

ResearchPro International Multidisciplinary Journal

Vol- 2, Issue- 2, April-June 2026

ISSN (O)- 3107-9679

Email id: editor@researchprojournal.com

Website- www.researchprojournal.com



Historical Journey of Criminal Law in India: From Codification to Modernisation

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Article Info: (Received- 21/01/2026, Accept- 16/02/2026, Published- 03/04/2026)

DOI- [10.70650/rpimj.2026v2i200008](https://doi.org/10.70650/rpimj.2026v2i200008)

Abstract-

The development of criminal law in India can be traced back to the history of evolution of law proper which started with the emergence and growth of king as a symbol of justice. In the earliest Dharmashastras there is a reference that the administration of justice was firmly established as an important function of the king. The king was looked upon as a beholder of social and moral order and for the purpose of maintaining Dharma, he was endowed with the power of Danda, i. e. the punishment. The duty of the king was to maintain and uphold the law.¹

Key Words- Criminal law, Lex Loci, Law Commission, Justice,

The king's authority and duty to administer justice having been firmly established, the law became more and more systematic and its study and practice went into the hands of practical lawyers in course of time. The practical jurists developed law into the minutest details. It must, however, be stated that judicial procedure had little place in early works, i. e. Dharmashastras. Earlier works treated procedural law merely as a part of substantive law. The usages and practices occupied an important place in the administration of penal justice in the King's Court."²

The Dharmshastras contains a substantial portion of criminal law of ancient India under the head Vyavahara which, in modern sense meant dealings between men and men. In the earlier stages there was no distinction between civil and criminal law but later Manu picked up eighteen cases of hurt' in the form of Vyavahara-sthitau which were separated from the cases of property violations. Some of these cases included assault, defamation, theft, robbery, adultery etc. Yajnavalkya also mentioned these offences in the chapter entitled Vyavaharadhyaya and they were again stated by Nilkantha in his Vyavahara Mayukha. The Kautilya's Arthashastra also referred to these form of violations in the ancient system of Laws in India³. Later, the Hindu rulers followed more or less similar law and procedure for dispensation of criminal justice with little modifications here and there⁴. This system prevailed all over India for centuries.

The medieval period in the Indian history witnessed an era of Muslim invasions and weakening, of the authority of Hindu rulers The Muslim invaders gradually imposed

their own Laws on a larger part of India and criminal justice was administered according to the Mohammedan law of crimes. In the Presidencies of Madras and Calcutta Muslim law was the law of the land and Mohammedan criminal law was enforced by the Moghal Emperor. In Bombay, however, the Hindu Law of crimes still prevailed since it was not under the Moghul Empire at the time of its annexation to the British Company. The Island of Bombay was transferred by the Portugese to the English Company in 1672. The British, on assumption of power, gradually modified the existing Mohammedan criminal law to make it in consonance with the notions of equity, justice and good conscience.

The Muslim Law of Crimes

The Mohammedan criminal law was based on the tenets of holy Quran. As the Moghul rule expanded, its provisions were found inadequate to meet the requirements of a large community hence certain modifications were made in it by way of Sunna i.e. the rules of conduct. The Muslim criminal law was mainly expounded by Hidaya and Fatwa. The Hidaya contained the general principles of Muslim Criminal law while the Fatwa-i-alamgiri was a collection of case law.⁵

The basic principles of Mohammedan law of crime and punishment were contained under five different heads, namely, Quisa (retaliation), Diya (blood-money), Hadd (defined punishment), Tazir (discretionary punishment) and Siyasat (ordinances of the King). They are explained as follows :-

Quisa-It is an Arabic term which means 'retaliation'. This principle of punishment was applied to cases of wilful killing, maiming or causing severe injury. Under this mode of punishment, the next of kin of the person killed or the injured man himself had the right to inflict similar injury as the wrongdoer. According to Abu Hanifa the retaliatory killing was to be done with a sword. This punishment was based on the principle of private vengeance. In case the victim was slave, then his master was to have the right of retaliation. However, this mode of punishment was subject to certain limitations were entitled to demand it,

2 **Diya**- The term 'Diya' signified 'blood money' which meant money compensation payable to the person wronged. The muslim law permitted the remedy of 'retaliation' to be exchanged with 'blood money'. In case of wilful killing or murder, the next of kin of the person killed could claim blood money from the criminal himself while in other cases his family or associates were liable to pay this money. However, this mode of punishment was never applied in Bengal. The Diya or blood money could thus be accepted in lieu of retaliation. In case of unintentional injuries, the amount of 'Diya' was payable at the fixed rate

3. **Hadd**-The literal meaning of the Arabic term 'Hadd' was boundary of Limit and in context of Muslim criminal law it meant fixed of defined punishment For the offences coming under this category, the law prescribed immutable penalties and the Judge had no discretion to alter the prescribed punishment Thus, as soon as the offence under this category was proved, the prescribed punishment had to be awarded without any modification. The offenses falling under this category being serious in nature and injurious to the public at large, they were severely dealt with and deterrent punishments were awarded for them. The offences under Hadd promised The common forms of 'Hadd' were stoning, flogging or amputation of limbs etc.

4. **Tazir**- This kind of punishment was essentially discretionary in nature depending on the discretion of the Presiding Judge. The punishment could be anything such as imprisonment, banishment, reprimand, boxing on the ears or any other humiliating treatment, viz exposing the offender to public ridicule or marching him through streets with his face blackened or head shaved. The punishment under Tazir under Tazir being

discretionary.

5. Siyasat-It authorized the ruler to prescribe punishments for those offences which were not covered under any of the categories mentioned above. Such punishment could be inflicted on the offenders in the public interest. Siyasat punishments were exemplary in nature and their gravity could even exceed that of Hadd or Quisa if the circumstances so warranted. The purpose of Siyasat was to enable the ruler to maintain law and order in the community by using his discretionary authority for the sake of public tranquility.

Reforms in the Mohammedan Criminal Law

As already stated, the Charter of 1726 introduced English law in all the Presidency towns. Thus in Calcutta Town the English criminal law was applied, but in the Mofussils of Calcutta Presidency, the Mohammedan law of crimes was the law of the land. In 1765, the Company was granted Diwani of Bengal, Bihar and Orissa but the British administrators did not think it advisable to interfere with the criminal justice administration at that stage and allowed Muslim criminal law to continue. However, they gradually introduced reforms in that law to make it more reasonable in accordance with the principles of Justice. The historical development of the changes introduced in Muslim criminal law by the British Government can be traced through the following stages:-

Changes introduced by Hastings

Warren Hastings was the first to make an attempt to modify the existing Mohammedan law of crimes, with a view to correcting its imperfections. First of all, he sought to change the law relating to dacoity. Under the Muslim law of crimes, the Moulvis were not authorised to pass the sentence of death on dacoits unless the dacoity committed by them was attended with murder. Hastings changed this law and provided that dacoits must be sentenced to death and executed in their village and the whole village should be fined and the families of the dacoits be made slaves of the State. He justified this change in the law on the ground of competence of the British Company to correct the defects of the existing criminal law and punishments in exercise of its Sovereign authority. With the establishment of Sader Nizamat Adalat in Calcutta, he assumed complete authority to modify the punishments awarded under the provisions of Muslim criminal law so as to be just and reasonable. In order to discourage mutilation, he introduced a provision that this sentence could not be executed without his specific permission.

Cornwallis Code⁶

Cornwallis Code" of 1793 which consisted of forty-eight Regulations also introduced certain changes in the existing Mohammedan Criminal law. Regulation IX of the Code contained general provisions relating to the criminal procedure. The proceedings of a trial consisted of the charge, the plea and evidence for the prosecution, the defense and evidence for the accused and the futwa or the opinion of the native law officer. The trial Judge was ordinarily to pass sentence on the basis of the futwa and grant his warrant for the execution of the sentence but where he disapproved the futwa, he was not to pass sentence on such case but instead was to complete the trial and transmit it to the Nizamat Adalat along with a copy of futwa and his reasons for disapproving it. The Nizamat Adalat was to take final decision and award sentence in such cases. The sentence of death or imprisonment for life had to be referred to the Sader Nizamat Adalat for final disposal.

Changes introduced By Sri John Shore. Further changes were introduced in the law of homicides in 1797 by Sir John Shore who succeeded Cornwallis. The change enabled

the trial Judge to overlook or modify the futwa of the Muslim law officer on the law of homicide to meet the ends of justice. The kazis were to pass futwa in all cases of wilful murder without any reference to the heirs of the deceased. Further, where the futwa provided for blood money under Quisa, the Judge could commute it to imprisonment. In case the Judge did not approve of the opinion of the native law officer, the case was to be referred to Sadar Nizamat Adalat for final decision. Severe punishments were prescribed for the offence of perjury.

Changes in Law relating to Forgery and Perjury

The offences relating to forgery and perjury were to be decided according to the doctrine of Tazir and discretionary punishments were awarded for them. According to Abu Hanifa perjury was punishable with Tusheer which meant exposure in public place with dishonor but his disciples prescribed whipping and imprisonment for this offence. Regulation XVII of 1797 had provided that the Fatwa was to mention the penalty according to both opinions, and that the Judge was to award sentence on conviction of the accused accordingly.

Overruling Futwa

In course of time, the British administration realised that the requirement of Fatwa of Mohammedan Law Officers was presenting difficulties in the dispensation of criminal justice under the Mohammedan law of crimes. Therefore certain steps were taken to overrule fatwa in 1810. It was provided that the requirement of 'futwa of the Mohammedan Law officers may be dispensed with by the Circuit Courts whenever they deemed it advisable and refer the case to the Sadar Nizamat Adalat which was finally to propose the sentence. In 1817 it was further provided that two or more Judges of the Sadar Nizamat Adalat could pass sentence disregarding the 'fatwa of acquittal given by the Mohammedan Law Officers if they had reason to believe that the law officers were unduly favoring the accused. Thus the 'futwa' of the law officer on any matter relating to evidence could be overruled for its unreasonableness.

Changes Introduced by Lord Hastings⁷

The law relating to adultery and other sexual offences was modified during the Governor Generalship of Lord Hastings. As for the Mohammedan criminal law, the offence of Zina (adultery) came under Hadd and was punishable with stoning or scourging.

Changes introduced by Lord William Bentinck⁸

In 1829, by a Regulation, the custom of Sati or burning alive Hindu widows was abolished and made punishable in the same way as culpable homicide. Even persons guilty of aiding and abetting Sati were to be punished by fine or imprisonment or both.

The Elphinstone Code-

In 1827, Elphinstone⁹, the Governor of Bombay introduced a uniform scheme of criminal law in the form of a code called the 'Elphinstone Code which consisted of thirty Regulations. Fitz James Stephen described this code as a "body of substantial criminal law which remained in force until it was superseded by the Indian Penal Code in 1860." The Code recites that the administration of justice in the Province of Bombay was to be carried on according to the personal laws of the people with necessary modifications and amendments through Regulations to meet the exigencies of time. The courts ascertained the personal law in each case, by reference to the law officer of the offender's religion. However, the Code had certain defects, one of them being that it attempted to deal with everything in forty-one sections, and was rather sketchy. The classification of offences in the Code was also defective in the sense that many minor offences were mixed up with major ones.¹⁰

The process of codification of laws began after the Charter Act of 1833 and the enactment of India Penal Code in 1860 introduced a uniform criminal law throughout British India.¹¹ Thus it may be concluded that till 1860 the prevailing criminal law lacked uniformity in its application. The Provinces of Bengal and Madras followed Mohammedan criminal law while Banaras and other ceded territories followed Muslim law of crimes with certain reservations. In Bombay, the personal law of the parties was applied for criminal trials. This multiplicity of laws caused hardships to people residing in different Provinces. Moreover, the decisions differed from Judge to Judge depending on his discretion and interpretation of law. This created great confusion as to the correct position of law on a particular issue. Considering the gravity of the situation, the First Law Commission considered criminal law as the first topic to be taken up for codification and finally evolved a Penal Code in 1860.

The Code of Criminal Procedure was also enacted in 1861 which was subsequently replaced by the Code of Criminal Procedure,¹² 1898 and which was subsequently replaced by Code of Criminal Procedure, 1973 which came into force on April 1, 1974 and today we have the BNSS which came into force on July 1, 2024.

It may, however, be submitted that the Indian Penal Code, 1860 and the Indian Evidence Act, 1872 were enacted during the colonial period and, with the passage of time, became outdated in view of the significant social, economic, political and technological changes in Indian society, particularly after independence. The Indian Penal Code was largely based on English criminal law, which no longer fully suited the needs, traditions and changing circumstances of Indian society. Similarly, the Indian Evidence Act, 1872, being more than a century old, required substantial reform to meet the requirements of the modern Indian justice system.

Keeping these changes and requirements in view, the Indian Penal Code, 1860 has now been replaced by the Bharatiya Nyaya Sanhita, 2023 (BNS), which came into force on 1 July 2024. Likewise, the Indian Evidence Act, 1872 has been replaced by the Bharatiya Sakshya Adhinyam, 2023 (BSA). which came into force on 1 July 2024. These new enactments seek to bring India's criminal and evidence laws in line with contemporary Indian society, technological advancements, and the evolving needs of the justice delivery system. Thus, the colonial-era laws have been replaced by new legislation intended to reflect the changing needs, values and circumstances of modern India.

Establishment of an All India Legislature

The British rulers experienced that the state of law in Presidency towns and Mofussil areas was also most uncertain and haphazard and lacked uniformity. There were as many as five different authorities which made laws and regulations for India. They were:-

- i. The Charters issued by the British Crown;¹³
- ii. The Acts passed by the British Parliament;
- iii. The Regulations (orders) of the Governor-General-in Council.¹⁴
- iv. The rulings of the Supreme Court; and
- v. The Regulations passed by the Presidencies.

On account of the multiplicity of the sources of law, the laws made by one authority often differed from those made by the other authority, with the result that there was a lot of confusion about certainty of laws. With a view to removing this anomaly, it was proposed to establish an all India Legislature having authority to enact laws for the whole of British India, This was done by the Charter Act of 1833. The All India Legislature so established consisted of the Governor General-in-Council having a fourth

member as the Law Member. He was to assist the Council in making the laws for the entire British India. The establishment of an All India Legislature was a great step towards the process of centralisation and improvement in the quality of laws enacted for India.

The Charter Act of 1833

As stated earlier, an All India Legislature was established in India by the Charter Act of 1833 which forms a watershed in the legal history of India. Lord Macaulay was appointed as the Law Member of the Council under this Act. The laws passed by the All India Legislature were called as 'Acts' and not Regulation. The Council was authorised to make laws for whole of the British territory in India and it could repeal, amend or alter any law or regulation in force in any part of India. The laws made by the Legislature were required to be placed before the British Parliament through the Board of Control for approval. With the creation of this new Council, the Governments of Bombay and Madras were deprived of their law-making power.¹⁵

First Law Commission¹⁶

Lord Macaulay in 1833, had emphasized the urgency of codification of Indian laws by arranging them in a systematically written code. Consequently, section 53 of the Charter Act of 1833 made provision for the appointment of a Law Commission in India for the purpose of codification and consolidation of the Indian laws. The principle which was to be followed in the process of codification and consolidation of the Indian Laws was stated by Macaulay in the following words :-

"We do not mean that all the people of India should live under the same law, far from it we know how desirable that object is but we also know that it is unattainable. Our principle is simply this-uniformity where you can have it, diversity where you must have it, but in all cases certainty."

Lex Loci Report

The Charter Act of 1833, allowed unrestricted entry to Europeans in India, consequently there was unprecedented inflow of foreigners and they settled in different parts of the country. Subsequently, by 1837, they were also authorised to hold land. But the status of Europeans including Christians, Anglo Indians and Parsees residing in Mofussil areas, and the application of law to them remained uncertain for all these years. In Presidency Towns, these aliens were judged by the English Law but there was obscurity of law applicable to non-Hindus and non-Muslims in the Mofussil. In other words, there was no *lex loci* i. e. law of the land, for them. Therefore the attention of the First Law Commission was drawn to this issue by the Government in 1837 and it was directed to make enquiries on this subject and submit its report. The Law Commission submitted its report known as 'lex loci report to the Government on October 31, 1840 suggesting that substantive law of England should be declared as *lex loci* (Law of the land)¹⁷ applicable to all excepting Hindus and Muslims inhabiting in the Mofussil areas. The Law Commission attempted to justify this recommendation on the ground that English Law was applicable to all persons other than the Hindus and Muslim.

The *lex loci* Report submitted, by Andrew Amos, the Chairman of the First Law Commission to the Government was published in 1845. It was considered as a unique contribution made by the First Law Commission, since it brought to an end the diversities in the laws applicable to non-Hindus and non Muslims, prevailing in Mofussil areas. But the Government did not want to implement the Report in haste and therefore, as a measure of caution, circulated it to all the local Governments, Sadar Courts and Presidencies for their opinion. The *lex loci* proposals met severe criticism from different

quarters.

The Caste Disabilities Removal Act, 1850

The Lex loci report presented by the First Law Commission was not implemented by the Government due to its pre-occupation with other important political and military affairs. However, a part of the Report was implemented to redress the complaint of Christian converts and for this purpose an Act called the Religious Freedom Act, 1850, otherwise known as the caste Disabilities Act, was passed. The Act protected the proprietary rights of Hindu and Muslim converts to Christianity¹⁸.

Second Law Commission

The Second Law Commission consisting of seven members was appointed on November 9, 1853 for a period of three years under the chairmanship of Sir John Romilly. The other members were Sir John Jervis, Sir Edward Ryan, Lord Sherbrooke, C. H. Cameron, John M. Macleod and T. F. Ellis. The Commission held its sittings in London till the middle of 1856 and submitted four reports after examining the proposals of the First Law Commission thoroughly. Of these, the Second Report, which was submitted in February 1855, was most important as it dealt with the grounds on which the codification of substantive law was to be carried out for India.¹⁹

Third Law Commission

The term of the Second Law Commission having expired in 1856, it was necessary to set up another Commission to complete the task of codification initiated by the Second Law Commission. Therefore, a Third Law Commission consisting of six members with Sir J. Romilly as its chairman was appointed on December 14, 1861. The other members of the Commission were Sir W. Earle; Sir Edward Ryan; Mr. Robert Lowe; Mr. Justice Wiles and John Macleod. Later on, Sir Earle, Mr. Justice Wiles and John Macleod were succeeded by Sir W. M. James; John Henderson and Justice Lush.²⁰

The main function of the Third Law Commission was to proceed with the codification of substantive Law in India as suggested by the Second Law Commission in its Second Report. This Commission submitted seven Reports dealing with the proposals to codify different laws such as Succession, Contracts, Negotiable Instrument, Specific Relief, Evidence, Transfer of Property and the revision of the Code of Criminal Procedure.

Fourth-Law Commission

In 1875, Lord Salisbury, the Secretary of State for India, wrote a letter to the Government of India that under the provisions of the Indian Councils Act, 1861, it was possible to appoint a Law Commission in India itself. He suggested that a team of eminent draftsmen could be entrusted the task of preparing the drafts of different branches of the Indian law. The Government of India accepted the proposal of Lord Salisbury and proposed certain substantive laws to be considered for codification. They included Trusts, Easements, Master and Servant, Alluvion and dilluvion, transfer of Immovable Property and Negotiable Instruments. It was proposed that codification of these laws should be carried out in India. The Bills on Negotiable Instruments and Transfer of Property originally prepared by the Third Law Commission in England were remodeled. The drafts of the Bills on Trusts, Easements, Alluvion and Dilluvion and Master and Servant were prepared by Dr. Whitley Stokes. All these Bills were referred to the Fourth Law Commission on February 11, 1879.²¹

Fifth Law Commission

After the Indian Independence in 1947, many colonial laws needed a thorough revision and change consequent to changed conditions of India. Some efforts were made in this direction but it goes to the credit of Sir Hari Singh Gaur, who moved a resolution in the Legislative Assembly in December 1947 suggesting the establishment of a

statutory 'Law Revision Committee' to review the position of laws. The resolution was, however, withdrawn subsequently on the assurance from Dr B. R. Ambedkar, the then Law Minister, who proposed to set up a permanent Law Commission for this purpose. Thereafter, on July 26, 1954, the All India Congress Committee passed a resolution to set up a Law Commission to look into the modernisation of laws. On November 19, 1954, a non-official resolution, was moved in the Parliament for the appointment of a permanent Law Commission for revision and modernisation of the Indian substantive and procedural laws. Accordingly, the then Law Minister, Shri C. C. Biswas made a declaration in the House on August 5, 1955 announcing the appointment of a Law Commission²².

Conclusion

Thus the Law Commission was to deal with effective administration of substantive as well as the procedural laws, reorganisation of civil and criminal courts, legal education and Bars, conditions for appointment of Judges etc. The object was to simplify the law and procedure and remove its anomalies and inconsistencies and achieve uniformity and certainty in the administration of justice.

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Reference

1. Pendse, S. N. (1985). Oaths and Ordeals in Dharmasastra, p. 5.
2. Sengupta, N. C. Evolution of Ancient Indian Law, p. 47.
3. Manu, VIII–V, p. 47.
4. Rankin, G. C. Background to Indian Law, pp. 186–187.
5. Mittal, J. K. Indian Legal History (7th ed.), p. 20.
6. The Cornwallis Code was a set of 48 regulations enacted in 1793 by Lord Cornwallis, the Governor-General of India. It laid the foundation of the British-Indian administrative and judicial framework by separating revenue collection from judicial functions and introducing measures to curb official corruption.
7. The term "Lord Hastings" may refer to two different British colonial administrators in India: Warren Hastings, the first Governor-General of Bengal (1772–1785), or Francis Rawdon-Hastings, Marquess of Hastings, who served as Governor-General of India from 1813 to 1823.
8. Lord William Bentinck, the first Governor-General of India, died on 17 June 1839 in Paris. He is particularly remembered for the abolition of Sati during British rule in India.
9. The Elphinstone Code was a systematic body of laws introduced on 1 January 1827 in the Bombay Presidency by Mountstuart Elphinstone, who served as Governor of Bombay from 1819 to 1827.
10. Rankin, G. C. Background to Indian Law, p. 196.
11. The Indian Penal Code came into force on 1 January 1862.
12. Act 11 of 1974.
13. Charters issued by the British Crown were formal legal grants or letters patent used to create corporations, establish constitutional principles, and periodically renew or regulate the East India Company's administrative and trading powers.
14. The Governor-General-in-Council referred to the supreme executive and legislative authority under the British Indian administration, under which the Governor-General exercised powers with the advice, consent, and participation of the designated Executive Council.
15. The Charter Act of 1833, also known as the Saint Helena Act 1833, was enacted by the British Parliament. It renewed the East India Company's charter, terminated its commercial functions, transformed it into a purely administrative body, and further centralized British authority in India.

16. The First Law Commission of British India was constituted under the Charter Act of 1833 and was headed by Lord Thomas Babington Macaulay. In independent India, the first Law Commission was established in 1955 under the chairmanship of M. C. Setalvad.
17. Lex loci is a Latin legal term meaning “the law of the place.” It is a principle of conflict of laws under which the rights and duties of parties may be determined according to the law of the place where the relevant act, transaction, event, or injury occurred.
18. The Caste Disabilities Removal Act, 1850 (Act XXI of 1850), also known as the Religious Disabilities Act, was enacted during East India Company rule. It removed legal disabilities relating to property and inheritance that arose from a person’s change of religion or loss of caste.
19. The term Second Law Commission may refer to two different bodies in Indian legal history, depending upon whether the reference is to the British Indian period or the post-independence period.
20. The Third Law Commission of India was constituted in 1961 under the chairmanship of Justice J. L. Kapur and functioned until 1964. During its tenure, it submitted six important reports, numbered 23 to 28, concerning various areas of Indian law.
21. The term Fourth Law Commission may refer to two different bodies in Indian legal history: the British-era Fourth Law Commission constituted in 1879, or the post-independence Fourth Law Commission established in 1964.
22. The Fifth Law Commission of India was established in 1968 under the chairmanship of K. V. K. Sundaram and functioned until 1971. During its tenure, it submitted six official reports, numbered 39 to 44, dealing primarily with criminal law, judicial administration, and procedural reforms.

Cite this Article

"Dr. Aditya Chaturvedi", "Historical Journey of Criminal Law in India: From Codification to Modernisation", ResearchPro International Multidisciplinary Journal (RPIMJ), ISSN: 3107-9679 (Online), Volume:2, Issue:2, April-June 2026.

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