CHAPTER II

Evolution of criminal justice System in India

In ancient India during the period of early Vedic culture and Indus valley civilization, though there exists a well developed architecture and municipal administration there was no found criminal justice administration, but during the Vedic culture the origin of criminal justice system was found but it was not attained a definite shape, there was a tremendous development of mathematics, astronomy, medicine, grammar, philosophy, literature along with criminal justice administration. But there was also tremendous development of penal law, as than it was termed as code of conduct. This is evident from the large number of legal treatises written in ancient India. Only a very small fraction of this total legal literature survived the ravages of time, but even what has survived is very little.

It is evident that, all Hindu Law originated from the Vedas also called as Smritis. However, in fact the Hindu law really emanated from the books written by the Intellectuals are named as the Smritis like Manusmriti, Yajnavalkya Smriti and the Smritis of Vishnu, Narada, Parashar, Apastamba, Vashishta, Gautam, etc the grate
Intellectuals. These Smritis were not laws made by parliament or some legislature these are all in the nature of code of conduct to regulate the human behavior of those days in all respective. They were some books written by certain Sanskrit Scholars in ancient times who has specialised in law. Later, commentaries called Nibandhas or Tikas were written on these Smritis, like the commentary of Vijnaneshwar who wrote a commentary called Mitakshara on the Yajnavalkya Smriti, the commentary of Jimutavahana who wrote a book called the Dayabhaga is a digest of several Smritis, Nanda Pandit who wrote Dattak Mimansa it deals specifically with the Law of adoption.

In ancient India Danda was considered to be a crucial constituent of legal and social system. It was signified punishments for violation of various laws of Society. These laws were framed and established by the ruling classes and on many points followed by the principal of Varna or class legislation. The ultimate sanction behind the exercise of the State authority lays in the power of the sword which depended on the power of king. Various Dharma shastras and other material, demonstrate the judiciary was not only an important arm of the Government, but also indispensable to the power structure known as the State.
The Smritis prescribes various rules relating to punishments those to be awarded for different offence/crimes. Abuse and defamation of a person was constituted made as an important offence/Crime, and of may have original frequently from prejudices based on castes or religion for these Smritis lays down punishments for offenders according to his caste or religion. Narada’s definition of Vakparusya also points to such a conclusion. He defines it as abusive speech couched in an offensive and violent terms regarding the native country, caste, family and religion of man. The people are quarrelsome with each other, Brahmans are extremely greedy, Persons belonging to Visvamitra gotra highly orthodox and ferocious oftenly they commit cruel deeds against the Sudras when they found with learning or listening of Vedas, a few examples of such are abuse of country, caste, religion and family respectively. The nature of punishment as well as its gravity of punishment prescribed in the Smritis appear to have the objective of preventing acrimony based on caste religion and the other prejudices and to maintain the social homeostasis in the society on castes as laid down in Vedas and Smritis. Gowtama states that a Sudra who intentionally reviles by criminal abuse or assault a member of the twice born caste, is to be
deprived of the limb with which he offends it was a kind of deterrent theory of punishment as now, there is no found prisonisation, though the punishment to the Sudras are sought to be excluded from learning the Vedas. If any one listens to recitations of the Vedas and mantras intentionally without permission, than his ears are to be filled with molten tin or lac. If any one violates these and dares to recite the Vedic texts his body is to be split in to pieces in the open place. If any one tries for assuming equal position or status by learning Vedas, with members of the upper castes, corporal punishment is prescribed against such persons. The anxiety of smritis to preserve the varying social status of different castes and religions was reflected also in the rules which prescribe different punishments for one cast and the same offence if they committed by members of different castes. Thus if a Kshatriya abuses a Brahmin he has to pay a fine of hundred Karsapanas, but in case if it is a Brahmin abuses a Kshatriya only fifty Karsapanas, if it is a Vaisya it only twenty five and nothing fine imposed if it is happened in the case of a sudra. For a Sudra Vishnu prescribes a fine of twelve pahnas for abusing a man of one's own caste. For abusing a member of lower castes the fine is only six pahnas. If a Kshatriya defames a Brahman he has to pay a fine of one
hundred pahnas, but in the case of a Vaisya the fine prescribed is
corporal punishment is to be inflicted. When a Brahman defames a
Ksatriya he has to pay a fine of fifty pahnas, but in the case of
defaming a Vaisya and Sudra a fine of only twenty five and twelve
pahnas respectively. The fact that Manu makes abusing a Sudra
punishable with a fine of twelve pahnas whereas Gautama prescribes
nothing. It shows that during the time of Manu Sudra's position was
improved some what in this respect. Visnu also prescribes a fine for
the first amercement for insulting a Sudra. At the same time Manu
appears to be very stem and hard in dealing with the offences in which
a twice born man is insulted by a Sudra, he prescribes cutting out of
the tongue, a thrusting into his mouth of red hot iron nail. According
to Manu it the Sudra has the arrogance to each Brahmins their duties
the King should see that hot oil is poured into his mouth and into his
ears. The same is prescribed by Vishnu when a low born man
mentions the name or caste of a superiorlivingly. The underlying
principle behind the above discriminatory rule appears to be that men
of high social position must be protected against low social persons
and such low social persons insulting a Brahmin must be awarded
severe punishment. Bruhaspati states that persons begotten in the
inverse order of caste and members of the lowest caste are called the refuse of the society, if they insult a Brahmin they must be corporally punished and must never be amerced in a fine. It is obvious that the nature and degree of punishment prescribed in the smritis is discriminatory, and the discrimination itself is frankly justified. It has two dimensions. First, it is based on the caste of the person who commits the offence and secondly, it is based on the caste of the victim of such an offence. The combined objective of the whole provision is to preserve and enforce the homeostasis of the system and caste inequalities with the help of the coercive powers and machinery of the state. The Arhasastra of Kautilya states that when a Ksatriya commits adultery on an unguarded Brahmin woman a fine of the highest amercement is to be confiscated. In case of a Vaisya his entire property is to be confiscated, but if it is a Sudra he is to be burnt alive. Where a man commits adultery with a woman of low caste of a Sudra committing adultery with a woman of low caste he is to be put to death. When a Sudra approaches a woman of Brahmin caste he is to be burnt alive. When a Vishaya and Kshatiya approach a woman of the Brahmin caste they are to be burnt alive. Similarly when a Vaisya offends a Kshatriya woman, or when a Sudra offends a Vaisya woman
they are to be burnt alive. In cases involving adultery between a man of a twice born caste with a woman of the Sudra caste the man is to be banished. But a Sudra committing the same offence with a woman of first three castes, must suffer capital punishment. In contrast to all these, where a Brahman commits adultery once with a married woman of equal class he needs only to perform one fourth of the penance prescribed for an out caste. Punishment for offences relating to sex is not confined to only cases in which married woman are involved but also covers Criminal intercourse with women in general. If a man has criminal in intercourse with an Aryan woman his body organ is to be cut off, and all his property will be confiscated. Apastamba prescribes punishment for adultery is cutting of the organ of the adulterer but introduces a distinction in the crime of intercourse with a marriageable girl by providing the punishment of confiscation of property and banishment of the adulterer from the society.

Manu recommends cutting of two fingers of the man forcibly contaminating a maiden besides making him pay six hundred pahnas as fine. In the case of a man of equal caste defiling a willing maiden only a fine of two hundred pahnas is prescribed in order to deter him from a repetition of the offence. If however, a Sudra has intercourse
with a woman of twice born caste punishment of loss of part and confiscation of property and even loss of life is also provided. According to Narada when a man has illegal connections with a woman of his own caste a fine of the highest degree is prescribed, but when this involves a woman of lower caste the middling fine is prescribed. In case if he has illegal connections with a woman of superior caste capital punishment is to be awarded. Narada also draws a distinction between illegal connections of a man with a village woman, he prescribes severe punishment including death and confiscation of entire property, in the later case if the woman belongs to the Brahmin caste. Smriti laws seems to have appreciated clearly the difference in nature and gravity of sexual crimes involving woman belonging to another man (married woman adultery) and unwilling woman and a willing woman. Illegal Connections with a woman who is not one's wife (excluding certain categories of fallen woman), is a thing of which the smriti laws positively disapproved and as such make it a punishable offence. But they clearly distinguish between the offences involving the woman of three categories stated above. Another striking feature of the smriti law is the liability of the adulteress to be punished. Gautama states that the King should get an
adulteress devoured by dogs in a public place, if the adulterer is of a caste lower than her.

The head of a Brahmin adulterer is to be shaved and her body to be anointed with butter, she is to be placed necked on a black donkey and to be taken round along the high road. According to Vasistha the woman becomes free thereby. Manu departs from this rather lenient treatment. If a wife violates the duty which she owes to her lord, the king shall cause her to be devoured by dogs in a place frequented by many people. The prescription of punishment is a clear recognition of the principle that such offences are no longer a private affair between individual, but a matter between individual and state, a matter with which the whole society is concerned. Here we have the existence of the common principle to all ancient society that evil should be returned for evil. It is the dictum of an eye for an eye and a tooth for tooth, cutting the tongue of a Sudra for abusing a Vrituaus person and dropping of hot oil into his mouth for giving instructions to the members so that high caste and low cast.

According to Vishnu with whatever limb an inferior insults or hurts his superior in caste the King shall deprive him of that limb, for striking out both eyes of a man, the King should imprison him for life
or order him to be mutilated in the same way. Manu lays down that with whatever limb a thief commits an offence of theft, the King should deprive him of that limb in order to prevent a repetition of that crime and also a lesion to the entire society. It is also evident from Narada's rule prescribing the cutting of that limb of a man of lower caste which he offends a Brahmin. Likewise Katyayana also prescribes the cutting off the limb of a robber. The Smriti law treats crimes not only crimes as such, but also as wrong or torts. A person who kills a Kshatriya is to give 1000 cows to the Brahmins for the expiation of his sin, 100 cows for the murder of a Vaisya and 10 for the murder of Sudra. In this sense smriti laws consider the state or the society to be the party wronged and the compensation as the nature rather than providing of relief to the party aggrieved. Many rules in the smriti uphold the principle wrath for wrath in dealing with the perpetrators of crime. Vasistha states that, the slaver commits no crime by killing an assassin. Baudhayana states that, a person who slays an assassin learned in the Vedas and belonging to a noble family does not incur by that act the guilt of the murderer of a learned Brahmin because in the case. "fury recoils upon fury". Now the questions are who is assassin (Atatayin). Vasistha prescribes six acts
as follows. (A) Who hold a weapon in his hand and ready to kill, (B) a Robber (C) He who takes away land (D) He who abducts another man's wife. (E) An incendiary, (F) A poisoner. Vishnu described seven as follows (i) Killing with sword or (ii) with poison or (iii) with fire (iv) Those who raise their hand to pronounce a curse (v) False accusation which reaches to the ears of King (vi) and those having illicit relation with another man's wife (vii) lastly such persons who deprive others of their worldly fame or of their wealth or destroy religious feelings. Bruhaspati also upholds the principle or revenge by stating that one commits no wrong by returning the abuse or giving blow for blow or striking the offender down. Katyayana States clearly that, an actual murderer is liable to be killed in various ways and goes further to state that one should certainly kill without waiting for consideration a man coming with the intention of destroying a life or dam. Katyayana also introduced a significant departure in the law relating to assassins as to limit the right of killing assassins only to cases where the assassin belong to any lower classes.

A characteristic feature of the law of punishment in the smriti is the extreme leniency with which Brahmins are treated in award of punishment. Gautam states that, if a learned man offends, the
punishment should be very much increased. This principle however
no where appears to be applied in the Smriti law while prescribing the
punishment for different crimes except in case of theft. But he himself
contradicts the principle when he states what corporal punishment
must not be inflicted on a Brahmins. He further states that, the King
must allow Brahmin immunity from sin types of opprobrious
treatment. He must not be imprisoned or punished otherwise in any
manner. Apastamaba excludes the Brahmins from death penalty.
Vishnu forbids infliction of corporal punishment on a Brahmins but
prescribes his expulsion from his own country. Likewise Narada
firmly lays down that a Brahmin should not be killed even if he is
convicted of all possible crimes. Manu laid down as follows "No
greater crime is known on earth that slaying a Brahmin. A Kind,
therefore, must not even conceive in his mind it's thought," He had
prescribed that the guilty Brahmin should be expelled and his entire
property be left to Brahmins, he had further prescribed a number of
marks to be impressed on the forehead of the guilty Brahmin such as
the sign of tavern for drinking liquor, dog's foot for stealing headless
corpse, and the mark of a female part of violating a Guru's bed.
Yajnavalkya Smriti also voices which does not exclude even a
Brahmin who is guilty of causing abortion, stealing gold, striking a Brahmin woman with a sharp edged weapon or killing an innocent woman. Vishnu prescribes that, if the murderer belongs to the Brahmin caste the figure of headless corpse should be impressed on his forehead.

The procedure for awarding punishment to cuprites against their crimes is Narada points out that, the Judicial Proceeding has four feet, four bases and four means. It benefits four, reaches four and produces four results. Virtue, Judicial proceedings, documentary evidence and royal edicts are the four feet of a law-suit, and each following one is superior to the one previously named. Here virtue is based on truth, judicial proceedings rest on the statements of the witnesses, documentary evidence consists of declarations reduced to writing, and an edict depends on the pleasures of the King. Similarly there are four parts of a trial. First, the connection (agama) must be examined, second, the title must be ascertained, third, the case and at the end a decision is to be given. Because the four means of conciliation and the rest are adopted, it is said to have four means, and since judicial procedure protects the four orders it is said to benefit four. The four results of judicial proceedings are justice, gain, renown and esteem.
Because the judicial procedure affects criminals, witnesses, the assessors of the court, and the King to the amount of one quarter each it is said to reach four. There are four judicial proceedings such as declaration, answer, trial and deliberation of the judge, regarding the onus-probandi, Narada emphasises that law suits are based on the statements of the two litigants. The accusation is called the plaint and the answer the declaration of the defendant. The plaintiff should affirm his case first and then the defendant when they have finished the members of the Court (Sabhyas) and after them the judge should speak. The suitor stood before the Court bowing and the judge asks "What is thy business? What is thy grievance? Fear not! Speak out, O Man."

If the cause be judicially entertainable the judge should deliver the Court seal to the Plaintiff for calling the defendant or he should order the Court officer to call the defendant. The law suit could proceed further only when the Court was convinced that a prima facie case was established by the Plaintiff and it was entertainable judicially.

An officer of the Court was to reduce to writing the statements of each party, and also whatever else has been written on the board,
together with the names of the witnesses as well as the statements in which both parties concur. Even such things as the statement of the plaintiff made under the influenced to writing. Accuracy in recording those statements is important, and the scribe who writes down towards or the Plaintiff or the defendant differently from what they narrate is to be punished as a thief by the King who desires to enforce dharma. The additional statements of the Plaintiff or defendant which are not contained in the writings of both the parties are to be subsequently entered into their declaration. These are called prathakalita, i.e. what is interposed. If the Plaintiff and defendant come into conflict claiming their own superiority or precedence, their declaration is to be received in the order of their castes, or after considering their grievances. Thus the Courts too were permeated in their practice and procedure with caste distinctions and privileges, which clearly shows the principle of procedure. This conclusion is strengthened by Narada's view than a Sudra has no right to prefer a false accusation against a member of the twice born caste, and if he does so his tongue shall be slit by the Officers of the King and he shall be put on the stakes. In similar cases Brahmins are placed above every thing.
That if a litigant even when he has been asked to speak out, does not say anything; he deserves to be confined at once to the jail. He is also supposed to be losing party. It is presumed that he has to say nothing or the claim against him is valid in law. The principle that judgment should not be passed in the absence of parties seems to have been followed by the Court. Katyayana further says even if defendant does not present himself when a decision is to be taken on usages, a gift of money, desirable actions and services, the King should not cause an error in decision by deciding in the defendant's absence. The impartiality of the verdict is sought to be maintained by the rule that where a litigant induces even a single member of the Court to be partial towards him or where he offer a bribe, even to the opponent, he should be treated as a losing party to the dispute. In a civil dispute if a litigant himself threatens the other side or offers a bribe to him or gets him threatened or restrained through another person. He becomes Hina (losing party). It appears that the Courts also acted as custodian of properties in dispute during the pendency of suit, any property thus kept under the care of the judge must be returned to the winning party together with the interest accruing over it. Katyayana further lays down that if a litigant does not present himself before the Court after
he is summoned, he loses his cause at once. Similarly where a litigant desires to obtain more time or adjournment merely under a pretext, he should be regarded as deceitful and such a conduct be declared to be a reason leading to the loss of the cause to him. There appears to be a realisation that causes should be decided without delay and parties should not be permitted to absent, them from providing information and thus cause delay in decision. Fresh trial of the cause is possible who has been defeated in accordance with texts speaking of Hina (losing) litigant. There is however, no retrial for him who is defeated in accordance with the texts that lay down expressly the loss of the matter in dispute. According to Narada, however a case should be tried once more, if a man was of the opinion the suit has been decided and punishment declared against him is in contravention to justice or texts, rules or judgment has not been given in a proper way provided he is prepared to pay twice the amount of fine inflicted upon him. Narada further described legal proceedings of two kinds, one which is not attended by a wager, secondly when either of two parties stakes in writing a certain sum to be paid besides the amount in dispute, in case of defeat. Litigants are also supposed to provide sureties. If no surety is provided by the Plaintiff who has a proper cause for dispute, he is to
be guarded and he has to give to the messenger guarding him, his wages at the end of the day. In the event of failure by the three higher castes, he is to be guarded by warder outside the lock up. But in case of the Sudras and others are to be confined and fettered if they can not give sureties. It is however, prescribed that persons of all castes should not be obstructed in performing their obligatory rites and duties such as bathing, worshipping, Sandhya Prayer etc. The Court would accept only competent surety. The master, an enemy convict, under trial accused of certain categories, one appointed on the King's business or man of unsound mind could not be accepted as sureties. Strangers are not permitted to speak on behalf of others, if any one is doing so, he will be punished. Brother, father, son or authorised agents are appearing to have been permitted to speak on behalf of their litigant relations. But the Victory or defeat would affect the party himself and not the representative. A representative is not allowed in cases involving murder of a Brahmin, wine drinking, theft, in diceden assault on another's wife, eating of forbidden food, kidnapping a maiden and intercourse with her, counterfeiting coins, measures etc. In such cases the man himself should engage in the dispute. Through Yajnavalkya Smriti we come across various kinds of tribunals
dispensing justice to the people such as assemblies of town dwellers, Companies of Traders and families. These are classified according to their relative importance in the investigation of the affairs of manna. Competent surety must be taken from both parties for the satisfaction of the award. An appeal may be preferred from the decisions of family to persons specially appointed by the ruler. The King shall reverse the cases decided by compulsion, by fear, by woman, at night inside a house, abroad and brought forward by enemies. "Shri P.V. Kane has summed up few other miscellaneous procedures from Dharma Sashtras as follows."

Certain persons are exempted from personal appearance in the court and allowed to send their representatives. These include idiots, mad men, very old people, women, boys or sick persons for all of whom their kinsman or appointed agents are to give answers in the court as in practice at present under power of attorney. It appears that in a dispute of criminal nature no court fees are required to be paid as now. The person found guilty has to pay the King the fine declared in the smritis for offences. In civil disputes also nothing is paid as court fees at the inception of the suit. Certain rules of course, do prescribe payments to the King, but this has to be done after the decision of the suit. Such payments essentially partake the.
nature of Court fees. Up on the perusal of the above provisions shows that the ancient smritis and judicial system was a well established complete in itself. This system although discriminatory according to modern legal philosophy, but was maintaining the law and order of the then society. This system might be obsolete today, but it has distinctive characteristic features of its own, this system was having description of every kind of crime and punishment thereof the then present in ancient society. We may collect those distinguished noble principles which still best suits to the present society. These old and best suited principles may be adopted in the present legal system to boost the crippling judicial system. It is sure that, if the Indianization (implementing the smriti) of the present legal system is adopted, then certainly legal system may be saved from degradation. We have to undertake a thorough research on this pattern to there out the grain from the chaff. We have to critically examine the old legal and judicial system for obtaining noble principles and giving up those principles which were either unwarranted to the welfare of society at all. Let us do needful in this direction.

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