

Enactment of Penal Code, 1860: A Historical Analysis

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Abstract:-The object of the present study intends to explore the origin, growth and transformation of Penal Code, 1860 from Islamic criminal law. Before the enactment of the Penal Code, 1860 the applicable law was the Islamic criminal law which seems to have been reformed by case law and Regulations by the Governor General of the British administration. To the British, Islamic criminal law suffered from many defects. The English administrator of East India Company realised that many provisions of Islamic criminal law were repugnant to good governance, natural justice and common sense. The East India Company's administration under the Governorship of Warren Hastings and Lord Cornwallis took strong reformative steps to suppress the evils and punish the offenders by reconstituting the Islamic criminal law courts and by passing various regulations to remove the defective provisions of the Islamic criminal law. By the late 1820, most of the substantive rules of Islamic criminal law had been superseded by the Regulations. In 1832 Islamic criminal law was ended and was applied to all persons as a general law, Muslims and non-Muslim alike although Penal Code was made in 1860. This study assesses the reasons and process of transforming of Penal Code, 1860 from Islamic criminal law and focuses on changes of Islamic criminal law that had been done by the British administrator. This study is predominately qualitative in nature. Analytical and descriptive methods have been followed in writing this work. Mainly content or documentary analysis has been applied in conducting the study.

Keywords:- *Islamic Criminal Law, Homicide, Judicial Administration, Punishment of Islamic Law, Reform of Criminal Laws.*

I. INTRODUCTION

The Criminal Justice System (CJS) in Bengal was primarily based on the rules of Islamic criminal law up to the last quarter of the eighteenth century. It was administered, financed and enforced by the Nawabs at Murshidabad through a network of officials appointed by them and local Zamindars.¹ The East India Company began collecting revenue of Bengal from 1765. The Company began promulgating regulations for administering the revenue and related judicial issues soon after the acquisition of the *Dewani* rights in that year. Initially the revenue collection was carried out through the local functionaries of the *Mughal/Nawab* power, but from 1772 the Company began engaging its own employees for that purpose. It seems that the first definitive criminal justice measures were not undertaken until 1790. Between 1772 and 1790 various steps in terms of setting up of several courts under the company's supervision, and appointment of English judges- supervisors affected the criminal justice system. The first initiative to change the judicial administration but not substantive criminal law was taken by Warren Hastings in 1772.² It needs to be mentioned that there was a delay in implementation of the expected reform in the criminal law because of the notion of the "cloudy title"³ of the company. The "cloudy title" of the company to the *Nizamat* made it slow to alter the criminal law.⁴ The proposition of the "cloudy title" refers to the formal legal basis of the company's legislative power in matters relating to the criminal justice system. Two instruments are considered as determinant for ascertaining the legislative power of the company: the *firman* (Imperial order) of the Delhi Emperor of 12th August, 1765 and the treaty of the company with the installed Nawab of Bengal of September of the same year. The *firman* authorised the company to collect revenue on behalf of the Emperor and to adjudicate civil and revenue cases. The treaty with the Nawab

¹ Shahdeen Malik, "Historical Discourse on Colonial Criminal Law", *Journal of the Asiatic Society of Bangladesh*. 44:1 (1999) Humanities, p. 15.

² B.B. Misra, *Judicial Administration of the India Company in Bengal, 1765-1783*, (Delhi, India: Motilal Banarsidass, 1961), p. 280.

³ 'Cloudy title' refers to any form of claim which has been outstanding or any other obstacle like unclear deed of the property, or legal issues not yet been solved which does not allow any person to control over anything till it is clear of such encumbrance.

⁴ G.C Rankin, *Background to Indian Law*, (Cambridge: The University press, 1946), p. 169.

empowered the Company to raise and maintain an army on behalf of the Nawab. Explicitly none of these instruments mentioned the delegation of the criminal jurisdiction to the company.⁵ According to M N Gupta: But for some years, the Directors of the Company did not feel that their function under the *Dewani* was any more than to collect the revenues and maintain an armed force for suppressing revolts. Whatever may be said about this attitude as regards other branches of administration, so far as the branch of the criminal justice was concerned, the uncertainty was justified. The terms of the *firman* by which the *Dewani* was obtained, reserved the *Nizamat* for the Nawab at Murshidabad.⁶

The initial absence of measures on criminal law with the perceived absence of explicit legal power to amend the laws, suggested an attitude of strict adherence to an existing legal framework by the Company. It is clearly implied that the Company would have undertaken criminal law reform much earlier if only it could have done so legally. Since the responsibility for the criminal justice system (*Nizamat*) was not explicitly delegated to the Company, it judiciously refrained from any direct involvement with the system and, therefore, the Company was not able to reform the criminal law immediately and without delay.

II. REASONS FOR TRANSFORMATION OF CRIMINAL LAW IN BENGAL

After the British East India Company, in 1765, had acquired the authority over the department of finances of Bengal, it gradually extended its control over other branches of government. One of these was the administration of criminal justice. Since Bengal was part of the *Mughal* Empire, the legal system was essentially Islamic and based, as far as penal law is concerned, on Islamic criminal law. Constitutionally, the British could not change that. However, they reformed the judiciary in such a way that the Muslim judicial officials were subordinated to British judges. Moreover, since they regarded Islamic criminal law as inconsistent and too lenient, they began to remedy those doctrines that they regarded as obstacles to the maintenance of law and order and as repugnant to natural justice. The main objection of the British to Islamic criminal law as administered in India was that it restricted the power of the courts to enforce capital sentences. Under Islamic criminal law, as compared to contemporary British law, there were relatively few capital offences and, in addition, there were so many defenses available that convictions for such capital offences were difficult to obtain.⁷ According to the British, the Islamic law of crimes was not adequate to the suppression of crime in society. There were a number of inconsistent features, principles and rules therein which no civilized government could suffer for long. As for example, immoral intercourse (*zina*) between a woman and a married man was in all cases punishable by death, whether violence was used or not; but punishment is barred by the existence of any doubt on the question of right or by any conception in the mind of accused that the woman is lawful to him by his alleging such idea as his excuse.⁸ Referring to the defective state of law Stephen observed: “The Islamic criminal law was open to every kind of objection. It was occasionally cruel. It was frequently technical and it often mitigated the extravagant harshness of its provisions by rules of evidence which particularly excluded the possibility of carrying them into effect.”⁹

The concept of crimes and criminal acts in the then existing law was found lacking on several counts by Rankin. On homicide Rankin wrote, “The Islamic criminal law of homicide, if taken as a whole, was very complicated, technical and obscure.”¹⁰ Mittal quotes Rankin’s words¹¹ while Jain attempts to extend: “The primitive character of the criminal law prevailing in Bengal at the time could not better be appreciated than by a survey of the Muslim Law of murder.”¹² In Islamic law in the case of murder, the heirs of the murdered man could claim *qisas* i.e. the heirs had a right to inflict the same injury on the wrong-doer as he had inflicted on his victim. Instead of claiming *qisas*, the heirs could also compound the murder by accepting *diyat* (blood money)

⁵ Shahdeen Malik, “Historical Discourse on Colonial Criminal Law”, *Journal of the Asiatic Society of Bangladesh*. 44:1 Humanities, (1999), p. 26.

⁶ M.N. Gupta, *Analytical Survey of Bengal Regulations*, (Calcutta: Calcutta University Press, 1943), p. 51.

⁷ Rudolph Peters, *Crime and Punishment of Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century*, (Cambridge: University Press, 2005), p. 109.

⁸ V.D. Kulshreshtha, *Landmarks in Indian Legal and Constitutional History*, 8th ed, (Lucknow: Eastern Book Company, 2007), p. 222.

⁹ J.F. Stephen, *A History of Criminal Law of England*, Vol. III, P.293, referred by V.D. Kulshreshtha, *Landmarks in Indian Legal and Constitutional History*, 8th ed, (Lucknow: Eastern Book Company, 2007), p. 222.

¹⁰ G.C Rankin, *supra* note 4, at p. 167.

¹¹ J.K. Mittal, *An Introduction to Indian Legal History*, 7th ed, (India: Allahabad Law Agency, 1985), p. 223.

¹² M.P. Jain, *Outline of Indian Legal History*, 5th ed, (Nagpur: Wadhwa & Company, Reprint 1993), p. 366.

from the murderer, or they could even pardon the murderer. Warren Hastings criticised this law as a law of barbarous construction, and contrary to the first principle of civil society, by which a state acquires an interest in every member which composes it and a right in his security.¹³

Again the defects of punishments of Islam are also taken up to show that those were severe and cruel. Jain, again, following Rankin, adds: "The Islamic criminal law sanctioned the terrible punishment of mutilation which meant slow, cruel and lingering death to the unfortunate person who had to undergo the punishment, for he could not adopt any honest means of livelihood."¹⁴ Although it is impossible to prove that mutilation was more inhuman than imprisonment. Here it has been mentioned that punishments in Islam are not for revenge, but for reformation, and must not exceed the extent of the offence. Punishment if it is to be deterrent must also be exemplary. Allah Almighty says in the Holy *Quran*: "And as for the man who steals and the woman, who steals, cut off their hands in retribution of their offence as an exemplary punishment from Allah. And Allah is Mighty, Wise." (Al-Quran, 5: 39).

However, to understand the philosophy of this punishment, it would be helpful to comprehend the background of the society which Islam envisages to establish. Knowledge of the financial guarantee which an Islamic economic system provides to every citizen of the country is also necessary. As far as the structure of society is concerned, Islam builds it on simple living, truth, righteousness and abstinence from absurdities of life and senseless customs. As far as Muslims are concerned, there is emphasis on worship and purity of heart and sight, and the moral teaching provides details regarding obligations to humans. In the light of all that, if the residents of a country are truly Muslims, the thought of stealing should be unimaginable. Despite that if anybody steals for his greedy nature, he should be given exemplary punishment because it is better to be severe to one and save a thousand than to be indulgent to all and ruin many. He certainly is a good surgeon who does not hesitate to amputate a rotten limb to save the whole body.¹⁵

T. K. Banerjee has pointed out that "with exceptions crime under Islamic law was considered to be a wrong done to the injured party not an offence against the state and punishment was regarded as the private right of the aggrieved party." At the same time he has acknowledged that "... in some respects, undoubtedly, the Islamic criminal law was superior to the English criminal law of that period which was still rude and crude, and far from perfect. English law would hang a man for stealing trivial things, but in Bengal a thief could never be capitally punished."¹⁶ Dr. Aspinall also compared Islamic criminal law with the English law more favourably when he observed that: "In prescribing the severest punishments for crimes against the person, it was in advance of the English criminal law of the eighteenth century which punished offences against property with much greater severity."¹⁷ He observed further: "And when the occasional barbarity of Islamic punishment is emphasized, one should remember, first, that the administration of the law was more humane than the law itself; and, secondly, that there were still in England over 160 offences punishable with death."¹⁸

At that time the British thought that it became necessary for them to interfere with the Islamic criminal law because some of the principles of law of homicide were manifestly unjust and absurd and the means provided for giving effect to its sanctions were insufficient. Though the British administrator allowed the Islamic law of crimes to remain in force for quite some time, yet they subjected it to radical reforms so as to rid it of its archaic features. British officials were baffled by the leniency of Islamic criminal law and by the loopholes that often precluded the infliction of what they saw as adequate punishment for serious criminals. Application of unmodified Islamic criminal law, they believed, stood in the way of maintaining law and order. On the other hand; they were reluctant to allow *siyasat* (exemplary punishment) sentences, which they regarded as arbitrary and opposed to the notion of the rule of law. The British, then, saw no other way than to gradually modify strict Islamic criminal law, by putting it to British notions of justice and law and order. In the process of criminal law the government also introduced deterrent punishments for some virulent crimes (gang robbery, dacoity, etc) afflicting the society.¹⁹ The process of repealing and amending the Islamic criminal law, and supplementing the same with some new approach to criminal law, through government enacted Regulations, started in the right earnest from the time of Lord Cornwallis in 1790 and this process continued unabated and

¹³ *Ibid*, at p. 367.

¹⁴ M.P. Jain, *supra note 12*, at p. 370.

¹⁵ Dr. Mohsin Tariq Mandiwala, *Philosophy of punishment in Islam*. Available at: www.studying-islam.org › Articles › Punishments › Punishments. [accessed on 10.12.2013].

¹⁶ T. K. Banerjee, *Background to Indian Criminal Law*, (Calcutta: Abhinav Publications 1963), pp. 62-67.

¹⁷ A. Aspinall, *Cornwallis in Bengal*, p. 61, referred by M.P. Jain, *Outline of Indian Legal History*, 5th ed, (Nagpur: Wadhwa & Company, Reprint 1993), p. 388.

¹⁸ *Ibid*, at p. 62.

¹⁹ M.P. Jain, *supra note 12*, at p. 372.

unobjectionable till 1860 when the Penal Code (PC) finally superseded the Islamic criminal law by that time.²⁰ Since the pre-company criminal law was considered by some English and Indian writers as complex, illogical and barbaric, the new Regulations, by implication, were to them simple, logical and humane. But Fisch, first pointed out that the Company's reform in fact led to a more severe criminal justice system through an enlargement of acts qualified as crimes and strict imposition of punishments, including longer terms of imprisonment, transportation and death.²¹ To reveal official reasoning at various levels, Fisch examines the replies that were made to successive inquiries- in 1789-90, in 1801-02 and in 1813. It seems that most British officials objected to mutilation. Many officials described it as cruel and barbarous. Fisch concedes that the British at the time thought such reasoning was humane. He is at pains to argue that it would be impossible to get evidence that mutilation was more brutal than imprisonment. The case against mutilation- then and now - could rather be seen as resting not on logic but on sensitivity to another's physical pain. This seems indeed to be the view of most of the officials who replied to these inquiries.²² Fisch also establishes that severity and deterrence were dominating considerations in a variety of instances. By contrast, he stresses the mildness of much Islamic law.²³ He could perhaps have paid more attention to the views of Muhammad Reza Khan, Naib Nazim of Bengal for much of this period, who looked back with nostalgia to the days when the Muslim administration was unaffected by foreign influence: 'The exacting of fines has heretofore never been a means of exempting the guilty from punishment; on the contrary every degree of severity and torture has been and still is inflicted upon them as enjoined by the Laws of God.' Muhammad Reza Khan submitted this warning to the company's administration in Bengal in 1769.²⁴ Thus Fisch clearly undermined the views against Islamic criminal law. When the British took control of the revenue collection in the Bengal in the latter half of the 18th century, they also began to exercise increasing control of the judicial authority in the areas under their domination. The 20th century Indian legal scholar Asaf A. A. Fyzee has described the transformation of Islamic law in India under British colonialism:

In the earlier days of British rule, the influence of Islamic law, pure and simple, was felt everywhere. Originally the Company had merely the right of collecting the revenue. The administration of justice, civil and criminal, remained as it had been under the Islamic law. The law-officers were mostly Muslims; the criminal law was Islamic; in civil matters, the Islamic law was applied to Muslims and the Hindu Law to Hindus in accordance with the opinion of Pundits attached to the courts.²⁵ Unfortunately, the laws were changed by the British Administrators step by step until Islamic laws with regard to evidence and criminal laws were abolished by codified laws in the 1860s. In civil matters, too, the influence of Islamic law was increasingly restricted through legislation and the introduction of principles drawn from equity and the common law of England. Thus the system known as 'Mohammedan Law' in India is modified by English Law, both common and statutory, and Equity, in the varying social and cultural conditions of the subcontinent.²⁶

III. PROCESS OF THE ENACTMENT OF PENAL CODE, 1860

It is well known that the Company took over the administration of civil justice after assuming the authority of *Dewan* of Bengal, Bihar and Orissa in 1765. A well organised structure of judicial system, *i.e.* civil courts and criminal courts existed at the time of Company's acquisition of *Dewani* rights. It appears that with a highly developed law as well as legal system the Company took over the *Dewani* of Bengal, Bihar and Orissa. It is said earlier that initially the colonial authority did not interfere with the "native" laws. According to Derret, there were three reasons behind the Company's adherence to the indigenous laws: (a) at the time when Hastings's Plan of 1772 was adopted it was the time of French Revolution and "all Europe was accustomed to a confusion of local laws" (b) for Hastings, and the administrator even to the lawyers of the generation the application of a separate set of laws derived from religion was not an easy task and (c) the colonial power just

²⁰ *Ibid*, at p. 380.

²¹ J.Fisch, *Cheap Lives and Dear Limbs: The British Transformation of the Bengal Criminal Law 1769-1817*, (Wiesbaden, 1983), p. 128.

²² *Ibid*, at p 129.

²³ *Ibid*, at p 125.

²⁴ Abdul Majed Khan, *The transition in Bengal, 1756-1775. A study of Saiyid Muhammad Reza Khan*, (Cambridge: Cambridge University Press, 1969), p. 206.

²⁵ Asaf A. A. Fyzee, *An Introduction to the Study of Mohammedan Law*, (London: Oxford University Press, 1931), p. 38-39.

²⁶ *Ibid*.

adhered to the Portuguese policy to leave the judicial administration to “natives” themselves.²⁷ However, from Hastings’s time the British colonial power started taking an interest in the native’s administration of justice system as a number of intellectual’s study²⁸ of the native system and a new set of cadre of civil servants came into being by this time.

Two events, it appears, had affected the administration of Islamic law in British India a great deal during the nineteenth century: replacement of existing Islamic laws through direct legislation in the western sense and withdrawal of the native law officers from the court. English legal doctrines, it appears, came to replace the existing Islamic laws in India as a direct consequence of codification of laws. In addition, codification of laws contributed to restrict Islamic law to questions related only to the ‘family relations and Statuses which culminated in the development of a new branch of law later which was classified as ‘personal law’. Besides, the withdrawal of the native judicial officers in 1864²⁹, who had been attached to the court to provide explanation of religious doctrines, contributed to establish absolute control over the judicial administration by the British colonial authority. As a result the English judges became the sole interpreters of the religious laws in India.³⁰

Unlike criminal law a reservation, it is pertinent to mention, had been maintained on the application of “native” religious laws, from Hastings’s plan of 1772 to the whole period of the British regulations in India. Despite this promise to respect the personal laws of the “natives” it appears that the colonial authority invested their utmost endeavour to develop a legal system based on the English ideology which would support their policy in India in the long run. Especially, the event of withdrawal of the “native” law officers from the courts in the guise of re-organisation of the courts brought an occasion for the British judges to interpret Islamic law independently. These ‘semi-autonomous judges’ of the British India relied mostly on the translations of some traditional texts, i.e., *Hedaya*, *Fatawa-e-Alamgiri* and so on to resolve disputes involving interpretation of *Shariah* instead of applying the Islamic law from its historical and philosophical perspective.³¹

Besides, the colonial authority sought to codify the “native’s” religious laws on the ground, allegedly, that the language of the religious texts of the two religions (Muslim & Hindu) was unknown to the colonial authority. It appears, on the contrary, that not only the alien language of the religious texts but also lack of trust on the native law officers was one of the major causes which drove the colonial authority to codify native laws. For example, in the words of Sir William Jones:

If we give judgment only from the opinions of the native lawyers and scholars, we can never be sure, that we have not been deceived by them. It would be absurd and unjust to pass an indiscriminate censure on so considerable a body of men, but my experience justifies me in declaring, that I could not with an easy conscience concur in a decision merely on the written opinion of native lawyers, in any cause in which they could have the remotest interest in misleading the court.³²

It is not surprising that the *maulavis* were mistrusted. British accusations of inconsistency stemmed partially from genuine questions of probity that may have been linked to a low official salary. More importantly, suspicions arose from the diversity of opinion that any number of legal questions might generate. Islamic legal theories had always provided leeway for judicial discretion in applying *Shariah* principles. Operating with their own preconceptions, British judges seemed unable to accept that there might be genuine differences of opinion on a point of law. When *maulavis* did disagree, their opinions often simply reflected the inherent inadequacies of the British text based approach.³³

²⁷ J. D. M. Derret, ‘Justice, Equity and Good Conscience’ in *Changing Law in Developing Countries*, ed., JND Anderson (London: George Allen and Unwin, 1963), p.114.

²⁸ Charles Hamilton: *Hedaya or Guide: A Commentary on the Mussulman Laws*, Vol II (London, 1791); Sir William Jones: *The Mohammedan Law of Inheritance: With a Commentary*. (Oxford University press, 1792); Henry Thomas Colebrook: *Essays on the Religion and Philosophy of the Hindus*. (London: William & Norgate, 1858).

²⁹ Although the Islamic criminal law was ended in 1832 but the *Muftis* (law officers) continued to function as native judicial officers in the courts till 1864. The British thought that as the *Muftis* formed an integral part of the judicial machinery for long time, they (British Administrator) were not courageous enough to remove them from their office immediately. For detail see, M.P. Jain, *supra note 12*, at p. 381.

³⁰ Anisur Rahman, Islamic Law and Colonial Encounter: On the discourse of ‘Mohammedan Law’ in British India. Electronic copy available at: <http://ssrn.com/abstract=2170464> [accessed on 12.02. 2013].

³¹ *Ibid.*

³² Bijoy Kisor Acharyya, *Tagore Law Lectures, 1912: Codification in British India*, (Calcutta: S.K. Banerji and Sons, 1994), p.334.

³³ M. R. Anderson, ‘Islamic Law and the Colonial Encounter in British India, in *Institutions and ideologies: A SOAS South Asia Reader*, ed. David Arnold and Peter Robb (London: Karzon Press Limited, 1993), p. 12.

In reality, it might not be true. It may raise a question that whether it was a trick of the British to remove the *maulavis* from the courts. Because when the *maulavis* gave their *fatwa* inconsistent with the British notion, they were accused of taking bribe or the British judges thought that they did not give the accurate opinion on a point of law. It seems that the British judges removed the *maulavis* intentionally from the courts because at one time they wanted to be the sole interpreter of the law of the courts.

3.1. Warren Hastings Plan, 1772

After the acquisition of *Dewani* rights by the East India Company, the question arose whether the company could alter the criminal law then in force in India. The first interference with the Islamic criminal law came in 1772 when Warren Hastings changed the existing law regarding dacoity to suppress the robbers and dacoits. Warren Hastings took over the Governorship of Bengal in 1772 and under him the famous judicial plan, which came to be known as the Warren Hastings plan was prepared. Hastings, explaining the plan for better governance of Bengal to the court of directors of the Company, stated that it would establish the Company's system of governance on 'a most equitable, solid and permanent footing'.

The preamble to the Regulation 1772 pointed out that for some time, the peace of the country had been very much disturbed by bands of dacoits, who not only infested the high roads, but often plundered whole villages, burnt houses, and murdered the inhabitants; these out-laws had eluded every attempt of Government for detecting and bringing them to justice. Warren Hastings also pointed out in his letter, "The Islamic criminal law often obliges the Sovereign to interpose and to prevent the guilty from escaping with impunity and to strike at the root of such disorders as the law may not reach..."³⁴ It is therefore became the indispensable duty of the Government to try the most rigorous means to punish the dacoits. Apart from this change, Warren Hastings left the Islamic criminal law untouched in 1772. In spite of his predilections in favour of the indigenous laws generally, Warren Hastings was convinced of the need of reforming the Islamic criminal law in certain respects. Accordingly, in 1773, he formulated certain proposal for its modification.

Firstly, he suggested that intention and not the nature of the weapon used be made the test of willful murder. If the intention of the murderer clearly be proved, no distinction should be made with respect to the weapon by which the crime was committed. The murderer should suffer death, and the fine be remitted.

Secondly, Warren Hastings suggested abolition of the privileges granted by the Islamic criminal law to the sons or the nearest of kin to pardon the murderers of their parents or kinsmen.

Thirdly, he advocated abolition of the rule which required the children, or the nearest of kin of the deceased, to execute the sentence passed on the murderers of their parents or kinsmen.

Fourthly, the fine imposed for murder should be proportionate not only to the nature of the crime, but both the nature and the degree of the crime, and to the substance and means of the criminal.³⁵

Warren Hastings submitted his proposal to the council for consideration and approval. The council took no decision thereon as it regarded it a very fragile matter to change the established law and, therefore, it thought that no rapid action should be taken in this regard. Because of the dichotomy which was maintained at the time between the *Dewani* and the *Nizamat*, the council was hesitant on the question whether it should intervene in any way in the law of crimes and seek to modify it. In spite of Warren Hastings strong advocacy and pleading in favour of the proposed changes, the matter was not proceeded with to any conclusion and nothing further seems to have happened in this regard for the rest of his tenure as the Governor-General.³⁶ So, Hastings proposal for reforms were not heeded because as expressed by Rankin "The cloudy title of the company to the *Nizamat* made it slow to alter the criminal law."³⁷

3.2. Lord Cornwallis Code, 1790

In 1786, Lord Cornwallis came to Bengal as Governor-General. Before his appointment, he had acted as the Commander-in-Chief of the British army in the American War of Independence. Enlisted with vast military and administrative experience, Cornwallis in every direction built on the foundations by his predecessors, and especially by Hastings. From 1772 to 1790, no special effort was made to change the Islamic criminal law. Cornwallis found the judicial machinery suffering from much confusion, diversity of practice and uncertainty of jurisdiction. His reforms were aimed at removing these defects. Cornwallis concentrated his attention on

³⁴ Kulshreshtha, *supra note 8*, at p. 264. It is noteworthy to mention that the offence like dacoity, robbery of the natives were increased at that time not by the reason of difficulties of Islamic criminal law but by the reason of discontentment of the Indian people to the British rule.

³⁵ M.P. Jain, *supra note 12*, at p. 372.

³⁶ *Ibid*, at p. 373.

³⁷ G.C Rankin, *supra note 4*, at p. 169.

removing two main defects, namely, (a) gross defects of Islamic criminal law and (b) defects in the constitution of courts.³⁸ However, he carried out the following reforms in criminal laws.

IV. REFORM OF CRIMINAL LAWS

Cornwallis initiated the first systematic attempt to modify the Islamic law of crimes in 1790 by a Regulation of the Government of Bengal. During 1790-93 Cornwallis introduced certain changes in the criminal law. In December 1790 a rule was framed for the guidance of Muslim law officers that in all trials of murder they were to be guided by the intention of the murderer either evident or fairly inferable and not by the manner or instrument of perpetration.³⁹

In Islamic criminal law there are five categories of illegal murder: *Qatl-i-amd* (willful murder consisting of murderer's will, voluntary act, and use of mortal weapon), *Qatl-i-sibhi-amd* (willful murder, but the instrument used is not considered to endanger life), *Qatl-i-khata* (erroneous murder), *Qatl-i-sibhi-khata* (involuntary murder), and *Qatl-bit-tasabbur* (accidental murder).⁴⁰

In distinguishing *Qatl-i-amd* from *Qatl-i-sibhi-amd*, Imam Abu Hanifa had laid emphasis on the weapon used and consequently the weapon became the ultimate and sole criterion for determining the category of homicide committed. On the other hand, the notable Imams such as Abu Yusuf, Imam Muhammad and Shafie advocated the more rational doctrine that it was the intention and not the method to commit the murder which was relevant, and that if the intention to commit murder was proved, no distinction should then be drawn on the artificial basis of the method employed for the purpose.⁴¹

This distinction on the commentaries was relied upon by Lord Cornwallis in justifying amendments to rules concerning willful murder. In Cornwallis's celebrated Minutes of the 1st December of 1790, he is quoted as stating:

It need therefore be further observed that we have greater encouragement that for this alteration from the consideration that Islamic law itself is not entirely settled upon the most important distinction; for although the Doctor Abu Hanifah's opinion I wish to see corrected; yet his immediate disciples and successors, Abu Yusuf and Imam Muhammad, gave a very different judgment; contending and laying down that the intention, and not the mode or instrument should be considered... Shafie... makes the intent the criterion, and so reasonable and well grounded has his last opinion been found, that both Islamic and our own have from time to time availed themselves of it to award capital punishment against such offenders.⁴²

Further in case of murder, the will of the heir or kindred of the deceased were not to be allowed to operate in the grant of pardon or in the demand of compensation money as a price of blood. So the abolition of the right of the heirs of the murdered to pardon the murderer was another notable change. This change was expressed in the following words:

If the answer of the law officer declares the prisoner to be convicted of willful murder (*Qatl-i-amd*), the judge, without making any reference to heir or heirs of the slain, is to require the law officer to declare the punishment to which the prisoner convicted would be liable according to the Islamic criminal law, supposing all the heirs of the slain entitled to prosecute the prisoner for *qisas* have attended and prosecuted him... and have demanded *qisas*.⁴³ Imprisonment was earlier substituted for *diyat* or blood money for non willful murder.⁴⁴ Again, the usual punishment of amputation of limbs of body was replaced by temporary hard labour or fine and imprisonment according to circumstances of the case. The Governor-General-in-Council resolved on the 10th October, 1791, that the punishment of mutilation should not be inflicted on any criminal in future; thereafter, all criminals sentenced by the courts to lose two limbs should, instead of being made to suffer such punishment, be imprisoned and kept to hard labour for fourteen years; and the criminal sentenced to lose one limb should instead be imprisoned and kept to hard labour for seven years.⁴⁵

³⁸ A. Aspinall, *Cornwallis in Bengal, The Administrative and Judicial Reforms of Lord Cornwallis in Bengal, Together with accounts of commercial Expansion of the East India Company, 1786-1793*, (Manchester University Press, 1931), p. 63.

³⁹ *Ibid.*

⁴⁰ Islamic Foundation Bangladesh, *Bidibaddha Islami Ain*, (Codified Statutory Islamic Laws), vol. 1 part.1, (Islamic Foundation Bangladesh, April 1995), at p.256.

⁴¹ *Ibid.*, at p. 92.

⁴² Shahdeen Malik, "Law of Homicide in the Early Nineteenth Century Bengal: Changed Law and Unchanged Application", *Bangladesh Journal of Law*, vol.2, no.1 (June, 1998), p. 93.

⁴³ This change was brought about by Regulation IV of 1797.

⁴⁴ Fisch, *supra note 21*, at p. 52.

⁴⁵ See Resolution in the proceedings of the Governor-General-in-Council, dated 10-10-1791.

A few further modifications were introduced in the criminal law of homicide on 13th April, 1792, the Governor-General-in-Council laid down the following few propositions. Firstly, in cases of murder, the refusal by the relations of the deceased to prosecute the offenders was no longer be considered as a bar to the trial and condemnation of the offenders. If the heirs refused to prosecute, the Courts Circuit were to proceed with the trial in the same manner as if the slain had no heir, and the Muslim law officers attached to the courts had to give the *fatwa* on the assumption that the heirs had been the prosecutor and were present at the trial. Secondly, it was laid down that the same rule would apply to all cases of murder wherein it was known that the slain had an heir who was legally entitled to claim *qisas*, who would neither appear after the lapse of reasonable time, nor communicate his intention, by his legal representative or otherwise, of pardoning the offender. In none of these two cases, the sentence was to be passed by the trial court. The record of the trial was to be sent to the Sadar Nizamat Adalat which was to pass the sentence on the supposition that the heir was the prosecutor, that he was present at the trial and that he demanded *qisas*. Thus, one more step was taken away from private justice towards public justice.⁴⁶

Regulation IX, 1793 amended the law of evidence by providing that the religious persuasions of witnesses shall not be considered as a bar to the conviction or condemnation of a prisoner. In that case the law officers of the court had to declare their *fatwa* on supposition that the witness had been of Muslim persuasion. Thus non-Muslims could give testimony against Muslims in criminal cases not permitted so far according to the Islamic law of evidence. On 1st, May 1793, the Cornwallis Code- a body of forty-eight enactments was passed. Regulations IX of 1793 in effect restated the enactments which provided for modification of the Islamic criminal law during the last three years. Thus it laid down the general principles on which the administration of criminal justice was to proceed.

3.3. Changes in 1797

Regulation IV in 1797 explained and restated some confusion existing on certain points on law of homicide. The purpose of the Regulation was to do away finally with all operation of the will of the heirs in case of murder. The Regulation laid down that the prisoner convicted of willful murder was to be punished without any reference to the heirs of the person killed supposing-

- a) All the heirs of the person slain entitled to prosecute the prisoner for *qisas*, had attended and prosecuted him...and had demanded *qisas*;
- b) That all heirs were at an age competent to demand *qisas*;
- c) And that they had all demanded *qisas*.

Another innovation made at the time was to substitute imprisonment for blood money (*diyat*). In cases where under the Islamic law, a person convicted of homicide was liable to pay blood money (as in the case of unintentional murder), the court of circuit was to commute the fine to imprisonment for such period as it considered adequate for the offence.⁴⁷

The Regulation also laid down that in any case not provided for by the Regulations, the court was to adhere to the Islamic criminal law, even if it appeared to it to be repugnant to justice, if the same was in favour of the prisoner; but if against the prisoner, the court was to recommend a pardon, or mitigation of the punishment, to the Governor- General-in-Council.⁴⁸

Regulation XIV of 1797 granted relief to the persons who were in prison on account of their inability to pay blood money. A large number of persons condemned to pay *diyat* had been lodged in prisons for an indefinite period as they were unable to pay the money involved. The Sadar Nizamat Adalat was empowered to grant such relief to these prisoners as it should consider in each case in justice to require. Henceforth, fines were to be imposed not for the benefit of private parties, but for the use of the government. In such cases, a definite term of imprisonment in lieu of fine was to be fixed so that after the expiry of the term, the prisoners were discharged even if they did not pay the fine.⁴⁹

The same Regulation prescribed severe punishments for the offence of perjury as this offence had very much increased at that time. In aggravated cases of perjury, a perpetual stigma could be inflicted on the forehead of a criminal through imprinting (branding) in addition to the existing penalties of corporal punishment, imprisonment and exposure.⁵⁰

⁴⁶ Rankin, *supra note 4*, at p. 170.

⁴⁷ Jain, *supra note 12*, at p. 377.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

3.4. Further Reforms, 1799-1831

The process of introducing reforms in the Islamic criminal law continued till 1832 when the application of Islamic law as a general law was totally abolished although finally the Indian Penal Code was enacted in 1860 and the *Muftis* (law officer) were continued to function as native judicial officer till 1864.⁵¹ Various piecemeal reforms which were introduced from 1799 to 1832 in the Islamic criminal law were as follows:

Regulation VIII of 1799 provided sentence of capital punishment in certain cases which were considered as justifiable under the Islamic criminal law. No longer was any murder to be justifiable and in all cases of murder, the offenders were to be punished with death. The Regulation laid down that in those cases where the murderer was declared not liable to *qisas* solely on the ground of the prisoner being the father, mother, grandfather, grandmother, or any other ancestor of the person slain; or one of the heirs of the person slain being the child, grandchild, other descendant of the prisoner, or the slain having been the slave of the prisoner, the prisoner was to be condemned to death.⁵²

The law of homicide was further reformed by Regulation VIII of 1801 by drawing a distinction between an involuntary homicide in the prosecution of a lawful intention, e.g. shooting at a mark and accidentally killing a man, and a voluntary homicide in the prosecution of an unlawful and murderous intention, e.g. shooting one man to kill but instead killing another. The Regulation laid down that a person convicted of having deliberately and maliciously intended to murder one individual, and having in the prosecution of such intention accidentally killed another individual, was to be liable to suffer death because of his murderous intention and actual homicide. In case of involuntary homicide in the prosecution of a lawful intention the rule of Islamic law imposing a fine was to continue. Also, in cases where a person unlawfully and maliciously intended to wound, maim or otherwise do corporal injury to one individual, but caused the injury to another accidentally in the prosecution of his intention, he was to be punished in the same manner as if the injury was caused to the person whom he wanted to injure.⁵³

Practice of infanticide and its abatement were declared equivalent to murder and were made punishable with death penalty. Even an attempt was punishable. In Bengal, there prevailed the abominable practice of infanticide that of destroying children by throwing them into water. The Government found, after an investigation that there was no religious basis for such a practice and it was indulged into partly from economic reasons and partly from a blind belief in its efficacy as a stimulant to the fertility of the mother. Regulation VI of 1802, therefore, abolished the criminal and inhuman practice of sacrificing children and declared infanticide punishable as willful murder liable to a sentence of death.⁵⁴

Regulation III of 1803 provided that in case where a person was liable to discretionary punishment under the Islamic criminal law, the *fatwa* of the law officer was merely to declare the same in general terms, stating the grounds why the prisoner was subject to discretionary punishment and the punishment, short of death, was to be proposed by the judge of Circuit or by the Sadar Nizamat Adalat.⁵⁵

It was provided that no punishment was to be inflicted only on suspicion. If in a particular case the evidence fell short of legal requisite for *hadd or qisas*, but was, nevertheless, sufficient to convict the prisoner on strong presumptive proof or violent presumption, the judge was to sentence the accused the full punishment as if he had been convicted on the full legal evidence. In all other serious cases where no penalty was prescribed by any regulation, or provided for by the Islamic law, the maximum punishment was to be 39 stripes and imprisonment with hard labour for 7 years. When this degree of punishment appeared to be insufficient, the Sadar Nizamat Adalat, on reference to it, was authorised to inflict a higher punishment short of death.⁵⁶

Robbery was another recurrent offence which had become rampant⁵⁷ in Bengal at the time on a large scale. Suitable legislation to deal with them was passed only as late as 1803. Regulation LIII of 1803 abolished the conditions of robbery. It also abolished the necessity of evidence of any special kind. In all cases murder committed in the prosecution of robbery, or aiding or abetting the same or being accessory thereto the offenders were to be sentenced to death. For habitual and notorious robbers, in consideration of circumstances, the Sadar Nizamat Adalat was empowered to inflict capital sentence. In simple robbery seven years' punishment was given.⁵⁸ Dacoity was another major problem to be checked by law and punishment. Regulation IX of 1808 provided that notorious dacoits were liable to imprisonment or transportation for life. Laws were made more

⁵¹ For detail see footnote 29 of this article.

⁵² Jain, *supra note 12*, at p.378.

⁵³ *Ibid.*

⁵⁴ Kulshreshtha, *supra note 8*, at p. 266.

⁵⁵ Banerjee, *supra note 16*, at p. 81.

⁵⁶ Kulshreshtha, *supra note 8*, at p. 266.

⁵⁷ The reason for increasing robbery in Bengal was described in page no. 26 of this article.

⁵⁸ Jain, *supra note 12*, at p. 380.

stringent to check dacoity.⁵⁹ In order to check crimes of burglary, the existing Regulations were modified. Regulation I of 1811 provided for the punishment of imprisonment or banishment for 14 years and to corporal punishment of 39 stripes for the offence of burglary between sunset and sunrise. Similarly punishment was laid down for other types of attempts to commit burglary.⁶⁰

By Regulation XVII of 1817, the law relating to adultery was rationalised and modified. The offence of adultery fell under the category of *hadd*, and was punishable with stoning or scourging and needed 4 eye-witnesses for convicting a person of the offence. The law of evidence was so technical that it made conviction of a person for the offence almost impossible. The Regulation in question laid down that henceforth conviction for the offence of adultery could be based on confession, credible testimony or circumstantial evidence. The maximum punishment to be inflicted for the offence was fixed at 39 stripes and imprisonment with labour up to 7 years. Married women were not to be prosecuted on such charges save by their husbands.⁶¹ Here it can be said that *zina* (adultery) in Islam and adultery in British notion are not the same. Islam regards adultery as one of the most heinous of all social crimes and looks upon chastity of a man or a woman as one of his or her most precious possessions. For the establishment of the kingdom of God, Islam strongly condemns this most deadly of all social crimes which if not checked and suppressed, can bring about total disintegration and destruction of society. The Holy *Quran* seeks to close all those avenues through which this evil can find its way among people and severely punishes the act of adultery and condemns the guilty parties as social pariahs.

Other important Regulations were passed to stop slave trade in the country, enticing away females to prohibit *beggary*, to punish for affrays with homicide. The use of *corah* (whipping) as an instrument of punishment in the execution of sentences of any criminal court was prohibited by section 4 of Regulation XII of 1825 and it substituted the use of *rattan* (caning) in its place. By section 3 corporal punishments were totally forbidden for female convicts. The same Regulation further restricted the number of cases in which reference to *Sadar Nizamat Adalat* was necessary. Similarly, various other Regulations were passed in order to check various other types of criminal activities.⁶²

By Regulation XVII of 1829, a great social reform was introduced amongst the Hindus with the abolition of *sati*. The custom of *sati* or burning alive of Hindu widows was declared to be illegal and was 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 Regulation declared that the *sati* was “revolting to the feelings of human nature” and was in violation of the paramount dictates of justice and humanity.⁶³ The provisions made by the Regulations from time to time were like patchwork on the Islamic criminal law. Commenting on the state of criminal law, Stephen observed, “Objectionable in all respects as this system was, it was considered necessary to make it the foundation of the criminal law administered by the Company’s courts, though its grosser features were removed in some cases by Regulations, in others by decisions of the *Sadar* courts and in others by circulars and orders of various kinds. It became necessary in many instances besides correcting the law to supply its defects and for this purpose all sorts of expedients were devised, the law of England, instructions from the government, general ideas of justice, analogies, in short almost anything which occurred to those by whom the system was administered was resorted to for that purpose. The result was a hopelessly confused, feeble, indeterminate system of which no one could make anything at all.”⁶⁴

V. END OF MUSLIM LAW AS GENERAL LAW, 1832

Regulation VI of 1832 marks the end of the Islamic criminal law as a general law applicable to all persons although Penal Code was made in 1860 and Muslim *ulema* continued to function as law officers in the courts till 1864.⁶⁵ According to the British, the Islamic criminal law was an archaic and primitive system and it could not have been practicable to keep it in operation for a hundred years without being reformed extensively. Crime was rampant in the society; there was an acute law and order problem in the country; with the classical Islamic criminal law these problems could not be met effectively.⁶⁶ It is worth to mention that crime increased at that time not for the reason of difficulties of Islamic criminal law but for the reason of discontentment of the

⁵⁹ *Ibid.*

⁶⁰ Kulshreshtha, *supra note 8*, at p. 267.

⁶¹ Jain, *supra note 12*, at p. 380.

⁶² Kulshreshtha, *supra note 8*, at p. 267.

⁶³ R. C. Majumdar, *The History and Culture of the Indian People*, Vol. X, part II (Bombay, India: Bharatia Vidya Bhavan, 1965), pp. 268-69; Jain, *supra note 12*, at p. 381.

⁶⁴ Kulshreshtha, *supra note 8*, at p. 267

⁶⁵ For detail, see footnote 29 of this article.

⁶⁶ Kulshreshtha, *supra note 8*, at p. 267.

Indian people against the British rule. The adverse impact of the British rule on the political, economic and social spheres resulted in sharp reaction of the Indian people against the foreigners. This led to a series of the anti-British activities throughout the country. Crimes such as dacoity, robbery by the natives increased as a result of such reaction towards the British.⁶⁷

VI. THE INDIAN PENAL CODE, 1860

The Penal Code was drafted by the first Law Commission under the presidentship of Lord Macaulay and three commissioners named Macleod, Anderson and Millet. The Commission was constituted in 1834 to investigate into the jurisdiction, powers and rules of the courts and police establishment. Elucidating the task before the commission Lord Macaulay observed, 'I believe that no country ever stood so much in need a code of law as India and I believe also that there never was a country in which the want might be so easily supplied. Our principle is simply this- uniformity when you can have it; diversity when you must have it; but in all cases, certainty.' In preparing the Penal Code they drew not only upon the English and the Indian laws and regulations, but also upon Livingstone's Louisiana Code and the Code of Napoleon. The Commission drafted and submitted the Indian Penal Code in 1837. Another Commission reviewed the Code in 1847. The Code was accordingly revised but it was only after the two Law Members of the Governor-General of India in Council revised the Code that it was submitted to the Legislative Council in 1856. It finally came into force after receiving Governor-General's assent on October 6, 1860.⁶⁸

While posterity hailed Macaulay's code as a work of genius, many persons at the same time criticised it. An example of such criticism by Rankin may be of interest. He said, 'The Penal Code is one of the much praised Acts of Indian Legislature and in spite of its many defects has served its purpose fairly well. Its sentences can hardly be said to be other than monstrous. No civilized country today imposes such heavy sentences as does the Penal Code. Heavy sentences have long gone out of fashion in England and the odour of sanctity and perfection attaching to the Penal Code should not deter indigenous legislatures to thoroughly revise the sentences and bring them into conformity with modern civilized standards.'⁶⁹ The draft of the Penal Code, when it was circulated for opinion, evoked a good deal of opposition and many eminent judges and the advocates were against it. "The saying in East Bengal is", said Sir C. P. Ilbert, "that every little herd boy carries a red umbrella under one arm and a copy of Penal Code with the other."⁷⁰ To date we do not know of any objection raised by the Muslim jurist of those days when Penal Code was enacted in 1860. Through the history it has been found that the Muslim jurists are very keen with regard to *Shariah* law and they avail every opportunity to raise their voice if any step is taken against *Shariah* law by any quarter of the society or the ruler. Thus it remains a query for us to know as to what kept them away from raising any objection in implementation of the Penal Code. It might be the provisions of the Penal Code show many similarities in concept as well as practice of Islamic criminal law of *Tazir*. It is often claimed that the basis of the Penal Code, 1860 is Islamic criminal law devoid of some of the rules of *qisas* and *diyats*.

VII. CONCLUSION

The above discussion has shown that how thoroughly the British colonial rulers transformed Islamic criminal law after they undertook the judicial administration of those parts of India under their control. Through their translation of a limited number of texts of *fiqh*, and through their insistence that these few translations were to be regarded as the only authoritative expression of Islamic law, they constructed a rigid edifice lacking the flexibility to adapt to the changing needs of the Muslim community. Although the British proclaimed their intention to administer (transformed) Islamic law to the Muslims, they continually undermined that edifice by introducing legislation that whittled away at the territory governed by Islamic law.⁷¹ In 1832 the Islamic criminal law was ended and was applied to all persons as a general law and in 1860 the Indian Penal Code was enacted. Muslim *ulema* continued to function as *muftis* in the courts, providing *fatwa* to guide the British judges. Muslims also served in the Civil Service as judges in the lower courts and as vakils (advocates), but had not only lost their dominance in the judicial administration of India, but also lost the prerogative to interpret and

⁶⁷ For detail, see Muhammad Waliullah, *Amader Mukti Sangram* (Our Freedom Struggle), (Dhaka: Naoroje Kitabistan, 1967), p. 249.

⁶⁸ Ratanlal & Dhirajlal: *The Indian Penal Code*, 33 ed, (Nagpur: Wadhwa & Company, 2004), p. iv.

⁶⁹ G.C Rankin, *supra note 4*, at p. 215.

⁷⁰ C.P. Ilbert, *The Mechanics of Law Making*, p. 166; referred by V.D. Kulshreshtha, *Landmarks in Indian Legal and Constitutional History*, 8th ed., (Lucknow: Eastern Book Company, 2007), p. 270.

⁷¹ Alan M Guenther, "Syed Mahmood and the Transformation of Muslim Law in British India", Unpublished Ph.D. Thesis, *Institute of Islamic Studies, McGill University, Montreal*, (September, 2004).p.298. <http://digitool.Library.McGill>. [accessed on 10 June 2012].

administrate the Islamic law still applicable to their own communities.⁷²The British introduced a new system of law and justice in India. A hierarchy of civil and criminal courts was established. The law courts were not easily accessible to the common people. Justice became a costly affair. The laws were codified and efforts were made to establish the 'Rule of Law' in India. This only helped the British to enjoy arbitrary powers and to interfere with the rights and liberties of the Indians.

Note:

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