

CRIME, PUNISHMENT AND JUDICIAL PROCEDURE IN ANCIENT (SMRTI)
INDIA.

India's Culture is one of the oldest of the world. In ancient India danda was considered to be a crucial constituent of legal and social system. It was signified punishment meant for violating various laws of Society. These laws were framed and established by the ruling classes and on many points followed the principal of Varna or class legislation. The ultimate sanction behind the exercise of the State Authority lay in the power of the sword which depended on the power of Kind. Various Dharmashastras, material, demonstrate the judiciary was not only an important arm of Government, but also indispensable to the power structure known as the State. Let us consider first the position of crime and punishment in smrti India on ancient India.

The smrtis prescribe various rules relating to punishments to be awarded for different crimes. Abuse and defamation constituted an important Crime, and may have originated frequently from prejudices based on castes for the smrtis lay down punishments for offenders according to his caste. Naradas' definition of Vakparusya also points to such a conclusion. He defines it as abusive speech couched in offensive and violent terms regarding the native country, caste, family of man, etc.¹ "The Gaudas are quarrelsome", "Brahmans are extremely greedy", "Persons of Visvamitra gotra commit cruel deeds", are a few examples of abuse of country, caste and family respectively.²

The nature of punishment as well as its degree prescribed in the smrtis appear to have the objective of preventing acrimony based on caste and the other prejudices and to maintain the social position of castes as laid down in Vedas and smrtis. Gautama 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 offends³ and through punishment the sudras are sought to be excluded from learning the vedas. If he listens to recitations of the vedas intentionally, his ears are to be filled with mal ten tin or lac.⁴ If he dares to recite the vedic texts his body is to be split.⁵ For assuming equal position with members of the upper castes, corporal punishment is prescribed.⁶ The anxiety of smrtis to preserve the varying social status of different castes is

¹ (Narda Smrti) – XV. 1

² P.V. Kane, (History of Dharma Sashtras) Vol. III-511)

³ Gautam Dharma sastra XII. 1, Manu, VIII. 270, 279, - 283

⁴ Gautam Dharma Sastra XII.4.

⁵ I Bid . XII.5

⁶ I Bid . XXI. 6

reflected also in the rules which prescribe different punishments for one and the same offence if they committed by members of different castes. Thus if a Ksatriya abuses a Brahmana he is to pay a fine of hundred karsapanas, but in case a Brahmana abusing a ksatriya only fifty, a vaisya only twenty five and nothing in the case of a sudra.⁷ For a sudra visnu prescribes a fine of twelve panas for abusing a man of one's own caste.⁸ For abusing a member of lower castes the fine is only six panas.⁹ If a Ksatriya defames a Brahmana he is to pay a fine of one hundred panas, but in the case of a vaisya the fine prescribed is—does it corporal punishment is to be inflicted.¹⁰ When a Brahmana defames a Ksatriya he is to pay a fine of fifty panas, but in the case of defaming a vaisya and sudra a fine of only twenty five and twelve panas respectively.¹¹

The fact that Manu makes abusing a sudra punishable with a fine of twelve panas whereas Gautama prescribes nothing. (Gautam Dh.S., XII. 13-14). It shows that during the time of Manu Sudra's position improved somewhat in this respect. Visnu also prescribes a fine of the first amerement for insulting a sudra.¹² At the same time Manu appears to be very stern and hard in dealing with the offences in which a twice-born man is insulted by a sudra; he prescribes cutting out of the tongue¹³ thrusting into his mouth of red hot iron nail.¹⁴ According to Manu it the sudra has the arrogance to each brahmana their duties to King should see that hot oil is poured into his mouth and into his ears.¹⁵ The same is prescribed by visnu when a low born man mentions the name or caste of a superior revilingly.¹⁶ The underlying principle behind the above discriminatory rule appears to be that men of high social position must be protected against low persons and such low persons insulting a brahmana must be awarded severe punishment. Brahaspati states that persons begotten in the inverse order of caste and members of the lowest caste are called the refuse of society; if they insult a brahmana they must be corporally punished and must never be amerced in a fine.¹⁷ 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

⁷ I Bid . XII. 8-13 ; As B.K. III Ch. XVIII.

⁸ Vishnu V-35

⁹ Vishnu V - 36

¹⁰ Manu. VIII, 267 ; Nar, XV-XVI. 15.

¹¹ Manu VIII. 267 ; Nar, XV-XVI. 16; Br, XX.7

¹² Vishnu, V.103.

¹³ Manu. VIII. 270.

¹⁴ I Bid, VIII. 271

¹⁵ I Bid, VIII, 272, Nar, XV-XVI. 24/16, Vishnu V-25, Nar.XV-XVI

¹⁶

¹⁷ Brahaspath (XXI 15

two dimensions. First, it is based on the caste of the person who commits the offence, 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 system and caste inequalities with the help of the coercive powers and machinery of the state.

The Arthasastra of Kautilya states that when a Ksatriya commits adultery on an unguarded brahmana woman a fine of the highest amercement is to be confiscated; In case of a Vaisya hisentire property is to be confiscated; but a sudra is to be burnt alive.¹⁸ 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.¹⁹ When a Sudra approaches a woman of Brahmana caste he is to be burnt alive.²⁰ When a vaishya and Ksatiya approach a woman of the Brahmana caste they are to be burnt.²¹ Similarly when a Vaisya offends a Ksatriya woman, or when a sudra offends her or a VAisya woman they are to be burnt.²² In case involving adultery between a man of a twice born caste with a woman of the sudra caste the manis to be banished.²³ But a a sudra committing the same offence with a woman of first three castes, must suffer capital punishment.²⁴ 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.²⁵

Punishment for offences relating to ses 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 tercourse with an Aryan woman his organ is to be cut off, and all his property confiscated.²⁶ Apastambe prescribes for adultery the 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.²⁷ Manu recommends

¹⁸ Arthasastra – IV Chapter XIII

¹⁹ Arthasastra – IV Chapter XIII

²⁰ Vasisth Dh. Sastra XXI I; (Gautam Dh. S. (XXIII.15)

²¹ I Bid , XXI. 23

²² I Bid , XXI. 4-5

²³ I Bid Dh.S. II. 10.27.8

²⁴ I Bid, II. 10.27.9 ; Manu, VIII. 374 ;

²⁵ Apastamba Dharma Sutra S. II-10-27-11

²⁶ Gautam Dh.S. XI.2

²⁷ Apastamba Dh.S. II. 10.26.20

cutting of two fingers of the man forcibly contaminating a maiden besides making him pay six hundred panas as fine.²⁸

In the case of a man of equal caste defiling a willing maiden only a fine of two hundred panas is prescribed in order to deter him from a repetition of the offence.²⁹ 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 provided.³⁰ According to Narada when a man has 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 he has connections with a woman of superior caste capital punishment is to be awarded.³¹ Narada also draws a distinction between connection 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 brahmana caste.³²

Smṛti laws seem 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. Connections with a woman who is not one's wife (excepting certain categories of fallen woman), is a thing of which the smṛti 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 smṛti 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.³³ The head of a brahmana 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.³⁴ 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.³⁵ 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

²⁸ Manu, VIII. 367

²⁹ I Bid, VIII. 368

³⁰ I Bid, VIII. 374

³¹ Narada XII. 70

³² Narada XII. 71

³³ Gautama Dh, S.XXIII-14

³⁴ Vasista Dh.S. XXI. 3

³⁵ Manu, VIII. 371

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 Virtuous person and dropping of hot oil into his mouth for giving instruction to member so the high caste and like. According to Vishnu³⁶ 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, the King should deprive him of that limb in order to prevent a repetition of that crime.³⁷ It is also evident from Narada's rule³⁸ prescribing the cutting of that limb of a man of low caste which he offends a brahmana. Likewise Katyayana³⁹ prescribes the cutting off the limb of a robber. The smrti law⁴⁰ 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 Brahmas for the expiation of his sin, 100 cows for the murder of a Vaisya and 10 for the murder of Sudra. In this sense smrti laws consider the state or the society to be the party wronged and the compensation be as the nature rather than providing of relief to the party aggrieved.

Many rules in the smrti uphold the principle wrath for wrath in dealing with the perpetrators of crime. Vasistha states⁴¹ that the slayer commits no crime by killing an assassin. Baudhayana state 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 Brahmana because in the case. "fury recoils upon fury".⁴² Now the question is who is assassin (Atatayin). Vasistha⁴³ prescribes – six as follows. (A) who hold a weapon in his hand and ready to kill, (B) 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

³⁶ Vishnu smrtis (V)-19, 21 to 23

³⁷ Manu – VIII - 334

³⁸ Narada Purana XV-XVI.25

³⁹ Katyayana Smiriti. 822.

⁴⁰ Bodhayana 1.10.19.1-341. Visatha Dh. S. III-15

⁴¹ Visatha Dh. S. III-15

⁴² (Baudhayana 1.10.18.13)

⁴³ Vasistha Dh.S. III-16

or destroy religious fields. Brhaspati⁴⁴ also upholds the principle of revenge by stating that one commits no wrong by returning the abuse or giving blow for blow or striking the offender down. Katyayana⁴⁵ 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 belongs to any lower classes.

A characteristic feature of the law of punishment in the smṛti is the extreme leniency with which Brahmins are treated in award of punishment. Gautam⁴⁶ states that if a learned man offends, the punishment should be very much increased. This principle however nowhere appears to be applied in the smṛti law while prescribing the punishment for different crimes except in case of theft. But he himself contradicts the principle when he states that corporal punishment must not be inflicted on a Brahmin. He further states that the King must allow a Brahmin immunity from all types of opprobrious treatment. He must not be imprisoned or punished otherwise in any manner. Apastamba⁴⁷ excludes the Brahmins from death penalty. Vishnu⁴⁸ forbids infliction of corporal punishment on a Brahmin but prescribes his expulsion from his own country. Likewise Narada⁴⁹ firmly lays down that a Brahmin should not be killed even if he is convicted of all possible crimes. Manu⁵⁰ laid down as follows "No greater crime is known on earth than slaying a Brahmin. A King, therefore, must not even conceive in his mind this thought," He had prescribed that the guilty Brahmin should be expelled and his entire property be left to Brahmins. He had further prescribed⁵¹ a number of marks to be impressed on the forehead of the guilty Brahmin such as the sign of a tavern for drinking liquor, dog's foot for stealing a headless corpse, and the mark of a female part for violating a Guru's bed. Yajñavalkya Smṛti⁵² also voices which does not exclude even a Brahmin who is guilty of causing abortion, stealing gold, striking a Brahmin woman with a sharp weapon or killing an innocent woman.

⁴⁴ Brhaspati Smṛti XXI. 4

⁴⁵ Katyayana Smṛti 799.

⁴⁶ Gautam Dharmasāstra VII 12.13. & 17, XII

⁴⁷ Apastamba Dharmasāstra II, 5, XI-(i)

⁴⁸ Vishnu Smṛti V, 2, 3.

⁴⁹ Narada Smṛti V - 36

⁵⁰ Manusmṛti VIII-381, Manusmṛti VIII-380

⁵¹ Manusmṛti IX- 238

⁵² II. 277

Vishnu⁵³ prescribes that if the murderer belongs to the Brahmana caste the figure of headless corpse should be impressed on his forehead.

Let us consider now the procedure for awarding punishment to cuprites against their crimes.

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 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 of 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 asked ; "What is thy business? What is thy grievance? Fear not! speak out, O Man."

काले कार्याथिन पृच्छते प्रजतं पुरतः स्थितम् ।

किकार्यं का चते पीडामा मेपी ब्रूहि मानवः ।।

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.

⁵³ Vishnu Smrti V-4

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 influence of writing. Accuracy in recording those statements is important, and the scribe who writes down the words of 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 that a sudra has no right to proffer 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 brahmanas are placed above every thing.⁵⁴ Katyayan says:⁵⁵

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. Katyayan 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 offers 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 e' e* losing party. It appears that the Courts also acted as custodian of properties in dispute during the

⁵⁴ Narada Smṛti I, 8, 10, 11, 12, 13, 14, 15, 20, 21, 28, 36, 37, 40, 44.

⁵⁵ Yana Smṛti – 199, 200, 201, 160, 204, 205, 208.

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 realization that causes should be decided without delay and parties should not be permitted to absent, themselves 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 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 describe legal proceedings of two kinds – (i) One which is not attended by a wager- (ii) 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 is 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, three higher castes, he is to be guarded by warder outside the lock up. But 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 he is doing so, he is punished. Brother, father, son or authorised agent appear 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 brahmana, wine drinking, theft, in dices assault on another's wife, eating of forbidden food,

kidnapping a maiden and enter course with her, counterfeiting coins, measures etc. In such cases the man himself should engage in the dispute.⁵⁶

Through Yajnavalkya Smrti⁵⁷ 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, be fear, by woman, at night inside a house, abroad and brought forward be enemies. "Shri P.V. Kane⁵⁸ has summed up few other miscellaneous procedures from Dharma Sasthras as follow."

Certain persons are exempted from personal appearance in the court and allowed to sent their representatives. These include idiots, mad man, very old people, woman, boys or sick person for all of whom their kinsman or appointed agent are to give answers in the court. It appears that in a dispute of criminal nature no court fees are required to be paid. The person found guilty has to pay the King the fine declared in the smrtis 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.

The perusal of aforesaid provisions shows that the ancient smrtis & judicial system was complete in itself. This system, although discriminatory according to modern legal philosophy, but was main training 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. I am sure, if Indianization of the present legal system is adopted, then certainly legal system may be saved from collapse. We have to undertake a thorough research on this pattern to there out the grain from the chaf. 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

⁵⁶ Smrti I, 4, 14, 22, 34, 65

⁵⁷ Yajnavalkya smrti. II-10,18, 30, 31, 32

⁵⁸ History of Dharma Sasthras

present day society or not meant for the welfare of society at all. Let us do needful in this direction.

Dated :

Dr. Gokulesh Sharma
M.A. LL.D.
Additional Chief Judicial
Magistrate (Railways)
Fatehgarh at Farrukhabad. (U.P.)