



**Rahimov I.M.♦**

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**Fundamental principle of the morality of punishment:  
customs and traditions**

**Abstract:** The origins of morality date back to the distant depths of human history and are linked to the formation of man as a rational social being. This means that in order to determine the conditions and circumstances of the origin of morality in punishment, we need first to turn to the history of punishment in human society.

As a social phenomenon, morality acts and manifests itself in the form of a set of socially developed measures of human behaviour. As such, morality functions as an essential regulator for the behaviour of the individual in society. However, at the same time morality is an internal spiritual quality that guides people, a quality that is steps unique and different in every nation for the simple reason that qualities have different genetic roots.

**Keywords:** morality; punishment; customs and traditions; legal phenomenon; state; law.

Auguste Comte, author of *The Course of Positive Philosophy*, expressed a profound truth when he said that we can fully understand a concept only when we know its story. What therefore is the history of the origin of punishment on moral principles? Did it exist only with the advent of the state, or was it present in the first nations, communities and societies? What is religion's role in this historical process? And what other factors may have influenced the moral principles of punishment?

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♦ **Rahimov Ilham Mammadhasan oglu** – Doctor of Juridical Sciences, Professor, Honoured Jurist of Azerbaijan Republic (Azerbaijan). E-mail: mopi\_sid@yahoo.com



The emergence of morality in particular has been a complex, multi-faceted process, determined by objective laws that evolved in society starting with the primitive periods. The origins of morality date back to the distant depths of human history and are linked to the formation of man as a rational social being. This means that in order to determine the conditions and circumstances of the origin of morality in punishment, we need first to turn to the history of punishment in human society.

We should therefore look in depth at the historical sources for information on the conditions and circumstances of the occurrence of the primary rules of morality in the application by the human community of the institution of punishments for specific prohibited acts. It is worth remarking at this point on the role and meaning of morality in human development in general. According to Albert Schweitzer, morality is the first among the forces that shape reality after all, morality emerged long before religion and is independent of it [16, p. 103]. Religion only became involved in ethics in order to subjugate it to the matter of moral supervision and moral education of the masses. Here we can see the historical role of morality in the development of mankind, because in the early period of our emergence, there had not yet been formed either the religious or the legal means capable of establishing prohibitions and threats to protect people from dangerous, harmful and evil acts.

As rightly pointed out by A. Huseynov: “Primeval life was characterised by the fact that morality was directly inscribed in everyday life with its non-reflexive essence. It follows directly from a clear, self-evident and, crucially, pervasive separation of individuals into ‘us’ and ‘them’, which in all probability was seen as a division of ‘the people’ and ‘not the people’” [4].

The behaviour of individuals within the framework of the first steps of morality differed from animals only because here it was based on conscious instincts and was regulated purely externally via taboo - evaluation took into



account only fixed deeds. The ability of humans to maintain their instinctive impulses and to coordinate their actions with the interests of the group has been the result of a lengthy process. As A. M. Zolotarev rightly observes, “so long as humans continued to obey their behaviour according to two basic instincts solely - sex and food - they were not yet human” [7, p. 63]. With the development of human society within this primitive morality, different rules, prohibitions and regulations appeared, compliance with which was considered obligatory. As a rule, customs and traditions survive longer than the conditions and specific historical circumstances that create them - because they become fixed, any new conditions seem pointless and incomprehensible, and, pertinently, immoral. As a result, there also sprang up a natural need for freedom from the existing unnecessary, harmful customs and traditions that conformed already to the moral level of the community and which were protected under the threat of punishment.

In this way the selection and preservation of values and their transfer to future generations takes place. In fact, it is through customs and traditions that the moral succession of generations and social inheritance of spiritual riches is enacted. And within this process a pivotal role belongs to punishment, perfected along with the moral development of mankind. Looking through the historical sources gives us an understanding of the conditions and circumstances that accompanied the occurrence of the primary rules of morality, allowing us to understand the nature of was punishments applied by society for prohibited acts.

As a social phenomenon, morality acts and manifests itself in the form of a set of socially developed measures of human behaviour. As such, morality functions as an essential regulator for the behaviour of the individual in society. However, at the same time morality is an internal spiritual quality that guides people, a quality that is steps unique and different in every nation for the simple reason that qualities have different genetic roots. Therefore, amongst various ancient peoples, morals were significantly different from each other.



Consequently, the assessment criteria for morality and immorality in their historical development cannot ever be the same, because every nation has always had its own particular attitude towards different events, facts, deeds - their understanding of moral values will invariably be in accordance with how they judged the actions and doings of people. Accordingly, every nation in developing the determining of a sentence and the order of its application has based this process on the moral principles of its community, although with time it eventually becomes impossible to ignore the conventional universal human principles.

By ancient times, morality had already started to regulate not only the behaviour of the individual in society but also the relationship between the individual and society as a whole in the face of the community, tribe or other group, since morality acts primarily as the product of joint efforts by the masses to develop their moral ideal. So when we talk about the morality or immorality of punishment, we understand them that it is not only the relationship of the individual to this phenomenon but society as a whole. In other words, punishment can be considered based on moral principles only when it conforms to the moral assessment of the whole of society and not the individual. In this sense, society is a moral motivation, i.e. the desire to make good, to implement a moral ideal, to fulfill a moral duty, in order to prevent evil and to protect beneficial customs and traditions.

Here we witness the activity of society towards identifying a criminal policy that can be evaluated as moral or immoral, depending on the historical period. Punishment is a tool to achieve this goal, while morality is a set of rules, concepts, precepts about good and evil, due and undue that encompasses duty, conscience, honour and dignity. Simply fixing it all in the law by itself is not enough - moral norms should be the basis of punishment and its execution - and so when we talk of the moral principles of punishment, what we are in fact referring to is a moral essence of who has the undeniable right to the formation and use of this tool.



Thus, if morals were and are the basis and the result of conduct that defines the course of human behaviour in society, limiting it within a defined frame, then punishment has served and continues to serve as a means of restoring normal order in society, emanating conflicts not only between individuals but also between the individual and society. Therefore the penalty for violating the accepted rules of behaviour in society is morally justified, because the very idea of this measure is taken deliberately by the whole community as a reaction based on the norms of morality. This was the situation with the ancient peoples, where punishment “at the dawn of human culture in primitive societies had the character of revenge, often not commensurate with the weight of the crime but with the force of the irritant” [3, p. 49]. This is natural because, as correctly noted by Emile Durkheim, “punishment first of all is a reaction released by passion. And the more obvious this feature is, the less cultured is society” [5, p. 86]. This explains why it would be a correct approach to assess the morality or immorality of punishment in terms of the historical epoch of its application, taking into account the level of the moral state of the people at that time.

Indeed, in the entire area of criminal law there is no other concept that could be even approximately equal to the concept of punishment in its cultural-historical and philosophical definition. There is no other concept that is a better reflection of people’s thoughts, feelings and mores within their particular era. And no other concept is so closely associated with every phase of the moral development of people. Punishment itself impacts on the whole individuality of people, on their thoughts and feelings, their calmness and passion, development or lack of development.

In short, punishment reflects as in a mirror, as if viewing the depths of a people's soul. The form of punishment and its performance should therefore be judged at the level of the moral and intellectual culture of a people, even if history has not left anything to us to record it. We do know that punishment appears



among all peoples and at all times, ever since there were the first beginnings of an organised cohabitation of people. And since then the formation of the idea of punishment for all peoples has been essentially the same with only a few minor differences. Therefore we will not be wrong if we state that the institution of punishment was not created by one nation and not within a single historical epoch but by the history of all mankind, which explains why this problem has a far greater historical, philosophical, ethical significance than from a purely criminal legal aspect.

But how does punishment appear? At the beginning was it purpose that was first defined, or was it punishment and then the purpose? Nietzsche, for example, believed that it was naive and erroneously to look for some 'purpose' in punishment, e.g. revenge or intimidation, and then to set this intention at the beginning as the cause of punishment. Intention is only the final step that should be applied to the history of punishment since, no matter how great the insights afforded to us by any physiological authority (or even a legal institution such as public law), we do not yet understand its origin [9, p. 285].

According to Nietzsche, the history of punishment and the right to it arises from the contractual relationship between creditor and debtor, which is as old as the subjects of law and turns to basic forms such as purchase, sale, barter and trade. In this sense, punishment is considered as retribution, as the repayment of debt. Therefore the offender is a debtor who not only does not reimburse his profits and deposits, but even encroaches on his creditor because, in all fairness, that creditor is not only deprived in the future of all these benefits and advantages, he is also reminded now of the cost of all these benefits. The wrath of the injured creditor and the anger of the community returns the debtor to the wild, an unlawful state from which he was protected until now. The community expels him from itself - and now it is open to all kinds of potential hostilities [9, p. 271-274].



But the question arises as to what extent can suffering be the redemption of debt? Nietzsche believes this to be the extent to which the infliction of suffering gives the greatest satisfaction according to how the victim measures his loss. According to popular belief, the first expression of the idea of punishment among all nations was the vendetta or blood feud, which is genetically associated with the concept. Here I. Foinitsky notes that in the initial stages of the history of punishment, punitive activities belonged to individuals who were the victims of criminal acts. Punishment does not exist, it is replaced by revenge [13, p. 18].<sup>8</sup> Hegel connects the conversion of private revenge to criminal punishment at the time of the establishment of the state [2, p. 146].

The essence of blood vengeance is that the evil inflicted on someone - or something or via another action - must necessarily be rewarded in turn by evil, where any offence should be followed by retribution, revenge. If the insult involves blood, such as murder, then the revenge needs to be blood - blood for blood. This was not only retribution but also a moral duty, a sacred duty, a just one, in the end being the satisfaction of the sense of ownership. In this regard, it should be emphasized that through revenge, man finds his sense of right, that he becomes aware not only that the other caused him physical, bodily pain or material loss but, most importantly, he understands and acknowledges that he has been humiliated and insulted. This is why people came to understand that it was only through a blood feud that they were able to wash away their humiliation and, accordingly, satisfy their inner sense of justice. It is therefore not entirely correct to assume that blood vengeance was a punishment based on immoral principles - it was fully consistent with the moral level of development of the period. At the same time, blood vengeance was an ancient measure of social protection of a primitive society of people who had no other means of ensuring peace, tranquility and security. According to R. M. and K. H. Berndt, “in general, the tradition of blood feud also performs the function of maintaining order in society” [1, p. 281].



Traditions in society appear when the rule of conduct in view of its long-term use becomes a habit. Customs take on a binding status and are sanctified by religion and governed by the rules of morality.

Vendetta should also be seen as a moral duty, because any offence suffered by one of the members of the tribe or community is felt by all and, of course, provokes a general feeling of revenge. In this case, all the members of the community show compassion for the victim as if he were themselves, which indicates the presence of a moral element, although in this reaction by the community to this sort of offence it is the survival instinct of the community that overwhelmingly predominates.

N. S. Tagantsev states that “revenging earthly justice is the restoration of the dominance of moral powers of justice through the destruction or suffering of those who revel against this order” [11, p. 887]. If we believe that morality serves primarily as a product of the masses, then the blood feud as a moral ideal, generated by a community, has a moral basis because it is deeply rooted in the known organisation of the community in their habits, customs and traditions. Consequently, moral principles are something that combines punishment and blood vengeance, which was a sacred duty to family and clan. The mores of those early times required an obligation to transfer the debt of vengeance inherited from generation to generation. This was when the offence was a personal insult and the response to it took the form of harsh revenge, not restrained in any way - and this was consistent with and approved by the mores of the time.

Can we consider vendetta as a legal phenomenon? In the most general terms the meaning of vendetta is expressed as the demand of retribution for a blood offence, which, according to G. V. Maltsev, is more or less acutely experienced by a person or persons feeling displeasure (anger, indignation) caused by the loss or deprivation of life opportunities as a result of the actions of another person or persons [8, p. 129]. Some believe that the tradition of blood revenge as the rules of





conduct cannot be categorised as moral or legal norms [6, p. 6]. Others believe that the institution of blood feud has a public nature, created entirely and as a whole by the conditions of the social existence of ancient peoples [12, p. 16]. As we see, the legal nature of vendetta is contested on technical grounds, citing the fact that blood vengeance is not a law because there no existed law in pre-state societies by definition. However, these societies did have ethical standards of behaviour that were adopted by the community, the observance of which was protected. It is therefore an improbable conclusion to make if we think of binding the juridical, legal substance of vendetta with the emergence of the state.

The principles of equivalence and talion were the first concepts in the history of vendetta. The introduction of talion in the practice of blood revenge was in principle the beginning of the appearance of the institution of punishment for a crime. “For the greater offence, a greater punishment” is the principle of talion, and we should therefore agree with G. V. Maltsev when he writes: “No matter how far we peer into the depths of the history of the institution of vendetta, we see that from the beginning to the end that blood feud is seen as the right of one group against the other. No other ‘right’ in the archaic era is perceived by people as so serious or was as significant and indisputable as the right of blood vengeance” [8, p. 216].

Furthermore, Maltsev states that “the genesis of the institution of blood revenge was a process which coincided in time with the formation of the oldest systems of customary law” [8, p. 217]. In fact, if the institution of vendetta already solved certain problems in society in terms of conflict resolution and crime prevention, and if the institution of vendetta was adopted by the community, then why cannot it be considered juridical, legal? After all, the blood feud spawned talion which, after a stage of evolution, moved up to the criminal law of the early states as a punishment, i.e. retribution. The hidden but close links of modern law with talion may be seen whenever we get down to the logical and historical roots



of the system of punishments for an offence, or when we debate such issues as the lawfulness of the deprivation of human liberty and the death penalty. If the institution of vendetta had no juridical (legal) sense, then why it was necessary over time to cancel it out by the official law acts of individual states? For example, in ancient Rus, vendetta was abolished in the eleventh century during the rule of Yaroslavichy. In China, the institution was prohibited in the third century BC, during the rule of the emperor Xiao-Gouna as a result of the reforms by the legalist Shang Yang; and the abolition of blood vengeance in ancient India is associated with an extremely early period too. In many nations, even after its abolition, blood feud continued to play a role in social life for a long time to come. In Europe, for example, in places corresponding to modern-day France, Ireland, Poland and the Czech Republic, cases of vendetta were observed as late as the fifteenth-sixteenth centuries, while in the Near and Middle East and the Caucasus it still occurs today. As Plato wrote: “Blood stains cannot be washed away so long as the souls of the guilty have not redeemed their crimes in the same way: like for like, murder for death at the hands of the killers. Therefore, all should refrain from such crimes for fear of public exposure” [10, p. 312].

Over time, blood vengeance passed from birthright to religion, i.e. from the jurisdiction of the consanguineous tribal group to the authority of the religious community. But no religion could ban vendetta overnight since it had regulated relationships between communities, tribes and peoples for thousands of years. And even if religion had seriously attempted to do away with blood vengeance in one sweep, it is unlikely that this would be successful since all divine messages on the contrary favour vendetta, which has always been considered acceptable by the moral laws of every nation and which has contributed to the resolution of blood conflicts and disputes arising between people.

Given such an ancient history, punishment was therefore based on a powerful human desire, like any living creature linked to the instinct of self-preservation, i.e.



a reaction to dangerous activity from without, and yet at the same time not unconscious but blessed with the involvement of the mind, coupled with the idea of the intended purpose. This is man's intentional retaliation for evil with the purpose of eliminating the enemy, and so protecting himself from the attacker. In this way, an instinctive human action - revenge - becomes the prototype for modern punishment.

We can see the germs of what we now call punishment in social and natural phenomena, in the reactions of people which provide the basis for self-preservation strategies against the external dangers that threaten the existence of the community. These reactions did not have the character of individual revenge, but existed as traditions and rules adopted by all the members of the community and incumbent upon all. For example, we know that in all primitive societies, even in the most isolated tribes, members were sentenced to death for treason against the community, for blasphemy and witchcraft. The punishment for these acts was the reaction of the community, channeled as the organised expression of public discontent in the shape of public outrage - and not as general revenge. This is a public punishment because the danger of these acts must be felt by every member of the community.

In support of this, Durkheim notes the existence of a collective consciousness which acts as a system of beliefs and sentiments based on the common average found in a society. Any action becomes criminal when it offends the strongly defined states of that collective consciousness [5, p. 80-81]. For example, the most common of all actions to pose a danger to primitive societies was witchcraft - the belief in the ability of individual members of the community to control supernatural powers. If a witch or sorcerer was seen to stop the rain falling, they were damned as the worst of enemies for the community and invariably subject to the punishment of death since they posed such a critical danger to all the other members of society. This punishment was necessary in primitive times because it



prevented a clear danger to society, but the death penalty was not pursued as the goal of taking revenge on a traitor or witch - it was assigned with redemption in mind.

However, this redemption was not for the sake of the offender alone but for the whole of society with the objective of warding off the revenge of a supernatural being directed at all the members of that society - this tradition of punishment in form of the death penalty is in fact sacrifice. We may therefore conclude that punishment as a means of prevention of socially dangerous manifestations did not appear out of personal private revenge but from a time when primitive society began to feel threatened by supernatural beings, a state which could find its cause in a member of the community's behaviour. As long as the individual who was the source of this danger remained among the community, it was imperative that the community withdraw him from its midst in order to prevent supernatural revenge.

Now the existence and use of the death penalty for situations such as witchcraft may seem strange to us today, but we know that these were deemed to hold the gravest danger by the people of those times, even though we rarely find them documented. The death penalty could, for example, be imposed as a consequence of disrespectful gestures and acts against leaders. Fraser cites many examples of applying punishment to those who violate taboos - for example, in Africa, under penalty of death, no human or animal was permitted to look at the king of Loango when he ate or drank. When the ruler's own son ran into the room where he was dining, the father ordered him to be quartered on the spot and he had the dismembered parts of the boy's body put on display to his people. Indeed, to see the king of Dahomey eating was a similarly punishable act. Amongst the peoples of the Andaman Islands, when a man killed another in a battle between the villages or in private quarrel, he was forced to leave his village to live in isolation in the jungle, where he was to remain for weeks or even months and then to take a rite of purification. The same traditions, rules and penalties existed among



different tribes across places such as Africa, the Indian Subcontinent and New Guinea [14, p. 188-250].

The death penalty in primitive societies was determined not by the severity of the offence but by a lower estimation of human life. Extremely cruel punishment, according to Foucault, was also one of the elements of the greatness of justice: the fact that the offender cries out under the blows is not an embarrassing side-effect, it is the ceremony of justice expressing itself in all its power [15, p. 90]. Very often, however, such cruelty created the opposite effect. In his commonplace book *Attic Nights*, Aulus Gellius wrote: “Laws invented by Draco ceased to be used, not because someone had abolished them but because the Athenians had tacitly agreed not to use them because of their incredible rigor”. For some nations punishment took on a highly symbolic nature. For example, in the laws of the Babylonian king Hammurabi, if a man renounces his adoptive parents it must be followed by the cutting out of his tongue (article 192), if a wet-nurse swaps a dead child for a live one her punishment is cutting off her breasts (article 194), if a son beats his father it will result in him losing his hands (article 195).

At the same time, when deciding on the application of punishment, people would also take into account the identity of the offender, his community and family ties, but they had no idea of the motives and aims of the crime, and did not take any of this into account. Hence it is impossible to consider that primitive people were alien to the concept of justice and morality. In their judgement, the very element of publicity incurred by the death penalty served justice, which is why punishment would have been a colourful spectacle, perceived by one and all as a triumph of justice based on their collective morals.

Inevitably there comes a time when punishment no longer serves as a means of security, protecting customs, traditions and beliefs against dangerous encroachments. It has now stepped up to become a means of sanctioned vengeance that belongs not to the community but to its individual members who are victims



of life-threatening acts - in the legal language of today, crime. And so the author of this new approach to the prevention of these manifestations became the community, since it is the creator of tradition, driven by reactions of hatred and cruelty. Pertinently, the blood feud as found in all peoples has developed along essentially the same trajectory, manifesting itself in the same structures involved in the same functions, taking the same steps everywhere but at different times.

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