CARDINAL PRINCIPLES OF LAW OF CRIMES

Sidhartha Sekhar Dash[1]*, Prof Dr. Harish Ch. Padhi[2] and Dr. Biswadeep Das[3]

[1]Assistant Professor-II and PhD Scholar, School of Law, KIIT Deemed to be University, Patia, Bhubaneswar, Odisha, India.751024 , mob. 8763782795 sidharthadash.1981@gmail.com. [2] Guest Faculty, School of Law, KIIT Deemed to be University, Bhubaneswar, Odisha, India. harishpadhi2010@gmail.com [3]Assistant Professor, School of Biotechnology, KIIT Deemed to be University, Bhubaneswar, Odisha, India. biswadeep.das@kiitbiotech .ac.in

ABSTRACT

Law of crimes is founded on some substantive cardinal principles. Any interdisciplinary analysis of law of crimes requires assessments of values with these principles. Principles of harm, causation and utility always give scope for wide range of interdisciplinary study with law of crimes. The paper briefly discusses these principles. Any interdisciplinary contribution to the law of crimes has the potential to expand and limit the scope of these principles.

INTRODUCTION

Law of crime is founded on some basic principles. These principles help realise the law of crime to achieve its objectives. These principles also helps for the conceptual delineation of an offence. The understanding of these aspects of law of crimes is necessary whenever interdisciplinary study of law of crime is attempted. The changes of time also call for reshaping the objectives and approaches of law of crimes. Thus, any interdisciplinary research in law of crimes has the possibilities to expands or limits the scope of these cardinal principles. The authors here give an introduction to the substantive cardinal principles of law of crimes.

Concept Crime and Criminal Law: Definition of crime is always a challenging task. The meaning of crime differs from jurists to jurists. According to Austin, "A wrong which is pursued by the sovereign or his subordinates is a crime[i]". Terence Morris, "Crime is what society says is crime by establishing that an act is a violation of the criminal law"[ii]. Sir William Blackstone defines crime as "an act committed or omitted in violation of a public law forbidding or commanding it". Criminal law is the amalgamation of Criminal i.e adjective forms of crime and law. It is borrowed from "krimos" of Greek word, which is similar to "Karma", the social order in Sanskrit. It refers to those bodies of rules and laws that make some actions

* Assistant Professor-II and PhD Scholar, School of Law, KIIT Deemed to be University, Patia, Bhubaneswar, Odisha, India.751024 , sidharthadash.1981@gmail.commob. 8763782795.

offence. It casts a duty on the persons to not to do those acts. It denotes them as criminal act. Once an action is declared as an offence, the consequence for the commission of the offence is punishment. So the conduct or behaviour of the person should be in consonance to the duty attached. Morris says "without law there can be no crime at all, although there may be moral indignation which results in law being enacted.[iii]" Thus, "Criminal law concerns the system of legal rules that define what conduct is classified as a crime and how the government may prosecute individuals that commit crimes"[iv]. In 1931, the British Privy Council (Proprietary Articles Trade Assn. v. Canada), "Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the state[v]". "It is not simply anything which a legislature chooses to call a "crime.' It is not simply antisocial conduct which public officers are given a responsibility to suppress. It is not simply any conduct to which a legislature chooses to attach a "criminal" penalty. It is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community"[vi]. R v Wilcox, the Nova Scotia Court of Appeal wrote " Criminal offences reinforce crucial social values, the violation of which merits disapprobation and punishment.[vii]" For a criminal jurist, crime is more normative and mostly negative duty in nature which must be obeyed.

Objectives of Criminal Law: The primary objective of the criminal law is protection of the interest of the society and enforcement of law and order situation in the state. For criminal law, the interest of the state or the society comes first and individual interest is second. Enforcement of social order and stability are the foremost objectives of criminal law. Criminal jurists concerns are to define crime with certainty to punish the offenders and to restrict its coercive its operation to the non-offenders to further their fundamental freedom and liberty. Criminal jurists also concern with the application of defined crime to a fact situation so that; a proper application would result in respecting the liberty of a person.

The objectives of the criminal laws required to be uniform. In Indian criminal jurisprudence, interestingly no serious attempt has been made to delineate objectives of the criminal laws. A serious attempt to reform the criminal laws was undertaken by Malimath Committee. However, the report also does not illuminate much on the objectives of the criminal laws. A broad objectives are necessary to further the principles of laws of crimes as well as to bring reform into the fold. However, some jurists have made attempt to put the objectives of the Criminal Law. The objectives of the criminal law can be stated to be[viii] 1. Punishment of

Offender 2. Protection of the Community through deterrence, prevention or incapacitation, rehabilitation and reformation of the offenders, denunciation, and restoration. However there are some cardinal principles of more or less uniform through the common laws countries upon which criminal law is founded.

Cardinal Principles of Law of Crimes

The cardinal principles of criminal law apply to the offences generally. A particular or specific offence of a penal legislation may require more or less of those cardinal values, however, that is depending upon the analysis of the particular penal sections, the words and their interpretations. The analysis and interpretation of the cardinal principles are always consulted to build the premises of theoretical exposition of laws to meet the current and present values. The cardinal principles for substantive criminal law, those cast duty on the subjects are different to that of the procedural criminal law which, in short, gives procedure for the investigation, trial and punishment for the offence.

As we found above in the discussion on the meaning of "criminal law", where in absence of a "law" we cannot state consider an action a criminal in nature, so, the meaning of reus, here is that prohibited action which prohibited by a law. From this, we infer another cardinal principle found place in Latin expression *Nullam Crimen Sine Lege Nulla Poena Sine Lege,* no crime without law, no punishment without law. That law which makes a prohibited action, an offence, should be there in the statute before the action was done by the offender. This also means, as long as an action is not prohibited expressly by any statute, it is not an offence. This means, after an action is committed, the legislature cannot pass a law and state that the action which was done by a subject in the past is an offence. So, no law can be post facto. The making of the law pregnant with prescription not to do an action is more normative in nature. However, for the formulation of the duty, the legislature can take into account a host of findings from diversified fields of knowledge. It can range from social science to pure science depending upon the problem to be addressed and behaviour that is expected from the subjects. The above thick principles can be explained in following concepts. 1. Legality 2. Conduct 3. Harm 4. Causation, and 5. Utility

1. LEGALITY: As we derive our understanding from the foregoing paragraph from the about criminal law, the principle of *Nullam Crimen Sine Lege Nulla Poena Sine Lege,* no crime without law, no punishment without law, the legality or illegality of an action is analysed from the law that has prohibited. From the

language and phraseology of the statute, that as per the sound principles of interpretation the legality or illegality of an action of an accused is analysed.

The above principle can be considered independently. Nullam Crimen Sine Lege, means, the need of a valid penal law inclusive of the subsequent conduct of an accused, Nulla Poena Sine Lege, means, criminal sanction and its range must be given before hand to alleged action or conduct. So, there cannot be a post facto criminal law. Means an action cannot declared as an offence by the legislature after the action has already been committed. If at the time when the action was done, if that existing as an offence by the legislature then, the accused person can be punished for that proscribed offence. In is called prohibition against the ex-post facto criminal law. In case of India, there is a constitutional prohibition regarding the ex-post facto law. This value is very dear to our constitutional morality and u/a 20(3) of the Indian Constitution unambiguously states it.

2. CONDUCT, ACT OR ACTION: It means the outward manifestation of the action of a person. Since the law is concerned with regulation of behaviour, conduct of a person is relevant fact for the examination to find the criminality. Conduct is actus, that is reus, prohibited. Here, the scope of the law is, those conduct which stem out the volition and from the mind of a person. It is not the conduct of a person who has no biological or psychological or neurological capacity to director it according to his volition. It can be both commission and omission. The definition of the word act, on careful analysis gives array of meanings. Let's take an example. "Suppose A murders B by shooting him with a pistol. What is "the act?" The usual answer would probably be, "the act of killing B." Even a brief consideration shows us that we have here a complex rather than a simple thing; that if we are to use words in an accurate, scientific manner we must recognize that the term act is here used so as to include more than one thing. Apparently it covers (i) what may be called the act (or series of acts) in a narrow sense of the word, i. e., a muscular movement (or movements) willed by the actor; (2) some reference to the surrounding circumstances; (3) the consequences or results of the movement (or movements). It seems obvious that if we are to make any careful analysis, we must distinguish between these three things; to do so, we need to have separate names for them. Perhaps we cannot do better than to restrict the word act to the narrower sense above suggested, i. e., so that it means simply a muscular movement that is willed. If we do this, we can say that in considering criminal liability we have to consider (1) the act (or acts); (2) the concomitant circumstances; (3) the consequences; (4) the

actor's state of mind at the time he acts with reference to these circumstances and consequence[ix]". From this we can strictly say that, act in restricted sense lies in (1). The point no.03 though is consequence of act, and in broader definition can be considered as act, however, it shall be more logical to confine the effect to harm that is caused, which is discussed in next. Mr. Justice Oliver Wendell Holmes expressed "An act is always a voluntary muscular contraction, and nothing else. The chain of physical sequences which it sets in motion or directs to the plaintiff's harm is no part of it, and very generally a long train of such sequences intervenes[x]."

There is important difference between act and conduct. Conduct is a broader term. Conduct is important as it shows the behaviour of a person. In the law of evidence, it has special value to influence the case, and sometime, words or statement or complaint is considered through the canvass of the conduct. So much so that, conduct not only of the accused but also, of the complainant and witnesses are relevant in Indian the Law of Evidence.

3. HARM: A component of crime, which has the potential to offer much to the other branches of study, is harm. It is the area in the definition of crime, least has given been importance than to others. In case of tort, the court can create new form of harm through the principle of "wrong" however, in case of law of crimes, any interpretation that is made from the words given by the legislature; the harm should be surrounded by it. As per Jerome Hall, harm is a social dis-value. In case of Indian penal code, the legislature prefers to define harm in the context of injury. Injury means, harm to the body, mind, reputation and property[xi]. A thing or event that harms body or mind or reputation or property is a legal penal injury and hence is punishable where ever the injury is made punishable in the penal section of the code. So, harm is a necessary element for the creation of the offence.

The principle of harm, if we venture philosophically and traditionally, is creation of limitation on the power of the state or legislature to make law. It is inversely stated, if something is not harmful then there should be a law to punish it or the legislature should not make penal laws which results no harm to anyone. This is reading of the harm in negative framework of right. Mill says "social disapproval or dislike for a person's actions isn't enough to justify intervention by government unless they actually harm someone"[xii]. For Mill, a person can do anything as pleases to him, unless it is causing harm to others. For, Mill, the principle of harm is founded upon the construct of his utilitarian philosophy. However, for him, harm and offence are different, as one causes injury to one's right or gives a set back to the important interest that gives benefit to

one, that later means, " hurting one's feelings". Gerhard states, from the context of jurisprudence, the treatment that is given to the principles of harm, as "Since our law has always been hostile to doctrinal refinement, it is not astonishing that the potentials of the principle of harm are as yet largely undiscovered"[xiii]. The judicial interpretation of "bodily harms" by various decisions of the Supreme Court of India denoted "hurt" that used the language "bodily pain" under the Indian Penal Code, 1861 to include 'psychological harm'. Harm principle is having true potential, for the expansion of the jurisdiction of criminal law, if we acknowledge it expansion in science or other disciplines.

4. CAUSATION: After considering the conduct and harm, the next important thing is to find the association between these two or to state legally, is to establish the cause and effect relationship between these two. This is the causal relationship between the conduct of the person and the harm that is effect. This is significant considering its relevance under the law of Evidence as well as to establish *directly* the association of the action or conduct of a person to that of the effect he produced. So, "A causal inquiry, therefore, would first ascertain the sine qua non, or necessary, in the strictly physical sense, participation of the defendant's conduct in the production of the harm"[xiv]. However, the conduct should not produce incidentally the harm. According to Jeromy Hall, the conduct should *be effective enough to cause harm*. Hall finds that if the action is not that effective, it does not contribute to the casual connection to the harm. The criterion of effectiveness in causation is pivotal. "As Hall rightly notes, the use of the criterion of effectiveness in causation is not confined to law, but in law it has achieved singular significance"[xv].

In the principle of causation, when we collect the manifestation of casual effect or relationship between the act and the effect, we see causation in fact. These facts are produced before the court to ascertain the causal relationship. Certain principles of relevancy has also been founded this causation principle under the Indian law of Evidence as well.

The extension on the principle of causation through norm is the policy of law. The reason for doing this is, another area for the determination, which though not strictly another carnal principle for the criminal theory, is consider as a principle for the determination of the accountability of criminal legislation by judicial scrutiny. The possibility of another such criterion apart from the above four was also considered by Jerome Hall himself, not he could not specify it. For some text book writer, *Utility* is the next cardinal principle of criminal law. Here we discuss the principle of utility from a wide range.

5. UTILITY: Utility is understood primarily from two concepts. One is to appreciate the utility of the legislation that already has been legislated to see if it server any utility to the society and there, it is to see if the judicial scrutiny would lie to evaluate or review as to how far the legislation is fruitful to the objectives what it had set. And, another is to legislate a law in conformity to the utilitarian values. Utilitarian values, as championed by Bentham, was to prescribe a universal moral value considering the nature of human being and his frame of mind through the philosophy of pleasure seeking and pain avoiding, and also to legislate that law which at the end would produce greatest happiness of greatest number of persons. Bentham's philosophy has profoundly made impact on the Indian Penal Code, 1861. An example of this can be found in the defence of necessity that knows no laws, iven scope u/s 81 of the Indian Penal Code, 1861 . Debate of utilitarian morality, gave scope for analysis of 'wrong' in penal principles and the debate in noted case of Queen v. Dudley and Stephen, to find a 'morality' in itself, for its own 'ends', through Kant-inan 'categorical imperative'. This has taken the search for the truth to a more esoteric philosophical level. Bentham's utilitarianism prescribes morality of an action from its consequence than to its means. Whether an action is wrong or right, is seen from the context of effect of the action, whether it is resulting in greatest benefit of greatest number of persons. Legislation has always a utilitarian angle to it, so also a judgement. Considering utility in the context of greatest happiness of greatest number of persons, it can also restate the value of 'harm'. Conversely, principle of 'harm' can also restate the utility of a value. The prolific values of 'utility' independently and in association with 'harm' can engage with other studies to broad the scope of utility, harm, jurisprudence and criminal responsibility.

CONCLUSION

Legality is founded on values chosen by legislature for the enforcement through coercive action. Harm guides the legislature to select the values for declaration of illegality of the conduct or action of person. Causation helps establishing the association between action and harm. Together all these principles constitute an offence. Hence, an interdisciplinary research in law of crimes has the possibilities to expands or limits the scope of these cardinal principles.

[i] https://www.abyssinialaw.com/about-us/item/427-the-concept-of-crime#:~:text=Crime%20is%20A%20%E2%80%9CProcedural%20Wrong%E2%80%9D%20%E2%80%93John%20Austin%3A&text=Austin%20defined%20crime%20while%20making,his%20subordinates%20is%20a%20crime.

[ii] https://www.abyssinialaw.com/about-us/item/427-the-concept-of-crime#:~:text=Crime%20is%20A%20%E2%80%9CProcedural%20Wrong%E2%80%9D%20%E2%80%93John%20Austin%3A&text=Austin%20defined%20crime%20while%20making,his%20subordinates%20is%20a%20crime.

[iii] https://www.abyssinialaw.com/about-us/item/427-the-concept-of-crime#:~:text=Crime%20is%20A%20%E2%80%9CProcedural%20Wrong%E2%80%9D%20%E2%80%93John%20Austin%3A&text=Austin%20defined%20crime%20while%20making,his%20subordinates%20is%20a%20crime.

[iv] https://www.justia.com/criminal/

[v] Proprietary Articles Trade Assn. v. Canada 55 C.C.C. 241 at http://www.duhaime.org/LegalDictionary/C/CriminalLaw.aspx

[vi] Hart , Henry M. The Aims of the Criminal Law. JIt https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2758&context=lcp

[vii] R v Wilcox 152 C.C.C. 3d 157 (2001) at http://www.duhaime.org/LegalDictionary/C/CriminalLaw.aspx

[viii] The Purposes of Criminal Law, https://www.federationpress.com.au/pdf/Lanham%20Ch1B.pdf

[ix] Act, Intention, and Motive in the Criminal Law, Author: Walter Wheeler Cook, Source: The Yale Law Journal , Jun., 1917, Vol. 26, No. 8 (Jun., 1917), pp. 645-663, https://www.jstor.org/stable/786267, p. 647

[x] Act, Intention, and Motive in the Criminal Law, Author: Walter Wheeler Cook, Source: The Yale Law Journal , Jun., 1917, Vol. 26, No. 8 (Jun., 1917), pp. 645-663, https://www.jstor.org/stable/786267, p. 648

[xi] Sec 43 of the Indian Penal Code, 1861.

[xii] https://ethics.org.au/ethics-explainer-the-harm-principle/

[xiii] Mueller, Gerhard O.W. (1959) "Criminal Theory: An Appraisal of Jerome Hall's Studies in Jurisprudence and Criminal Theory," Indiana Law Journal: Vol. 34 : Iss. 2 , Article 2. Available at: https://www.repository.law.indiana.edu/ilj/vol34/iss2/2 p.222

[xiv] Mueller, Gerhard O.W. (1959) "Criminal Theory: An Appraisal of Jerome Hall's Studies in Jurisprudence and Criminal Theory," Indiana Law Journal: Vol. 34 : Iss. 2 , Article 2. Available at: https://www.repository.law.indiana.edu/ilj/vol34/iss2/ p.222

[xv] Mueller, Gerhard O.W. (1959) "Criminal Theory: An Appraisal of Jerome Hall's Studies in Jurisprudence and Criminal Theory," Indiana Law Journal: Vol. 34 : Iss. 2 , Article 2. Available at: https://www.repository.law.indiana.edu/ilj/vol34/iss2 p. 222