ORIGIN OF CRIMINAL LAWS IN INDIA

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Best Citation - Kushagra Varshney, *Origin of Criminal Laws in India,* 2 (2) LIU & 1 (2021)

ABSTRACT

The present paper focuses on the origin and development of criminal laws in India. Roots of the present are buried in the past; the present law cannot be adequately comprehended without a proper study of its origin and development. The history of India is gigantic, so is its number of rulers, and each ruler has its different sets of rules for criminal law. However, for convenience, these rules for criminal law are studied under three heads, namely, (i) Ancient Hindu Criminal Law, (ii) Mohammedan Criminal Law, and (iii) English Criminal Law. The paper provides the sources and rules of the criminal law of the three major heads.

KeyWords: Criminal Law, Punishment, Evidence, Sources, Trial

I. INTRODUCTION

Criminal law includes the substantive law (tells us about what are different crimes that are punishable) as well as procedural law (tells us about what procedure to follow to prosecute the accused, try them, and procedure to execute punishments of the offender). Criminal law in present India is primarily governed by the Indian Penal Code,1860 and Criminal Procedure Code,1973 as well as the Indian Evidence Act,1872. However, the criminal law in India wasn't governed by these Acts until the arrival of Britishers, it was enacted by them according to their needs and for the fulfilment of their greedy motive. Before the coming of Britishers, the Criminal Law in India was governed according to the *Sharia* law incorporated by the Muslim rulers of the Delhi Sultanate and Mughal Empire for almost 700 years. Before the Muslim invasion, the Criminal Law in India was governed by Ancient Hindu Law and the principle of *Dharma* for its long history.

II. ANCIENT HINDU CRIMINAL LAW

A. SOURCES :

The Hindu political, legal, and economic thought is included in the *Mahabharata*, *Dharmashastra* (of which *Manu-Smr*iti is the most important), *Niti-shastras* or the science of the statecraft (of which the *Shukranitisara* is the most elaborate), and *Arthashashtras* (of which Kautilya's *Arthashashtra* is the most popular version that is easily the most recognized and frequently referred work to this day). The concept of *Dharma* governed Hindu life since the Vedic times, and everyone from the king down to the commoner was expected to follow it.[1] "In the Vedic period when the social and state information was yet to be completed Dharma was the main source of Law. Sacred law (Dharma), evidence (Vyavahára), history (Charitra), and edicts of kings (Rájasásana) were the four legs of Law."[2]

B. ACTS REGARDED AS OFFENCES :

Legal authors and jurists of the Vedic age were familiar with most of the crimes known to the present world. Some of the acts which were regarded as offences have been given below: Homicide, hurt and other offences against the body were punished; theft, robbery, damage to land and crops, and other injuries to properties were regarded as crimes; adultery, rape, and similar acts were also punished; and the criminal law dealt also with the use of false weights and measures, forgery, defamation, false evidence, adulteration of food, and other fraudulent dealings.[3]

C. TRIAL OF ACCUSED[4] :

[1] A. Lakshminath, *CRIMINAL JUSTICE IN INDIA: PRIMITIVISM TO POST-MODERNISM*, Journal of the Indian Law Institute, January-March 2006, Vol. 48, No. 1 (January-March 2006), 26, 27 (2017)

[2] Dr.Reshma Umair, *DEVELOPMENT OF CRIMINAL LAW IN INDIA*, 10th International Conference on Recent Development in Engineeing Science, Humanities and Management 229, 229 (2017).

[3] P. M. Bakshi, *Punishment in Ancient Hindu Law*, The Journal of Criminal Law, Criminology, and Police Science, May – Jun 1956, Vol. 47, No. 1 (May - Jun 1956) 81, 81

[4] Dr. D.P.Verma, Dr. Ramesh Chandra Chhajta, *Human Rights of Arrested Person in Ancient India: An Appraisal,* Volume 19, Issue 12, Ver. I IOSR-JHSS 87-89 (2014)

1. Arrest :

In Ancient Indian Criminal Law, there are references of Local arrest, Temporary arrest and arrest amounting to inhibition from travelling and arrest relating to his work. However, certain categories of persons enjoyed immunity from being arrested based on some humanitarian terms. Brihaspati mentioned some as: - 1)Engaged in the study, 2) about to marry, 3) sick, 4) one afflicted by sorrows, 5) insane, 6) infant, 7) intoxicated, 8) very old man, 9) woman, etc. Even Narada has mentioned that the following persons should not be arrested: (1) About to marry, 2) tormented by illness, 3) about to offer sacrifice, 4) one afflicted by calamities and 5) minor.

2. Representation by Lawyers :

"The concept of Lawyers appearing for the parties and helping the court was applied in ancient times. Such a person well versed in law and was appointed by a party to litigation was called a Niyogi (Lawyer). The Niyogi was entitled to get fees and Sukra Neetisara states that 'the person authorized to represent a party in court was entitled to get his remuneration to the extent of $\frac{1}{16}th$, $\frac{1}{20}th$, $\frac{1}{40}th$, $\frac{1}{80}th$, or $\frac{1}{160}th$ of the suit claim and the remuneration should be inversely proportional to the suit claim." [5]

3. Defences available to accused :

According to *Yajnavalkya* a man above eighty, a boy below sixteen, a woman and an ill person were exempted from half of the punishment on humanitarian grounds. A child below five was considered *doli incapax,* i.e., incapable of committing the crime. Kautilya was in favour of granting immunity from punishment to a minor.

4. Rights of the accused:

Generally going through the procedure prevailing in ancient India it can be said that the following rights were available for an individual offender

1. Right to engage counsel
2. Right to appeal
3. Right to examine witnesses

Police officers were punished for violating their duties are found and it included also arresting a wrong person who otherwise should not have been arrested. Offences and misconduct committed by police officers, Jail Superintendent and other public servants were taken very seriously and severe punishments were prescribed.

5. System of Judiciary :

Civil and criminal disputes except the cases of violence (Sahasa) could have been tried by Kula, Shreni and Gana. A decision rendered by the Kula can be reviewed by the Shreni and a decision by Shreni can be reviewed by the Gana. Likewise, the decision of a Gana can be reviewed by the Adhikrita courts. The cases involving violence are to be tried by the Adhikrita a court-appointed by the King. Corporal punishments are to be decided by the Sasita (Kings Court) but to be finalized by the King himself.

D. PUNISHMENTS GIVEN TO THE OFFENDERS :

The punishments given at the time were according to the principles of morality and good conduct as prevalent in the present-day modern world. However, the kinds of punishments given at that time were much larger in number than they are today. Today, the punishments given to offenders in India is usually fines, imprisonment, and in rarest of the rare cases capital punishments but from the texts of *Manu, Vishnu, Narada, Yajnavalkya, Apastamba* we can infer that the various types of punishments in the Vedic age include: (a)Death, (b) Imprisonment, (c) Fine, (d) Whipping, (e) Cutting off limbs of the offender, (f) Throwing hot oil into the mouth of the offender, or branding him with a hot iron, (g) Throwing away the offender to be fed by dogs, (h) Parading the offender in the public streets in a state that would invite ridicule, (i) Demanding surety of the offender, (j) Confiscation of property, (k) Requiring the offender to

[5]Dr. Dilip Kumar, *Ancient Judicial System*, ANCIENT JUDICIAL SYSTEM, HTTPS://WWW.PATNAUNIVERSITY.AC.IN/E-CONTENT/SOCIAL_SCIENCES/AIH/MAAIH149.PDF, (last visited Nov. 2, 2021)

pay compensation to the victim, (l) Requiring the offender to undergo penance.[6]

III. MOHAMMEDAN CRIMINAL LAW

A. INTRODUCTION:

Muslim law owes its origin in the Arabian Peninsula after the establishment of Islam by Prophet Mohammad. It is considered to have its origin in communication with God. Muslim law replaced the Ancient Hindu Law with the establishment of the Delhi Sultanate in India in the 12th century A.D. The Sultans of Delhi imposed the use of Sharia as the law of State and thus criminal law in India was governed according to Sharia during the reign of Delhi Sultanate, Mughal Dynasty, and early years of the British Empire.

B. SOURCES :

Muslim law has been derived primarily from the *Quran,* i.e., revelations of God through its Angel Gabriel.[7] However other than *Quran,* sources of Muslim law include; the acts and words of Prophet (PBUH), i.e., *Hadis*, a decision of agreement, as to some point mooted, by the companions of Prophet (PBUH) or their disciples, i.e., *Ijma*, and, inferences from the indications afforded by *Quran, Hadis or Ijma* drawn by recognized Mujtahids (*Qiyas).*[8] Apart from these four, there are some secondary sources which include; *Urf* or Custom, Judicial Decisions, Legislation, Justice, equity and good conscience. [9]

C. EVIDENCE ADMISSIBLE :

Since most of the Muslim rulers in India belonged to the Hanafi School of Muslim thought, the laws are according to the principles of the Hanafi School. According to the Hanafi law, evidence is, (a) *Towatur* or fully corroborating evidence; (b) *Ehad* or testimony of a single individual; and (c) *Iqrar*, meaning admissions or confessions. Such evidence could be adduced through witnesses or documents and reliance could also be placed on circumstantial evidence. Trial by ordeal was unknown to strict Islamic law. Hearsay evidence was not altogether excluded. [10]

A Muslim witness was preferred to a non-Muslim witness. Women were considered competent witnesses when corroborated by another. Close relatives as well convicted persons and gamblers were not considered as competent witnesses. No prescribed number of witnesses have been told to establish a case, except in the case of Adultery which can be seen in the case of Ayesha, wife of Prophet (PBUH).[11]

D. PUNISHMENTS:

Punishments were classified under three main categories: *hadd, qisas,* and *taazir*.[12] However, banishment, incarceration, and *tashhir* were included in adaptation to its Indian environment.

Hadd had three different goals: retribution, expiation, and general and specific deterrence. Under Islamic criminal law, six major offences were recognized as *hadd* (stealing, robbery, whoredom (Zina), Apostasy (Irtidad), defamation (Itteham-e-Zina) and drunkenness (Shurb). Penalties for each of these offences were prescribed in the Quran and the Sunna and enforced by the police. *Qisas* was prescribed under Islamic law for murder and personal injury. *Taazir* punishments were preventive and reformatory. The purpose of *Taazir* was to prevent any further crime and reform the offender, which could be used so long as it did not contradict

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[6] P. M. Bakshi, *Punishment in Ancient Hindu Law*, The Journal of Criminal Law, Criminology, and Police Science, May – Jun 1956, Vol. 47, No. 1 (May - Jun 1956) 81, 81

[7] AQIL AHMAD, MOHAMMEDAN LAW, 15 (Central Law Agency 2007)

[8] Raymond West, *Mohammedan Law in India: Its Origin and Growth,* Vol. 2, No. 1 JOURNAL OF THE SOCIETY OF COMPARATIVE LEGISLATION 27, 29 (1900)

[9] AQIL AHMAD, MOHAMMEDAN LAW, 28-31 (Central Law Agency 2007)

[10] M.B. AHMED, THE ADMINISTRATION OF JUSTICE IN MEDIAEVAL INDIA, 212-222 (1941)

[11] Vepa P. Sarathi, *Historical background of the Indian Evidence Act, 1872*, Special Issue: 1972 JOURNAL OF THE INDIAN LAW INSTITUTE 1, 12 (1972)

[12] K. Varshaa, *Crimes and Punishment in Medieval India*, Vol.2 Issue 4, INTERNATIONAL JOURNAL OF LEGAL RESEARCH AND STUDIES 78, 80 (2017)

the general principles of Islamic law. Banishment to Mecca, Bengal, or Bhakkar was another form of punishment in Mughal India. The Mughals in India employed imprisonment liberally as a form of punishment. There were three prisons, which were located at Gwalior, Ranthambore, and Rohtas. Tashhir (shaming) was used as a form of punishment to degrade and shame the individual in a public venue to foster compliance with social norms.[13]

E. CRIMINAL JUSTICE SYSTEM :

There was a *nizam*, a supreme magistrate, invested with the power to try capital offenders. Just below him was the *deputy nizam*, who dealt with lesser offences such as affrays, riots, etc. Below him was the *Faujdar*, an officer of police who was the judge of all non-capital crimes. *Kotwal* was the peace officer of the local unit dependent on *faujdar*. Outside the capital, in the *mofussil* districts, the authority of the zamindars prevailed and each zamindar had his own civil and criminal courts in his district. Only in cases of death sentence, the matter had to be reported to the capital before actual execution. [14]

IV. DEVELOPMENT OF MODERN CRIMINAL LAW

A. DEFECTS IN MOHAMMEDAN LAW :

The Muslim system of administration of criminal justice was in practice when the British took over the reign of the country. In the beginning, they engrafted the Muslim system of administration but faced many difficulties.

Muslim criminal law considered a crime as a wrong against an individual, not as a public wrong. There was an unscientific classification of criminal law. Crimes were classified into crimes against God (adultery, drunkenness) and crimes against the individual (murder, robbery). In cases of murder, only private complaints were taken into cognizance. However, crimes against God were taken into cognizance by the state and were considered graver than murder and robbery.

The concept of *Kisa* or blood money was an easy loophole for the murder convicts to escape capital punishments. The distinction between murder and homicide was not based on the logical test of intention but on the nature of the instrument used to commit the crime. This way of prosecution of criminals was responsible for much injustice and inequality of decisions in the country.

The Muslim Law approved cruel and terrible punishments like mutilations. Such a punishment was inconsistent with the refined notions of mercy and justice. The punishment of mutilation meant slow, cruel, and lingering death to the unfortunate person who had suffered it.

The Muslim Law of Evidence was very technical and primitive, making the conviction of offenders very difficult. No Muslim could be convicted capitally on the evidence of an infidel. In other cases, a Muslim's word was regarded as being equivalent to that of the two Hindus. The evidence of two women was regarded as being equal to that of one man. This made the trial and conviction of the accused very difficult.

The law of *Tazir* was very vague and gave too much power to the hands of the Judges. This led to injustice and bribery in the courts and amongst police officials.[15]

B. REFORMS BY ENGLISH ADMINISTRATORS :

Since Muslim law had some defects, English officials were unable to administer the country efficiently. Therefore, for this reason, English administrators implemented various reforms in Muslim criminal law from time to time. This amending, repealing and supplementing of Muslim criminal law went on until the enactment of the Indian Penal Code, 1860.

1. Warren Hastings :

[13] HAKEEM, FARRUKH & HABERFELD, M. & VERMA, ARVIND, POLICING MUSLIM COMMUNITIES: COMPARATIVE INTERNATIONAL CONTEXT (Springer 2012)

[14] PSA PILLAI, CRIMINAL LAW (Lexis Nexis 2019)

[15] M.P. JAIN, OUTLINES OF INDIAN LEGAL HISTORY (1952)

The first interference with the Muslim criminal law came in 1772 when Warren Hastings changed the law related to dacoity to suppress robbers and dacoits. However, his plea for more reforms was rejected as the company still didn't have complete political power.

2. Lord Cornwallis:

By Regulation in 1790 Lord Cornwallis introduced the importance of intention in committing a crime rather than the weapon by which the crime was committed.

By Regulation in 1791, he substituted amputation and mutilation as a form of punishment with fines, hard labour, and imprisonment.

By Regulation in 1792, it was made that if relatives of the deceased refused or neglected to prosecute the offender then the case would be transferred to Sadar Nizam Adalat for passing final orders. Consideration of witnesses on a religious and gender basis was also abolished under this regulation.

In 1793, a Cornwallis Code was passed which codified the regulations passed in the past three years and was published and translated into Indian languages.

3. Lord Wellesley :

Through the regulations of 1799 and 1801, Lord Wellesley modified the law related to murder and made the crime of murder no more justifiable and guided the punishment for murder to be capital punishment irrespective of the circumstances. A distinction was made between innocent intention and criminal intention as Muslim law failed to distinguish between these.

By the Regulation of 1802, infanticide and its abetment were made punishable by the death penalty. Punishments awarded on mere suspicion were discouraged and in case of strong presumptive proof, the accused was sentenced to full amount even if it fell short of the legal requirements for *Hadd* or *Qisa*.

By the Regulation of 1803, the need for special evidence to establish the case of robbery was abolished. Murder committed in the prosecution of robbery or aiding or abetting the same were to be sentenced to death.

4. Further reforms till 1832:

Further regulations enhanced the punishment for perjury and forgery (1807), Dacoity (1808), burglary (1811) and adultery (1817).

Regulations were made to stop the slave trade (1811), entice away females (1819), prohibit *begari* (1820).

Regulation of 1825 prohibited the use of *Corah* as an instrument of punishment and replaced it with *rattan.* It abolished corporal punishments for females.

Regulation of 1829 abolished the practice of self-immolation on the funeral pyre of the Husband by the wife (*Sati*).

C. END OF MUSLIM LAW AS THE GENERAL LAW FOR INDIA :

The regulation of 1832 played a very important role in shaping the future course of criminal law in India. It empowered the judges of *Nizamat Adalat* to overrule *Fatwas*. It also provided that non-Muslims who were under trial could demand that they did not want to be tried according to the Mohammedan Law of crimes. On such a request, the Regulation authorized the Judge to seek the help of the natives in any of the following three ways:

i. By appointing the natives to the jury. It was the duty of the Judge to appoint a jury and to lay down the way the jury was to give its verdict.
ii. By constituting two or more persons as assessors. The opinion of each of the assessors was to be given separately.
iii. By referring any such case or any point to a panchayat of persons.

Overall, the ultimate responsibility to decide cases was exclusively given to the presiding officer. Non-Muslims were also made free from the jurisdiction of the

Mohammedan Criminal Law. After 1832, the Jury system, as it prevailed in England, was introduced in India.[16]

D. CODIFICATION & FORMATION OF INDIAN PENAL CODE :

The changes introduced by the Regulation of 1832 were not uniformly applicable to all Presidencies. This shortcoming was taken into cognizance by the company government and a commission was appointed to examine these conflicting rules. Later, the enactment of a Penal Code was found as a solution for the problem. Thus, Elphinstone Code was implemented in Bombay and a separate code was implemented in Punjab after its annexation (1844).

"An all-India legislature was created by the Charter Act of 1833. The office of Law Member in the Council of Governor-General was created, provision was also made for the appointment of a Law Commission. The first Law Commission was appointed in 1834 with Lord Macauley, the then Law Member as its chairman, Sarvshri Macleod, Anderson and Millet were the other members of the Commission. The Commission prepared a draft Penal Code for India which was submitted to the Governor-General of India in Council on October 14, 1837. It was revised by Sir Barnes Peacock, Sir J.W. Colville, and several others. The drafting was completed in 1850 and it was presented to the Legislative Council in 1856. The bill was passed on October 6, 1860. It received the assent of the Governor-General on the same date and thus became the Indian Penal Code, 1860. The code came into operation on 1st January 1862."[17]

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