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History of Defenses against Murder Available Before IPC

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ABSTRACT

The word ‘homicide’ is derived from the latin words homo and cide. Homo means a man and cide means to cut, therefore homicide means the killing of a man. Homicide is also synonymous with the word murder. Nothing is more precious to man than his life. Therefore, killing a man is one of the most heinous offences man can commit. The punishment given by the jury for such a crime is also of great magnitude; as such a crime is unforgiveable. However, there are certain circumstances where the crime is considered for pardon. Homicide can be justified in certain cases and the punishment for the same can also be mitigated. These are very special circumstances. The concept of justifiable homicide arises from the grouping of offenses amounting to murder under certain heads. The classification is done on various factors including the gravity of the motive and intention, the kind of intention, the personality of the wrongdoer, et cetera. The degree of punishment awarded differs based on the category of murder. This differentiation has not evolved recently and has existed even before the Indian Penal code was drafted. Awarding a punishment was also subject to a case to case basis, besides the standard categorization. For certain cases, the murder can be justified based on the intention or circumstances leading to murder. Thus the concept of defenses to murder developed. This system of justice can be traced back to the Hindu code of law and Shariat Law. The Hindu and Muslim dynasties that had ruled India before the British had adopted customary laws that had allowed for differentiation of murder and exemption or mitigation of liability. Several of these provisions have been incorporated directly or after modification in the IPC, whereas some have been omitted.

I. HINDU LAWS

The Hindu code of law is embedded in the set of books known as Dharma Shastras², the most ancient records of law. The most authoritative of the Dharmashastras is the Manusmriti.³ The Manusmriti categorizes homicide as i) legal homicide, the killing of a man on the orders of a

¹ Author is a student at Symbiosis Law School, Hyderabad

² Dharma shastras are books that contain civil and criminal laws from the vedic period.

³ Manusmriti is the treatise written by Sage Manu, parts of which are relevant even today in Hindu law.

king as a punishment, ii) illegal homicide that include homicide committed with a will, the knowledge and intention to do so. The code includes killing the fetus by the mother and even cases of suicide under this category, and iii) unintentional Homicide.⁴ Unintentional homicide, comparable to justifiable homicide includes four situations: in the due course of self-defense, a child committing the act, the act being driven by sudden provocation and anger, the wrongdoer was intoxicated or when one is under the spell of hallucinations (moha) and had no intention to kill. The exemption to punishment is only ascertained after fulfilling certain criteria. In the case of self-defense, the person must prove that the attack on himself/ his family/ his property was willful and sudden. The exemption is only to the extent of death penalty and severe torture. A minor punishment could still be awarded for the purpose of atonement of sins done by mistake.

Both the Manusmriti and Kautilya's Arthashastra recommend the same criteria for the second situation.⁵ The child must be below the age of 7 years and a discernment process shall be applicable for children between the ages of seven and twelve and the punishment varied from case to case. Peculiarly, the homicide under the name of honor killing was also considered to be justified. Honor killing can be defined as the killing of individuals by their own family members or members of the clan or the village for the activities not accepted by the society. These activities included intercourse between individuals of different castes (Varna), even if the act was consensual. In the eyes of the society, the most aggravating situation was between individuals of the highest (Brahma) and the lowest caste (shudra).

II. ISLAMIC CUSTOMARY LAWS

The *Sharia Law* is the customary law abiding on the followers of Islam. Dynasties ruling India during medieval times such as the Delhi Sultanate, the Khilji Dynasty, the Mughal dynasty and other rulers of Arabic origin, imposed the Islamic customary law on their subjects during their respective reigns.⁶ According to the Islamic law too, Homicide, (*qatl*) was classified into several categories such as: obligatory, forbidden, permitted, recommended, deprecated. Forbidden homicide included further classifications, namely, deliberate, quasi-deliberate, accidental, equivalent to accidental and indirect. Retaliation, amounting today to a penalty or a punishment was awarded based on the nature of the homicide, including exceptions. The category of homicide pertaining to the ones that were *permitted* is today what is considered as justifiable homicide. The most common occurring of a justifiable homicide is when it is done

⁴ MANU, THE ORDINANCES OF MANU (Sir William Jones trans., The Lawbook Exchange 2007).

⁵ KAUTILYA, ARTHASHASTRA (R. Shamasastri trans., Chaukhamba ed. 2014) (1905).

⁶ *Ibid.*

as a means of serving justice. The execution of those guilty of deliberate homicide, apostasy⁷, and brigandage⁸ fall under this category. The retaliation for homicide was also exempted in cases where the father, son or brother kills the wife, daughter or sister, if the latter three were found to be guilty of adultery. The man who kills the woman for adultery was not liable of penalty. The scope of the exemption was also extended to cases of self-defense, including but not limited to the defense of one's property or the defense of another person. However, the person who initiates the attack cannot seek the exemption when the homicide occurs in the due course of repelling the self-defense attack of the victim. Self-defense is also excused if the attack is awaited but only applies to imminent attacks. Moreover, the attack in question must be of an unlawful nature and self-defense cannot be applied to other cases of justifiable homicide, such as that of a judicial punishment of the court. Homicide in the face of self-defense cannot be justified if alternate ways of protection are available to the victim; for vindictive homicide cannot be justified.⁹

Due to the lack of mental ability to discriminate between good and bad, a child, as agreeable by most jurists, of the age of 15 or below, or a madman will not be considered in the same category of wrongdoers and will be exempted from the punishment. However, if the homicide is deliberate and such that would not be considered fair to exempt, a lesser form of penalty such as a fine payable by the family is applicable. The Hanafi School of thought, propagated by Abu Hanifa and popular among the Sunni¹⁰ Arabs, consider another situation in relation to a madman. If a man is in the right senses when committing the crime of killing another man but loses his sanity after the incident was treated differently. Some of the jurists agree that the decision to be taken must be postponed until the man recovers his sanity while others believe that the fine must be taken from his property. Punishment also cannot be conferred if the wrongdoer was under the influence of wine or any other substance. Although as a mandatory criteria, the man must be innocently intoxicated either by the administration of a medicine or should have been obligated to do so. On the counts of absence of deliberation, the punishment is not retaliation but rather a subsidized one. According to the Hanafi school of thought, the reason of a threat was applicable as a cause for exemption. If a man compels another man to kill a third person and the man does so, the homicide is justified only on part of the one who was threatened. The one who threatens is burdened with the liability. Another peculiar situation where the punishment is exempted and the homicide is considered to be a just one is by the

⁷ Apostasy was regarded as the crime of abandoning one's religious beliefs.

⁸ Brigandage is the crime of robbery.

⁹ Sheikh Burhanuddin Abi Al Hasan Ali Marghinani, *Al Hidayah: Commentary on the Islamic Laws*

¹⁰ A particular sect under the Islam religion.

‘right of blood’. The ‘right of blood’ implies that if a man kills another man for killing a man from his kin by the virtue of being a descendant, the homicide is treated with a subsidized punishment, similar is the case with a husband for the homicide of his wife.¹¹

During the period of the Delhi Sultanate, Homicide was classified into 3 types: Willful homicide is the term given to the occasion when one man has the intention to kill the other, and does so with the help of an instrument. The use of the instrument implied that the murder was well planned. The second category of homicide is when it is done without any intention or motive and is done purely by mistake. Justifiable homicide is the third category of homicide that consists of murders done with an intention but for a reasonable motive. Self-defense is one excuse that justifies homicide. Self-defense is not an absolute defense in itself. It must be proved that the right to defend one’s self could not have been exercised without inflicting death upon the one attacking the accused. Given that the accused could have defended himself/herself using a lesser amount of force than exhibited, the homicide would no longer be justifiable. The employment of Self-defense can also lead to unlawful consequences when the assailant “has retired in such a manner as clearly indicates that he has desisted the attack”. The act of self-defense must occur when one is under-attack and not afterwards. The excuse also extends to an attack by a robber or a thief during nightfall. If the violence on part of the owner was not required or if the possession in question could have been recovered without killing the thief, then the homicide cannot be justified. Homicide is only lawful when it is done fairly, not excluding the reason of self-defense.¹²

III. BRITISH RULE

Under the British Rule in India, several regulations modifying the customary laws were passed.¹³ In 1799, Lord Wellesley had abrogated all the provisions of criminal law that had provided for legal reasons to absolve one of the punishments for murder. Notwithstanding, the circumstances of the case of murder, the death penalty was made the standard punishment.¹⁴

IV. INDIAN PENAL CODE

The Indian Penal code(IPC) that is followed today, was enacted in the year 1860. The IPC

¹¹ J. N. D. Anderson, *Homicide in Islamic law*, 13(4) Bulletin of the school of Oriental and African studies, University of London 811-828 (1951).

¹² Madhusudhan Bandhopadyay, *A critical study of crime and punishment under the Sultans of Delhi (1206-1526)*, University of Calcutta 48 (1976).

¹³ NANCY GARDNER CASSELS, *SOCIAL LEGISLATION OF THE EAST INDIA COMPANY: PUBLIC JUSTICE VERSUS PUBLIC INSTRUCTION* (2010).

¹⁴ *Ibid*, Bengal Regulation no. VIII of 1799.

labels the killing of another man in two ways, namely Culpable Homicide¹⁵ and Murder¹⁶. Culpable homicide is the act of causing an act resulting in the death of an individual or harming an individual physically to such an extent which is likely to result in the individual dying. Knowledge of the act exists for both culpable homicide and murder, however for murder the intention and will to kill is greater than that for culpable homicide. Murder is culpable homicide but with a greater degree of criminality. “All murders can be culpable homicides but all culpable homicides do not amount to murder.” The difference between the two offenses is in the adjournment of punishment for the offense committed, as the punishment for culpable homicide can be imprisonment with the tenure varying whereas murder can include both imprisonment and death penalty. One of the most common defenses is the right of self-defense prescribed under sections 98-106 of the IPC. The right of self defense must be exercised with reasonable care only and only when there is an imminent threat to one’s life or property. It also exists against the persons of unsound minds. In *Jai Dev V. State of Punjab*¹⁷, it was held that the right cannot be claimed after the threat has ceased. The homicide is not justified, if the force used is excessive and unreasonable. In the case of *Biran Singh V. State of Bihar*¹⁸, the court invalidated the right for the individual under attack who had received simple injuries whereas the deceased was hit with a sword on his head. In *R V. Duffy*¹⁹, the court recognized grave and sudden provocation as an exception to murder. The provocation can be physical, verbal or circumstantial, the consequence being the accused losing their sense of control. The defense is partial and cannot be taken as a cover for acts done for revenge. Homicide is also justified when it is committed by a public servant during the course of his duty. For example, in pursuance of a thief who is difficult to catch and during the chase gets shot by the police officer. The police officer is said to have no intention of actually killing the thief and does so merely for public good. The fifth exception for culpable homicide not amounting to murder, is when the victim consents to the act that causes their death, however this is a very indefinite yet restricted and challenging defense as abetment to suicide would still amount to crime. The applicability of this defense is very narrow and unclear. Other the aforementioned exemptions, the general defenses that absolve one of criminal liability are also available. The defense of age is applicable to children below the age of 7 under the principle of *doli incapax* which refers to the individual's incapability. The defense of insanity is also available as an exemption from penalty. Similar to the ancient laws, an intoxicated person who has not consumed alcohol

¹⁵ INDIAN PEN. CODE, Act No. 45 of 1860. § 299

¹⁶ INDIAN PEN. CODE, Act No. 45 of 1860, § 300

¹⁷ *Jai Dev V. State of Punjab* AIR 1963 SC 612

¹⁸ *Biran Singh V. State of Bihar* AIR 1976 CRLJ 1347.

¹⁹ *R V. Duffy* 1949 1 ALL ER 932

voluntarily is also qualified to be considered for the defense.

V. CONCLUSION

In conclusion, today, the Indian criminal law justifies a homicide through the mechanism of defenses available against the crime. The classification of murder as intentional and unintentional justifiable and forbidden has existed since the Vedic period. Both the Hindu and the Muslim customary laws that were followed in the ancient and medieval India had categorized murder in various categories. One common category was justifiable murder or permitted murder. The classification of murder in these different categories helped ensure that the justice system is fair and treats like cases equally and unlike cases unequally. The punishment for the crime varies from the degree of the crime and this is necessary to maintain proportionality. The characterization of justifiable homicide results in fair punishment to the offenders with a just and fair cause to perform the act in question. It is necessary to evaluate the situation of each homicide as a standard punishment would beat the objectives of the justice system. Throughout history, certain homicides have been characterized as justifiable homicide. These justifiable homicides are accepted by the penal code today too as aforementioned. Insanity, minor age, self-defense and involuntary intoxication are standard cases of justifiable homicide that is constant in both the Hindu and Muslim code and also in the current Indian Penal code. However, the only difference is the age of minority in the Muslim Law which is taken as 15 unlike the IPC or the Hindu law that state the age as 7. The Indian Penal code has been drafted borrowing provisions from the customary laws of the land barring certain provisions that are unfair. For example, the exemption to punishment under the Muslim law for the right of blood has not been adopted. Neither has the honor killing exemption from the Hindu law. The question of the legality of the death penalty, also known as capital punishment is one to consider as being a punishment awarded by the court, it also comes under the head of justifiable homicides. However, it is not a commonly awarded punishment in India and is only applicable to the “rarest of the rare” cases, such as mass homicide.
