things regarding false statement, disrespectful words towards others. In this way, patidesaniya and sekhiya rules are also concisely commented by the commentator. The Bhikkhuni Vibhanaga consisted of seven groups of offences. Apart from the four parajika offences mentioned in the Bhikkhu patimokkha, other four offences are also included in the Bhikkhuni patimokkha. For example, with the evil intention, a Bhikkhuni must not touch the middle part of a male person. The commentator mentioned the four rules with some real stories of the lustful intention of the Bhikkhuni's.

In the Sanghadisesa seven rules are taken from the Bhikkhu patimokkha, apart from these seven rules, other ten rules are also specially mentioned for the Bhikkhnis. The ten rules are regarding law suits, regarding the restrictions of nuns moving alone, contract with male etc.

The Nissaggiya pacittiya consist of thirty rules, out of which eighteen rules are taken from Bhikkhu patimokkha. The rules are framed for some petty offences, and the commentator laid down the rules describing some stories.

In the paccittiya section the commentator commented on ninety six rules. All total rules of the paccittiya is one hundred and sixtysix rules.

In the patidesaniya sections, nuns are restricted to take some thing like oil, honey, fish, meat etc.

The Sekhiya and Adhikarana samatha are some with the Bhikkhu patimokkha.

Apart from the Bhikkhu and Bhikkhuni patimokkha, the Mahavagga and cullvagga are two most important books. The Mahavagga described the development of the Buddhist Sancha. Here various conversion of the Buddha with Yasa and fifty four other friends are nicely described and the Buddha also

laid down certain rules regarding the admission of new comers in the Sangha.

The next chapter of the Mahavagga is regarding the institution of Uposatha. If any Bhikkhu committed any serious offence, he was not permitted to remain as a member in the assembly. The third and fourth chapter regarding the residence of the monks during rainy season, which is technically called vassāvāsa. During the time of vassāvāsa, a monk was allowed to go outside only for some urgent reason. The period of vassāvāsa is three months, during the time of rainy season. Various rules of the Kathina ceremony are also available here.

The fifth chapter deals with the story of one kolivisa, how Buddha had permitted the monks to use the shoes and various rules regarding the wearing of shoes.

The sixth chapter deals with the use of various medicines by the monks, here special treatment of Jivaka's the famous physician of that time is also mentioned. The chapter not only deals with the Buddhist rules and regulations, apart from that, interesting accounts of surgical operations, various surgical instruments, and its use also mentioned there.

The cullavagga is the continuation of the Mahavagga, and in this way many rules and regulations are available in the cullavagga also. For example, various interesting descriptions of monasteries are available in the sixth chapter of the cullavagga.

The entire story of dissension of Devadatta with the Buddha is also mentioned in the seventh chapter. The chapter mostly deals with how a monk may be treated as a dissident, and the various rules of Sangha Veda.

The eight chapter is regarding the rules of how a monk received the other monks coming from outside or forest. In this way, in the other chapters, various rules regarding the formation of order of nuns, the admission of Mahaprajapati Gautami in the Sangha and various rules and procedure laid down to the nuns, full descriptions of the two Buddhist councils etc.

The influence of patimokkha in Buddhism is tremendous. In Hinduism, prayāscitta or any kind of secular punishments were awarded to the wrongdoers, if they committed the crime. But in Buddhism, apart from the punishment awarded by the Sangha or by the king, they had taken some preventive measure so that crime may not be happened in future. In the full

moon day, they have to confess before the assembly of the monk that they are free from all the evils and pure by heart. They are bound to learn some morals precepts, for example,

- (a) No killing,
- (b) No stealing,
- (c) No sexual indulgence,
- (d) No false talk,
- (e) No alcoholism etc.

Maximum importance was given upon the morality of the monks. The patimokkha itself is a moral code of conduct, rather than penal laws. That is why repentance was also regarded as a form of punishments. Buddha's view was abstain from all evils, and purify the mind. Greed, ill will, jealousy etc. were considered dangerous for the welfare of the people. The patimokkha sutta appears to be a great work of the Buddha, but he failed to anticipate, what the unrighteous monk may do in future, which may destroy the image of the Buddha, Dhamma and Sangha. Some delinquent monk misinterpret the Vinaya and also specially the patimokkha rules. During the period of Tantrayana, some monks misinterpreted the text that Buddha is full of love and compassion. So, definitely he will forgive them, if they enjoy women and wine also. But in fact Buddha was dead against about the concept of enjoying women and wine.

Apart from his failure of anticipation regarding the future of patimokkha, the patimokkha of Mula-sarvastivadins and the general patimokkha of Buddhism have some differences also. The chapters of the Mula-sarvastivadins patimokkha are given below :

- (i) Pravrajya,
- (ii) Posadha,
- (iii) Prevarana,
- (iv) Varsa,
- (v) Carma,
- (vi) Bhaisajya,
- (vii) Civara,
- (viii) Kathina,
- (ix) Kosanubaka,
- (x) Karma,
- (xi) Pandulohitaka,
- (xii) Pudgala,
- (xiii) Parivasika,
- (xiv) Posadhasthepana,
- (xv) Sayanasena,
- (xvi) Sanghabheda.

Both the Pali and Sanskrit preserved the old tradition of Buddhism, though slight changes are also there in the Mula Sarvasti Veda or the Sanskrit Patimokkha Sutta.

In the Sanskrit version of the patimokkha, various stories were given in details, but in Pali patimokkha, they tried to avoid the stories, similies etc. Despite their differences they followed the same disciplinary rules of Buddhism.

The first chapter of the Sanskrit text is pravajya. Here Buddha laid down certain rules and regulations for the new monks and also for the ordination of the new comers.

The second chapter is known as posadha in Buddhist Sanskrit and uposatha in Pali. It deals with the institution of the fortnightly assembly or the upasatha. A monk has to attain the ceremony, but if any serious charges levelled against him, then the monk is not allowed to attend the assembly.

The pavarana and the Varsa the third and fourth chapters deal with the monks residence during the rainy season. The practice, stay in one place in the rainy season, was common during Buddha's time among the Jainas and also among some of the recluses. But Buddhism was very much strict in the application of the rules of varsavāssa. During the three months of rainy season the monks were asked to stay in one place. Of course in some special circumstances, a monk may be allowed to go outside only for one week. At the end of the assembly the general gathering or the assembly

of the monks are known as pavarana.

The fifth chapter described how on certain conditions Buddha allowed to use the shoes to all monks, here the chapter begins with the story of a monk, known as Sona Kolivisa. His body was so delicate that without using the shoes he cannot walk in outside. Buddha specially permitted him to use the shoes. But he objected that being a monk, he alone never use the shoe. Then the Buddha allowed to all monks to use the shoes.

The sixth chapter deals with the medicines used by the sick monks at the instance of the famous physician, Jivaka. Here, how the monks enjoyed the various medicines and surgical aids offered by the famous physician Jivaka is nicely described. Apart from that, the ability of the Jivaka as a physician is also mentioned from place to place. Other references regarding the monasteries fixed with doors and windows, provided furnishers for seats and beds etc. are described very nicely, various stories and similies are also available in this chapter.

The seventh chapter deals with the dissensions of the monks among the Sangha during the life time of the teacher. A relative of the Buddha, Devadatta always tried to create some trouble in the Sangha. Devadatta was the leader

of the dissident group of the monks. Here, some special references are available regarding the discussion of the various sakayan youth, Devadatta, Ananda, Upali, Bhaddiya, Bhagu, Kimbila etc. Devadatta, even tried to kill the Buddha with the help of his friend King Ajatsatru. Devadatta demanded that some special rules should be made for the Sangha, and the rule should be followed by every monk. He demanded that (1) the monk should live only in forest, (2) the monk should exist only on, (3) monk should dress in robes made out of rags, (4) monk should not eat fish or meat.

The absurd demand made by the Devadatta totally rejected by the Buddha, and Devadatta formed a group of dissident monks, which was known as Songhaveda in the later period.

The eighth chapter related with the instruction that how a monk of particular locality received the monks of other place, and the monk who is coming from the forest. The monk has to look every comfort of the guest monk.

The tenth chapter, regarding the admission of the women in the Sangha and formation of the order of the nuns. Women were admitted in the Sangha or the order of the nuns at the instance of Mahaprajapati Gautami, the mother of lord Buddha and venerable Ananda advocated on behalf of the

Gautami and other nuns for their admission in the order of the nun. It is mentioned in other chapters also that Buddha was reluctant to give admission, the women in the order of the nun. Though he admitted the women in the order of the nun, but he imposed eight disabilities (garudhamma) on the nuns. The master first gave advice to the nuns that they should follow the instructions of the monks, and they should take guidance of Dhamma and Vinaya from the monks, but later on, it was found that, in many times the monks were not well versed in Dhamma and Vinaya to help the nuns in the ecclesiastical matters. That is why Buddha permitted the nuns to perform the ecclesiastical work by themselves, and special code of conduct were laid down for the nuns. Here, detailed discussions were made regarding the dress, toilet, seats, beds etc. for the nuns.

In the Mula Saravastivada Vinaya, a historical description is also available regarding the first two councils held respectively at Sattapanniguha of Rajagaha and Valikarama of Vessali. The aim of the first two councils was to record the Buddha vasana or the Sayings of the Buddha. The first council was presided by Mahakassapa and Ananda took an active part in the first council. He recited the whole discourses delivered by the Buddha, and Upali recited the whole Vinaya rules or the disciplinary code of conduct.

After a long period of one hundred years the second Buddhist Council took place in Vessali. Some dissident monks created trouble regarding the applicability of some of the disciplinary code of conduct. Specially the Vajji puttaka monks of Vessali created the troubles. The deviations were declared illegal by a group of eight monks, four from the dissident group and four from the orthodox group of monks. Though the main problem was solved by the eight monks both from the dissident group and the orthodox group, but not all the monks accepted the findings of the groups and a new sect emerged from them and they were known as "Mahasanghikas".

The growth of Buddhist code of conduct was continuing after the death of the Buddha also. The death of the Buddha was a setback to the entire Buddhist community. Though Mahakassayapa, Ananda etc. confidently handled the situation, in the later period many deviations had taken place in the Buddhist Sangha. Specially in Mahayana, Hinayana and Tantrayana Buddhism.

Notes and References

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3. Swami Darikadas Shastri (ed.), Patimokkha Sutta (Bhikkhu patimokkha), p. 3
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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 Nibbāna 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 Rawls, "Justice is the first virtue of social institutions as truth is of systems of thought."³

In India, the idea of justice originated from the Vedas, and it has taken a definite shape during the Buddhism recognising 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 reformative 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 Sramanera 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."⁷

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 penologists 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 Sanvara-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, vadhakachetana 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. Vadhakachetana 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 Srighanacarasangraha 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 Kattasarvara 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, assulting 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."¹²

In Bhagavad Gita also Krishna answered to Arjuna 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.

Prāyascitta : Prayāscitta means the self inflicted punishment by the wrongdoer himself, and to remove the sin the wrongdoer prayed for mercy before God, Brahman 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 heart,

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.

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

Prāyascitta 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 Khetria and Vaishya were also according to their own

Varna. 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 prāyascitta 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 given 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 prāyascitta 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 prāyascitta, 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."¹⁵

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 prāyascitta, 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."¹⁶

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 tatanugraham kila,
Anumanta himantasca khyata panca 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 expiations 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 rich offenders etc.

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, Rudra, 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 (Butla 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."²⁴

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-dandian. 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 punarjama 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 voiding Nyaya and Yukti has no moral value. Mimansa Shastras are the best example of it. The concept of interpretation or interpretations of statutes, 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 gives 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 law givers 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 lawal 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."²⁸

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 damage 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 amere in fringement of a private wrong. Where as 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 feel angry, if the

person insulted by a Brahmana, or a man may feel 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 seriously 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

offence and punishments were also very severe for it.

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 Brahmanas, 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 prāyascitta 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.

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Chapter VII

CONCLUSIONS

In the foregoing chapters we have made a detailed study of the Buddhist view of penal justice with special reference to the Vinaya Pitaka. In order to facilitate understanding, we have compared and contrasted it with the relevant Hindu and modern Western views also. It was unavoidable. Now we shall bring together our conclusions.

(1) Buddhist law is not as perfect a law as one could desire, but at the same time we cannot ignore the influence of Buddhist law in Indian society and in some parts of the world also. Buddhist law is not a lawyer's law, and in the Austinian sense, we cannot say that it is a positive law. The high sense of duty prescribed in Buddhism had a tremendous impact upon the morality of the people. In a sense Buddhist laws are some moral codes of conduct. The same thing is applicable in the case of Hindu law also. Both in Buddhism and Hinduism, the concept of law and morality has an integral outlook for the welfare of the people. In case of punishments also, Buddhism never believed in deterrence or retributive idea of punishments, and the importance was placed on mens rea or guilty mind of the wrongdoers. Like the ancient and medieval Western legal

philosophers, they were against the idea of absurd punishments, for example, punishments towards animals, trees etc., because animals, trees etc. were devoid of guilty minds. The idea of mens rea or guilty mind is one of the most important factors of criminology. But it is surprising to note that, such a rich legal idea or doctrine did not get the closest attention from the modern legal scholars.

(2) Logical consistency is one of the most important aspects of ancient Indian legal philosophy. Mimāṃsā Shastras of Hinduism and Patimokkha suttas of Buddhism are the best example of it. Nobody can complain about the logical inconsistency of Buddhism and Hinduism. Specially in the Hindu Shastras, it is clearly mentioned that if there arises any conflict between Dharma Shastras then reason will prevail. They had paid special attention to the fact that the rules or the moral codes laid down by them might not be arbitrary or unreasonable.

(3) Western Jurists and some modern Indian Jurists also have criticised both the Hindu and the Buddhist laws that these are static and incapable of growth. But in our analysis it is revealed that it is not true, because in both the Hindu law and the Buddhist law, the same personal law is applicable. The Hindu Marriage Act, 1955, The Hindu Succession Act 1956, The Hindu Minority and Guardianship

Act 1956, The Hindu Adoption and Maintenance Act 1956, etc. are the best examples of it. The legislator from time to time legislates various provisions for the Hindu people, and the term Hindu includes Jain, Sikh or Buddhist people. According to Section 2 of the Hindu Marriage Act 1955 -

- (a) Any person who is a Hindu, Jain, Sikh or Buddhist by religion, i.e., Hindu by religion,
- (b) Any person who is born of Hindu parents (viz., when both the parents or one of the parents is a Hindu, Jain or Buddhist by religion), i.e., Hindu by birth, and
- (c) Any person who is not a Muslim, Christian, Parsi or Jew.

In this way we can say that Hindu law or the Indian laws are not static. They have the ability to progress.

(4) The personal laws of ancient Indians or the moral codes of conduct had a tremendous impact upon the Indian people. Prāyascitta rules and regulations are still very much popular among most of the Hindu people. In this way, the Patimokkha rules have a vast influence on the Buddhist people. Apart from that, in most of the civilized societies, it is recognized that the expiatory theory of ancient Indians is one of the best theories to reform the dreaded criminals.

Of course, we cannot say that it is a fool-proof theory.

(5) An important aspect of ancient Indian law is that law and morality overlapped each other. Specially the Buddhists have dealt with the moral codes more systematically in comparison with other systems of religions. The concept of "Sila" in Buddhism had a vast influence in ancient Buddhist society, and also in the present society, the application of Pancha Sila in the international politics is the best example of it. Sila is the determining factor as to whether an action is moral or immoral. Perhaps, no religious system had developed such a pure idea of morality as it was developed by Buddhism. In Western countries also, they have treated the moral laws in different ways in the name of the natural laws. However, Austin and his followers in the later period have totally avoided this concept of law. But still, law and justice are based upon morality. So, in the last analysis, we can say that law and morality are co-related. In one word we can say that morality perfects law.

(6) In the ancient times, the jurists were more concerned with the religious laws. They used to treat the secular laws differently and the religious laws in different ways. If any delinquent monk violated the civil or criminal laws of the state, then the punishments were given according to the

procedure established by law. The delinquent monk was first tried by a religious tribunal to decide whether the monk was really guilty or not. If the monk was found guilty by the religious tribunal, then the next procedure was to disrobe the delinquent monk and handover the monk to the secular administration or the state administration for further trial and punishment. In case of a lay follower of Buddhism, he was directly related to the state administration, so the Sangha rules were not applicable to him and the secular laws were applicable to him. If any monk committed any offence he was treated as a general offender, and the punishments awarded by the state administration were more severe in comparison with punishments awarded by the ecclesiastical tribunal, or the assembly of monks.

(7) The storehouse of the Buddhist law, Vinaya piṭaka provides very little of lawyer's law or the positive law. The highest punishment in Buddhist law for the delinquent monk is the expulsion from the Sangha, and for some other offences, confession before the assembly is the only punishment. In our analysis, these types of punishments may have some effect in the religious assembly, but it has no effect in the society, because it has no deterrent and retributive effect. Some portion of deterrent and retributive effect is necessary for our society, and without it, society will not

survive. In the analysis it is seen that Buddha was concerned with the Sangha rules and regulations and he was dependent on the king in the administration of justice, and secular laws. Buddha had a friendly relation with many kings of his times, and he upheld the ideal policy of a government for the administration of the state.

(8) As for the origin and growth of Buddhist codes of conduct, they are the most civilizing forces not only for the Buddhist community, but to the entire human civilization. Buddha not only prescribed the legal codes for the monks, he also prescribed the ethical and religious codes also. He had taught the society for forty five years and he had left many instructions and guidance for the Sangha and the origin of the Sangha rules also came from the Buddha. In our analysis, the aim of the Buddhist codes of conduct are repentance and confessions by the wrongdoer, so that they may attain the highest spirituality. Another aspect of the Buddhist code of conduct was the removal of the caste system in the society, and from the Brahmana down to a Sudra, were treated equally by the Buddhist code of conduct. But in Hinduism the Brahmanas were treated differently and the Sudras were also treated differently. Buddhism tried to abolish the caste system in Indian society, and a person of any caste might join in the Buddhist Sangha. The code of conduct in Buddhism

was applied to regulate the life of a monk or to regulate the Sangha discipline. Buddhist code of conduct is an influence of Buddhist ethics. The Buddhist code of conduct enumerated in the Patimokkha Sutta can be divided into two divisions : (1) Bhikkhu patimokkha, (2) Bhikkhuni patimokkha. The offence and the punishments for the offence are systematically arranged. The worst offences are the pārājika offences and the punishment for the pārājika offences is expulsion from the Sangha. Of course the state administration would punish him separately for the offence. In this way for the sanghadisesa offence the punishment is temporary suspension from the Sangha etc. The other group of offences are Aniyata, Nissaggiya-pacittiya, Pacittiya, Sekhiya, Adhikama Samatha etc. In our analysis all these divisions of offences are, one kind of ethical influence upon the Buddhist norms. It has no legal value in the context of the present day society. Of course it has a great influence upon the Buddhist community. Because today also the Buddhist community is following the same path, which were guided by the Buddha himself. They had taken the mental elements, as one of the main reason for crime-causation. That is why, they have treated abetment and instigation as one of the most heinous crimes like murder, theft etc.

(9) Another aspect of these ethical codes is to remove the ego problem from the people. They regarded the ego problem as the main reason of moral degradation and a hindrance in achieving the Nirvana, the highest Buddhist goal. This comes out of purity of thought. The Buddha, during his life time, framed some rules accordingly. For example, the story of Sudina, a monk, granted the wish of his wife for a child and it became a parajika offence. Buddha framed the rule accordingly. Here, the main aspect of the patimokkha sutta is the purification of mind, because only the pure mind can concentrate in the Dhamma. Enlightenment is possible, if the mind is pure. The enlightened person broke all the bonds. That is why, maximum importance was given in the purity of mind, and repeatedly three opportunities were given to confess the sin, to a particular monk who had committed any wrongful act. If after three times repetition also the monk did not confess, his wrongful act, then he would be regarded as a sinner, and in this way it would be a hindrance in achieving the highest Buddhist goal, the Nirvana. The repeated recitation of the Patimokkha sutta also enabled the monks to keep their mind free from all evils. It helps in the control of the brutal instincts of a monk to purify his body and mind. Because, according to Buddhism, man is the composition of body and mind. Abhidhamma pitaka, the most philosophical work of Buddhism is concerned only with the purification of

the mind of a person. Only a pure mind can attain the Nirvana.

(10) In the Buddhist code of conduct also, maximum importance was given to the guilty mind or mens rea. So, instead of the main punishments, abetment or instigation were regarded as the most heinous crimes in Buddhism. Buddhism regarded abetment as one of the parajika offences, the highest offence of the Buddhist criminal jurisprudence. But, it was not so serious offence in Hinduism, because maximum importance was given in the law and order situation of the state. In Buddhism, though they regarded the life as substanceless, still if some one praised the death, with the intention to kill him, then it would be a parajika offence. A pure mind, which is free from all the evils, may attain the highest Buddhist goal, the Nirvana. One can achieve the purity of mind, through performance of Sila and by avoiding the abetment, instigation etc.

(11) The 'Ego-problem' has something more to it. "Ego" is one of the main enemies of the human beings. In early societies, claiming superiority was common among the religious minded people. Instead of achieving the religious objects or purity of mind, they tried to achieve a special image among the common people that they were something superior to others. It was the main problem in Hinduism; but in Buddhism also,

many Bhikkhus tried to show that, they knew the past, present and future of this Universe, but in fact, they were ignorant about all these things. It is also a parajika offence, because ego problem is one of the main problems in achieving the Buddhist goal Nirvana.

(12) Buddha was very much conscious that sex offences or sex scandals should not take place among the fellow monks and nuns and also with other persons. All sex offences have their origin in the lusty nature of human beings. Sex offences were regarded as heinous crimes. With reference to sex offences, various other related things were also mentioned by the Master himself. Various ways of sexual indulgences by various persons, and also other related subjects in this regard are covered by the Patimokkha. The delinquent monk could be temporarily suspended from the Sangha.

(13) Theft is also regarded one of the most serious offences and comes under the rules of parajika offences. In ancient India for the general people also, theft meant one of the most serious offences. But for a monk, it was not just a heinous crime, but some abnormality also. In patimokkha detailed discussion is there regarding what is theft, how one can commit theft. Under what circumstances a person is regarded as a thief. Definition and Article of theft : Various forms of theft etc. were discussed in details. According to

Buddha, greed is the root of all evils. If someone cannot control his greediness, definitely he may commit theft and other kinds of serious offences. Not only the Buddhist personal law, other secular laws also condemned theft. So the king should punish the thieves severely, and by doing so his fame grows and his kingdom prospers. Specially in the ancient Indian Hindu laws, a clear distinction was made between robbery and theft. If the offence committed before the owner, then it was regarded as robbery, but if the offence is committed in the absence of the owner, then it was regarded as a theft. So a clear distinction was made between theft or dacoity.

The idea of justice regarding theft is something different from the present day concept of theft and ancient Indian concept of theft. In ancient India, if the theft or the stolen property was not detected by the security or detective officers, then the king had to pay the compensation to the owner of the property.

(14) False statements given by the monks were also regarded as very serious offence by the Buddha. A person may give any type of false statement to fulfil his claim, but it may destroy the interest of other persons. The false statement made by some Bhikkhu led the Buddha to lay down some

rules, which are known as pacittiya rules.

(15) Buddha had nothing left unexplained whatever he thought proper for the welfare of the monks. He had explained everything from murder to falsehood. Buddha's aim was to purge the society of crime, violence etc. Only the pure mind can concentrate in the Dharma. People with ego could not attain the highest Buddhist goal, the Nirvana. Ego is regarded one of the most serious offence, and in this way it comes in the list of parajika.

(16) All the rules and regulations enumerated in the patimokkha sutta are systematically written like the present day cases. Serious offences were classified as parajika offences, but surprisingly the punishments for the serious offences are expulsion from the Sangha. These type of punishments have no relevance in the present day society, and also we cannot say that it had any relevance in the ancient Indian society. Because in every ancient society, capital punishments, mutilation of limbs etc. were very common. In Hindu prayascitta system also, though no physical punishments were prescribed, higher rate of fine were imposed upon the wrongdoer. But in Buddhism, no such type of fines were prescribed for the wrongdoer. The methods of punishments, where there are no physical punishments, no fine etc. seems very mild in approach. It seems very clear that, Buddhism

is more concerned about the next world rather than this world. So, punishments for the lay-devotees and the monks were not the same. Because the monks may attain liberation or Nirvana in Buddhism in this life, whereas the lay-devotees may attain the liberation in the subsequent or the next life. As it is aptly described by Ninian Smart in the article "Buddhism" in the Encyclopaedia of Philosophy (vol. I & II, p. 417) -

"Buddhism clearly involved a marked separation of monks (and nuns) and laity. The monastic life was conceived as necessary to the attainment of Nirvana, the laity would have to wait their turn in some future existence."

Though Buddha did not ignore the interest of the lay-devotees, he was mainly concerned with the interest of the monks. So, punishments were also divided accordingly. For example, exaggeration of one's power to perform miracles may not be an offence for a lay-devotee, but it is a serious offence for the monks, and accordingly, it is classified under the heading of parajika offence. In this way insecticide may not be an offence for general people, but it is a serious offence for the monks, and the punishments for insecticide has no relevance in the present day society.

(17) The various offences mentioned in the Patimokkha Sutta are grouped according to the gravity of the offences

in the religious sense, not in accordance with the seriousness of the offence. For example, for the Sanghadisesa offence, the punishments are temporary suspension of the offending monks from the Sangha. Sanghadisesa includes the sex offences also, and in Buddhism it is treated very lightly, whereas in the present day society or in the present system of law, the punishments for the sex offences are much severe in comparison with the Buddhist Patimokkha laws, in this way the Hindu personal law or the prayascitta system also treated the law very severely and apart from the religious sanction, like fast, repentance, Danda etc. heavy fines were also imposed upon the wrongdoer. The other offences like Aniyata, which means uncertain, Nissaggiya-pacittiya or the use of certain articles which are not appropriate to use by a monk etc. In this way pacittiya section, patidasaniya section and the last sections Sekhiya and Adhikarma samatha section are regarding some minor offences which have no relevance in the present day society. Though, still it is regarded as a sacred personal law of Buddhism.

(18) The Hindu laws are varna-based laws, but the Buddhist laws are universally applicable, from Brahmana down to a Scheduled Caste person enrolled as a monk in the Buddhist Sangha. For example, Mahakashyapa came from an orthodox Brahmin family, whereas Upali the master of Vinaya nitaka was

a barbar in caste. In Buddhism, the same law was applicable in the Sangha whether a monk came from a Buddhist or non-Buddhist family or he was an Indian or a foreigner.

(19) The social and cultural aspects of Buddhism have a close relation with the Buddhist law. In fact, during the life time of Buddha, he was regarded as an incarnation of God by his disciples and after his death also, he is regarded as the avatara of Vishnu, the creator of this Universe.

In the social field, Buddha was friendly with many kings of his time, and after his death also a number of kings were supporters of Buddhist religion. So, we cannot deny the direct influence of Buddhism in the administration of Justice and also in the general administration. Buddhist culture not only influenced the Indian society, but it has spread to most of the Asian countries. Buddhist moral ideas are still regarded in most of the countries of the world. Buddhist practice of Sila are well-known in most of the Asian countries, where Buddhism is still prevailing as a religion. The Buddhist concept of Sila has an universal appeal. For example, the Pancha sila of Buddhism is followed in the Indian foreign policy. Apart from that the various silas, for example, Attha-silas are both for the monks and the householders, Mangala Silas are those which are morally sound for the society. In

Disapujana Silas duties towards each others are enumerated. In Indria Sambara Sila, it is nicely described that if a person put restrain over his sense organs, then suffering never comes to him. Ajivaparisuddhi Sila means earning livelihood in a noble way. Dasa Sila, Patimokkha Sambara Sila etc. are the code of conduct for monks and nuns to lead a noble life. In this way, the Buddhist morality has an universal appeal as also a guiding principle of Indian foreign policy.

(20) The concept of peace in Buddhism has also an universal appeal. Buddha's concept of peace, kindness, forgiveness etc. are common in most of his discourses. In Dhammapada, it is said that a person can overcome anger by love, falsehood by truth etc.

"Na hi verena vereni assantidha kudachāṇam,
sverena ca assamanti asadhāṇa sanātano."

(Dhammapada, 5)

The principle guided by the Buddha are followed by the Indian people since the period of Buddha. That is why, the mode of punishment was entirely different in Indian society in comparison with other societies. Prayascitta in Hindu society, confession before the assembly of the monks in Buddhist society are the best example of it. It is the way of purification and the wrongdoer realised the past

misdeeds. Violence has no place in the Indian system of laws. Every dispute was settled peacefully.

Concluding remarks:

We have discussed in various chapters the uselessness of some ideas of punishments prevalent in the ancient Indian system of laws. Self-purification has no sanctional value in the present Indian society. It might have had some effect in earlier societies because of the religious bent of mind of the Indian people. Now, it is established that scientific punishments are the greatest civilizing force for the entire mankind. In our view, punishments should be proportionate. The seriousness of crime and the amount of punishments should be proportionate. Public utility should be the aim of punishments. Punishments vary from time to time. So, Buddhist personal laws or the Hindu system of 'Prayascitta' may have some appeal in ancient systems, but the same appeal is not continuing in the present day society. Various modern concepts, Human rights, political rights, increase of modern sciences and technology, refined way of modern life etc. changed the entire concept of punishment system among the human being, not only in India but among other countries also. Today we regard that mere confession before a religious assembly has no practical value, and it is a useless system of punishment,

but it had a tremendous appeal in ancient Indian society. In this way, pillory or the slavery system of punishments are the worst type of punishments, but instead of killing the wrongdoer he was kept as a slave, and it was regarded one of the most refined way of punishments in ancient society. The modern way of punishments like parole, probation, open jail etc. are regarded as the treatment method of punishments. But we do not regard the punishments prescribed by the Buddha, confession, bond of good behaviour etc. and the Hindu system of 'Prayascitta' as a treatment method of prayascitta. 'But it is a kind of a good treatment method of punishments for the human beings.

An attempt has also been made regarding the establishments of human rights through Buddhism. Of course, the human rights were regarded as the basic philosophy from the Vedic period. The Rgveda (V.60.5) says :

"No one is superior or inferior. All are brothers. All should strive for the interest of all and should progress collectively."

Like spokes of the wheel, no one is superior or inferior in a society. No person is the best or the worst in this world. Of course, the Varna system and lately the caste system badly effected the Vedic idea of human rights,

but the birth of Buddhism again reasserted the idea of human rights. Caste system has no place in Buddhism and the low caste people also occupied important places in Buddhist Sangha

In fine we can say that the importance of Buddhism lies mainly in the concept of love, compassion and brotherhood, and the five rules of conduct, the Panca Sila is still today a guiding principle of Indian Foreign policy. Buddhism embodies the best principles of a rational moral living, not succumbing to superstition and blind faiths. Though it produced an excellently codified legal system, Buddhism never put jurisprudence above morality. Everything was subservient to the attainment of the highest achievable thing in life - namely Nirvāna.

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