LAW OF HOMICIDE IN THE EARLY NINETEENTH CENTURY BENGAL: CHANGED LAW AND UNCHANGED APPLICATIONS*

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In temporal and spatial terms, the focus of the paper is on Bengal between the 1790s and the 1820s and the transformation of the law of homicide in colonial Bengal during this period. As the title of a recent monograph by an eminent historian aptly suggests,[1] Bengal was the springboard for British expansion into India, as well as the centre (with Calcutta as the capital until 1911) of the new Empire for about a century and a half. Also, amongst non-European states, Bengal in the eighteenth century had the most extensive contact with English culture, ideology and politics.[2] As for criminal law, the time from the 1790s to the 1820s was the period when the East India Company promulgated a large number of Regulations to implement a host of changes and effect a series of innovations in the criminal justice system. Later, from the late 1820s to the enactment of the Indian Penal Code in 1860, the alterations in the criminal justice system were mostly procedural and relatively less significant. In many ways, the post-1830 Regulations and Acts (from 1834) only 'refined' the system already created by the Regulations during the preceding four decades. The transformation of the criminal justice system was initiated and substantially accomplished during our focal period, between the 1790s and the 1820s.

This transformation was undertaken by a colonial governing order. Colonial encounter in Bengal, as in many other colonised societies, inevitably entailed changes in the legal system. In fact, legislating laws for the colonised

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1 Marshall, P. J., Bengal: The British Bridgehead, Eastern India 1740-1820, Cambridge, 1987.

2 See for detail, Raychaudhury, T., Europe Reconsidered: Perceptions of the West in Nineteenth Century Bengal, Delhi, 1988.

societies was central to the 'civilising mission' of the metropolitan countries.[3] Colonial legislation and the concordant law reforms justified and legitimised colonial domination and, in due course, the legitimation of the 'gift' of law was internalised by the colonised themselves.[4]

The hegemonic repercussions of the colonial law are clearly implicit in the juristic literature on the history of Indian colonial law. It also informs the understandings concerning law and its inter-relationships with societal factors. The dominant view about law, its role, function and its past in the legal history literature continues to be shaped by the epistemological constructs introduced by the colonisers.

In recent years a number of historians have emphasised this ideological prism through which much of the juristic literature is projected. But a detailed assessment of the juristic literature to indicate the process of formulation and consolidation of this legitimising construction of law and its history has not yet been undertaken.[5]

In colonised Bengal, the East India Company subjected three major components of the legal system — courts, land revenue law and criminal law — to numerous changes and reforms during the late eighteenth and early nineteenth centuries. Of these three spheres, the literature on the judicial system is extensive. The changes in power, composition, jurisdiction and authority of the East India Company courts have been recounted in detail,

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3 Darby, P., The Three Faces of Imperialism, New Haven, 1987. The most eloquent high imperial assertion of such mission is probably Macaulay's, as quoted by Banerjee, A. C., English Law in India, New Delhi, 1984, on the 'dedication' page:

It may be ... that, having become instructed in European knowledge, they (Indians) may, in some future age, demand European institutions.... There is no empire exempt from all causes of decay ... that empire is ... imperishable (which is the) empire of our arts, our morals, our literature and our laws.

See also Metcalf, R. T., The Aftermath of Revolt, India 1857-70, Berkeley, 1974, at p.240; Fitzpatrick P, "Custom as Imperialism", in Abun-Nasr, J. M., Spellenberg, U. and Wanitzek, U (eds), Law Society and National Identity in Africa, Hamburg, 1990, p.15.

4 As Chandra, S, "Whose Laws?: Notes on a Legitimising Myth of the Colonial Indian State." 8 (1992) Studies in History, p.187, at p.187 has noted: "After decades of political independence, however, the juristic methodology shows few signs of wilting."

On the construction of colonial socio-psychology see, Nandy, A., The Intimate Enemy: Loss and Recovery of Self under Colonialism, Delhi, 1983; Appadurai, A., "Review Article: is Homo Hierarchicus?", 13 (1986) American Ethnologist, p.745.

5 For example, Chandra, ibid., at p.187, only draws our attention to this aspect of the juristic literature, without elaboration, as he comments: "Without attempting a general critique of the pervasive juristic methodology ..."

though primarily within a strictly legalistic framework.[6] Similarly, the social, economic and political dimensions of the land laws and land revenue system introduced by the Company, particularly the rules and implications of the Permanent Settlement in Bengal (1793), have also occasioned a vast body of scholarly literature, both socio-economic and legal.[7]

However, the literature on the processes, mechanisms, and factors propelling the change and reform of the criminal law and the criminal justice system remains sparse.[8] It is mainly confined to a particular black-letter law and pattern-oriented framework. Much of this literature, with a few exceptions, was also influenced by the modernisation and developmental framework of the 1960s.[9]

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6 Cowell, H., The History and Constitution of Court and Legislative Authorities in India, Calcutta, 1872; Field, C. D., The Regulations of the Bengal Code, Calcutta, 1875; Fawcett, C., The First Century of British Justice in India, Oxford, 1934; Misra, B. B., The Central Administration of the East India Company 1773 - 1834, Manchester 1959; Srivastava, R. C., Development of Judicial Systems in India under the East India Company, Lucknow, 1971.

7 Guha, R., A Rule of Property for Bengal: An Essay on the Idea of the Permanent Settlement, The Hague, 1963; Islam, S., Permanent Settlement in Bengal: A Study of its Operation, 1790-1819, Dacca, 1979; Ray, R., Changes in Bengal Rural Society, circa 1760-1850, New Delhi 1979; Ray, R. K. and Ray, R., "Zamindars and Jotedars: A Study of Rural Politics in Bengal," 9 (1975) Modern Asian Studies, p.81 and re-argumentation in Ray, R. K., "The retreat of the Jotedar?" 23 (1988) Indian Economic and Social History Review, p.237; Abdullah, A., "Landlords and Rich Peasants under the Permanent Settlement, Part I", 4 (1980) Calcutta Historical Review, p.1 and *idem,* "Landlords and Rich Peasants under the Permanent Settlement, Part II", 5 (1980) Calcutta Historical Review, p.89; Greenough, P. R., "Indulgence and Abundance as Asian Peasant Values: A Bengal Case in Point", 42 (1982-83) Journal of Asian Studies, p.831; Datta, R., "Agricultural Production, Social Participation and Domination in Late Eighteenth Century Bengal: Towards an Alternative Explanation", 17 (1989) Journal of Peasant Studies, p.68.
On the legal aspects see Gupta, M. N., Analytical Survey of Bengal Regulations, Calcutta, 1943, ch v; and Kabir, L., Land Laws in East Pakistan, vol 1, Dacca, 1961.

8 On the pre-Company era, see Ahmad, M. B., The Administration of Justice during the Muslim Rule in India, Calcutta, 1934; Akbar, M., The Administration of Justice by the Mughals, Lahore, 1948; Sangar, S. P., Crime and Punishment in Mughal India, Delhi, 1967; on the Hindu concept of crime and punishment, see Day, T. P., The Conception of Punishment in early Indian Literature, Waterloo 1982; Menski, W. F., "Crime and Punishment in Hindu Law and under Modern Indian Law", p.295 in Recueils de la Societe Jean Bodin, vol lviii, Brussels 1992.

9 Snyder, F. G. and Hay, D, "Comparisons in the Social History of Law: Labour and Crime", p.1, in Snyder, F. G. and Hay, D (eds), Labour, Law, and Crime: An

This black-letter law and pattern-oriented legal history literature is critically examined elsewhere.[10] The aim of this paper is to argue that despite the 'modernising' paradigm of explanation of much of the colonial reform of criminal law, particularly laws relating to homicide, the actual amendment and changes in the relevant rules were propelled more by certain denigrating construction of the colonial rulers about the colonised people and, secondly, to indicate that inspite the reform, the judgements in homicide related cases continued to be decided according to the customary norms long after the amendments have been put in the law books. This reinforces our main contention that law reform and application of the reformed law was less than uniform and local pressures and perceptions of justice continued to influence the colonial courts even after the local laws were ostensibly overruled and changed.[11]

We also argue that it was the perception of the colonial rulers which were central to their law reform and law application activities, as the judgement in homicide related cases will indicate. We focus on the trials of certain categories of homicide to highlight our contention that despite specific Regulations, judgements often deviated from the letter of the Regulations.

TRANSFORMATION OF THE LAW OF HOMICIDE

The rules of the Mohammedan law of homicide were first changed by the Company in 1790. Three years later these and a few other rules promulgated in 1792 were consolidated by Regulation IX of 1793. This Regulation IX also introduced a number of new rules on homicide.[12] Unlike, for example, the Regulations on gang robbery, the rules on homicide more consistently transplanted post-Enlightenment and some English legal principles into early colonial Bengal.

Homicide under the Mohammedan law in Bengal, as detailed below, was a civil wrong. Except in extra-ordinary instances, the prosecution was dependant on the initiative of the relatives of the victim. The Regulations gradually stripped away the private/civil aspects of the Mohammedan law of homicide and turned the act of killing into a crime, to be prosecuted by the

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Historical Perspective, London, 1987; Snyder, F. G., "Law and Development in the Light of Dependency Theory," 14 (1980) Law and Society Review, p.723.

10 See Malik, S., The Transformation of Colonial Perceptions into Legal Norms: Legislating for Crime and Punishment in Bengal, 1790s to 1820s, unpublished Ph.D. Dissertation, School of Oriental and African University, London, 1994, particularly chapter 2..

11 Argued in detail in ibid.

12 For detail see Fisch, J., Cheap Lives and Dear Limbs: The British Transformation of the Bengal Criminal Law 1769-1817, Wiesbaden, 1983, at pp. 45-7.

state. This was done gradually, through a number of Regulations, by inserting legal fictions into the Mohammedan law.

In this section we detail the changes in the law of homicide. In the following section of this paper we look into some trials for homicide to scrutinise how these new rules were applied.

The Regulations on homicide were more consistent than those on gang robbery. However, our account of some selected trials for homicide will indicate the inconsistencies of application of the new rules and thereby sustain our contention that law-application was also riddled with contradictions.[13]

In the legal history literature, the structure of Mohammedan law is presented in terms of the three major categories of punishment. Crimes are adjunct to the punishments. Crimes are categorised as falling under a particular type of punishment. The three categories of punishments which cover all crimes are: (i) *Hudd*, (ii) *Kisas*, and (iii) *Tazeer* and *Seasut*.[14]

Hudd is the prescribed punishment for the offences of *Zina* (whoredom), *Kazuf* (slander of whoredom), *Shoorb* (drinking wine), *Surikah-i-Saghri* (theft), and *Surikah-i-Koobra* (robbery).[15] Harington explains:

> The design of *Hudd* is to deter offenders from the perpetration of criminal acts, injuries to the community of God's creatures. This being a public right, the Imam or his deputy is exclusively authorised to enforce it. The claim and prosecution of the injured are not indispensably requisite, and he can not remit or compound the prescribed penalty, as in the case of *kisas*. But the execution of Hudd is prevented by any doubt, or legal defect, and the Imam is directed to administer the law with lenity; preferring a dispensation with the legal penalties to the rigid exaction of these; in all cases that may admit of it.[16]

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13 See supra note 10 for detail.

14 Harington, J. H., An Elementary Analysis of the Laws and Regulations Enacted by the Governor General in Council, at Fort Williams in Bengal for the Civil Government of the British Territories under that Presidency, 3 vols, Calcutta, 1805-1809, at vol 1, p.246.

15 According to other schools of Sunni Islam, the categorisation of crime and punishment is somewhat different. For comparative accounts of homicide in different schools of Muslim law, see Ahmed, I. A., "Compensation in Intentional Homicide in Islamic Law", 9 (1980) (Nigerian) Journal of Islamic and Comparative Law, p.39, and Anderson, J. N. D., "Homicide in Islamic Law," 13 (1951) Bulletin of the School of Oriental and African Studies, p.811.

16 Harington, supra note 13, vol 1, at p.287. *Hudd*, according to Hamilton, C (trans), Hedaya, 4 volumes, London 1791, vol 2, at pp. 1-2:

> In law it expresses the correction appointed and specified by the law on account of the right of God, and hence the extension of the term Hidd to retaliation is not approved, since retaliation is due as a right of man, and not as a right of God, and in the same manner, the extension of it to Tazeer (or discretionary chastisement) is not approved, as Tazeer is a species of correction not specified or determined by any fixed rules of law, but committed to the discretion of the Kazee.

Kisas is the punishment of retaliation, inflicted upon the offender by the victim or his near ones. This punishment is applied to "offences against person, but restricted to homicide, maiming and wounding."[17] For *kisas*, the victim or his/her near ones[18] (a*kilah* is the traditional term) usually has the option of demanding strict retaliation (life for life, an eye for an eye),[19] or monetary compensation (blood money).[20] Alternatively, the victim or the near ones can also pardon the offender.

Tazeer and *seasut* are inflicted on petty offenders, and on those who, if not for falling under any of the numerous exceptions, would have been

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17 Supra note 13, vol 1, at p.247.

18 In Bengal Criminal Judicial Consultation (hereinafter BCJC), India Office Library and Records (hereinafter IOLR), P/128/20, at p.693, in a trial in 1795, the *futwa* stated that, at p.719, *kisas* or retaliation always requires the personal appearance of the representatives of the deceased and since that "requisite is wanting in this present instance, under which circumstance *tazeer* or imprisonment depend on the discretion of the *Hakim*" (ruler).

19 In Bengal Sudder Dewany Adawlut Abstract, IOLR Range 154, vol 37, the Adawlut considered a letter dated 29.12.1773 from the Collector of Luskarpore which indicated the legal implications of the choice by heirs. In this letter the Collector reported that although a man was found guilty of murder, the *futwa* forbade forfeiture of life since the heirs of the deceased "do not require it" (no page number given). The Collector further added that the Moulvis chose to "refer the matter entirely to the Nizamut Adawlut than to pass a sentence repugnant to the laws of the Koran, as they are always very tenacious in adhering thereto."

20 After the abolition of the payment of *diyut* as compensation for homicide, it seems that, at least for some time thereafter, some of the convicts suffered imprisonment, and paid *diyut* as well. For example, in Bengal Revenue Judicial Consultation (hereinafter BRJC), IOLR P/127/71, at p.732, is a letter of J Duncan, Resident at Benares, dated 6 January 1791 to the Governor General, in which he suggests that the sentence of 10 years of imprisonment for murder passed on one Bhowanny Sinh should be reduced as the murderer's intention, "is not ascertained to have been to take the life of the deceased." In the attached *arzee* (petition) by the convicted prisoner, at p.734, he pleads that he had given 10 bighas of land to the heirs of the deceased and had satisfied them. Duncan was authorised to shorten the sentence.
Interestingly, one of the very first reported cases, published in the Report of Cases Determined in the Court of Sudder Dewany Adawlut, vol 1 (containing civil cases from 1791), Calcutta, 1827, contained reference to the practice of *diyut*. In the reported case of *Nund Sing vs Meer Jafer Shah*, at pp. 4-5, concerning claims to land, the defendant based his right to the land on the fact that it was given to his family by the ancestors of the plaintiff as "price of blood money" for murder of his ancestors.

punished by *kisas* or *hudd*.[21]

> *Tazeer* and *Seasut* are inflicted upon those whose offences were not expressly provided for by the of laws of *kisas* and *hudd*. The other application of this punishment is for the crimes to which specific penalties are attached by the general provisions of those law when the particular application of these may be prevented by some circumstances of exception, doubt, or legal defect.[22]

The first major modifications of this criminal law was initiated, as already mentioned, in 1790. The focus was on intentional murder, as this aspect of the Mohammedan law of homicide was very different from the English law of the period.

Illegal homicides in the then practised Mohammedan criminal law in India were of five categories: *kutl-i-umd* (wilful homicide consisting of murderous will, voluntary act, and use of mortal weapon), *shibali-i-umd* (wilful like act of murder, for the instrument used is not considered to endanger life), *kutl-i-khuta* (erroneous homicide), *kutl-i-kaeem* (involuntary homicide), and *kutl-ba-fubub* (accidental homicide).[23]

The penalty for *kutl-i-umd* (murder) is *kisas* (retaliation),[24] unless the heirs or representatives of the slain forgive or compound the offence.[25] The murderer is also excluded from inheritance of the property of the slain. Expiation and exclusion from inheritance are the prescribed penalties for *shibali-i-umd* (manslaughter), along with the *diyut* or the fine of blood payable by the offender or, in some instances, by the *akilah*.[26] Expiation and exclusion from inheritance seems to have been the punishment for the two other species of manslaughter by misadventure (*kutl-i-khuta* and *kutl-i-kaem*).[27] And for the last category of homicide, *Kutl-ba-fubub*, "expiation is not incumbent, nor is exclusion from inheritance incurred ... the fine of blood is however payable by the *akilah* of the wrongdoer."[28] Harington mentions:

> It does not appear however that these provisions have ever been judicially enforced, against the kindred or connections of offenders in Hindustan or Bengal;

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21 Ibid, vol 1, at pp. 318-28 for detail. See also Hamilton, supra note 16, vol 2, at pp. 75-81.

22 Supra note 14, vol 1, at p.318.

23 Supra note 14, vol 1, at pp. 260-61 and sources cited therein.

24 For details of retaliation in circumstances of homicide, see Hamilton, supra note 16, vol 4, at pp. 279-90.

25 Supra note 14, vol 1, at p.272.

26 *Akilah* is payment of compensation by kinship of the offender, who may be held responsible for the payment of compensation. See supra note 14, vol 1, at p.274 fn. Hamilton mentions, supra note 15, vol 4,at p.275, that he used the word heir, though the corresponding Arabic word would be *next of kin.*

27 Supra note 14, vol 1, at pp. 275-76.

28 Ibid, at p.275.

> though futwas have been given, and sentences passed for payment of fine by the akila in pursuance of the letter of the law; the spirit of which, on this point, is contended by some to have exclusive application to Arabia; where the inhabitants were divided into tribes and closely united by the obligation of mutual support.[29]

The basis for proceeding to amend the rules on intentional murder was that in the early 18th century Indian courts, the intention of homicide came to be synonymous with the instruments used in committing the crime. Murder committed with a dangerous weapon (e.g., with a sword) was judged intentional, while murder not so committed (e.g., by drowning) was regarded as *shibali-i-umd*, though the same wilful intention may be attributed to the second murder as to the first. Harington explains:

> *Kutl-i-umd* is defined in the Hedaya to be homicide committed by a responsible person wilfully striking another person with a mortal weapon ... *Umd* means intentional; but the intention being concealed in the mind, can be discovered only by something affording proof of it; and as the use of a common instrument of homicide does afford such proof, when the slayer of a man uses an instrument of that description it proves his intention to kill.[30]

In distinguishing *kutl-i-umd* from *shibali-i-umd*, Abu Haneefa (whose exposition of law was generally regarded as the most authoritative in India) had laid emphasis on the weapon used and consequently the weapon became the ultimate, and at times the sole, criterion for determining the category of homicide committed. On the other hand, however, the other notable Imams such as Abu Yusuf, Mahammed, and Shafiee, while accepting the importance of the weapon used for determining the intent, had indicated that this cannot be used as a rule of thumb.[31]

This distinction in the commentaries was relied upon by Lord Cornwallis in justifying amendments to rules concerning wilful 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 the greater encouragement for this alteration from the consideration that even the Mohammedan law itself is not entirely settled upon the most important distinction; for although the Doctor Abu Haneefa is of the opinion I wish to see corrected; yet his immediate disciples and successors, Yusuf and Mahammed, gave a very different judgement; contending and laying down that the intention, and not the mode or instrument should be

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29 Ibid, at p.274. An example of futwa mentioning *akilah* is contained in BCJC, IOLR, P/128/22. at p.535, in a trial for murder by Hinga and Shopal who beat the victim Laul Mohammed to death with a stick, in 1795. The *futwa*, at p.554, stated, "on their sticks there was no iron, neither did blood issue from the deceased ... Under these circumstance, ... half of *diyut*, being Rs 1,562 is to be paid to the heirs of the deceased by Hinga and his *akilah of the same caste*." Italics added.

30 Ibid, at p.261; also Hamilton, supra note 16, vol 4, at p.271.

31 Supra note 14, vol 1, at p.262.

> considered ... Shafiee ... makes the intent the criterion, and so reasonable and well grounded has his last opinion been found, that both Mohammedan and our own have from time to time availed themselves of it to award capital punishment against such offenders.[32]

The intent, in place of the weapon used, became the determining criterion through section 75 of Regulation IX of 1793.[33] Section 78 provided that a sentence of death should be communicated to the Circuit Court within three days of its confirmation by the Nizamut Adawlut, and the Circuit Court should ensure that the Magistrate carried it into execution without any delay. As for actual execution, we can quote the following observation by a Magistrate of Nadia for an indication of the then prevailing routine:

> the trembling ascent of the poor wretched, and the slow withdrawing of the ladder enhance and prolong his suffering, and horrify human feelings. ... I have further to observe, that, in some districts, the executioners are in the habit of hamstringing criminals, or rather of cutting the tendons behind the ankles, even before life is extinct.
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> (in 1832) the exposure of bodies in chains or gibbets was prohibited, and the Magistrates were directed to give them up to their relatives when claimed. or bury or burn them when unclaimed, according to the custom of the cast to which they belonged.[34]

In the change effected by Regulation IX and in some other amendments of the law of homicide, the frame of reference, however, remained the Mohammedan criminal law. The rationale for the amendment was sought from the logic of the existing criminal law.

We have mentioned that under the Mohammedan law the heirs of the victim could demand punishment, compensation or even pardon the murderer. A revealing example of the application of these norms regarding the rights of heirs to demand *kisas* is contained in the trial reported by J Duncan. J Duncan, the Company Resident of Baneras, sent the details of this trial for "the decision of the Government."[35] From the records of this trial in a Baneras court, in November 1794, we find that two wives and two sons of one Sheik Buddler had died earlier. On the death of his third son, Sheik Buddler accused one Bundhoo of causing all the deaths in his family by witchcraft and he then proceeded to beat Bundhoo to death. Afterwards the victim's body was thrown

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32 Ibid, vol 1, at pp. 363-64.

33 Section 75 required that henceforth, in trials of murder, *futwa* shall be delivered 'according to the doctrines of Yusuf and Mahomed', see Clarke, R., The Regulations of the Government of Fort Williams in Bengal in Force at the End of 1853, London, 1854, vol 1.

34 Quoted in an essay (without a title and author's name, but in the form of reviews of several publications on criminal law) published in 12 (1849) Calcutta Review, p. 516, at p.560.

35 BCJC, IOLR P/128/18, at p.1.

into a river by Sheik Buddler and three others.

The deceased Bundhoo had four daughters and a son. Evidently, the fact of killing was conclusively established. Thereafter, the agent of the Court asked the son of Bundhoo: "What do you, who are the son and legal representative of the said woman, desire respecting the defendants?"[36] To which he replied that he desired nothing, and brought neither claim nor charge against anyone: "I do not demand ... neither retaliation nor redemption nor punishment."[37] A disclaimer in writing was signed by him.

But the matter got complicated when one Noor Ally, the vakeel of the 4 daughters claimed on their behalf that the defendant should suffer the punishment of perpetual imprisonment and he should be sent to the Island of Andaman (transportation).[38]

The trial was adjourned at this point. When it was resumed 10 days later a new representative of the daughters, one Osman, now declared that the daughters wanted that the accused should be mounted on a donkey and paraded through the city, and punished by being beaten by strips and then released.

The *futwa* reiterated these conflicting claims of heirs and ruled that in such circumstances "the son and daughters aforesaid have no right to bring any claim ... and it belongs to the Hakim to determine their punishment."[39] The final order stated: "The Governor General in Council having considered the proceeding ... sentences the prisoners ... to receive 39 *iageanas* or strips with the *korah*, and to be confined for three years from this date."[40]

The abolition of this right of the heirs of the murdered to pardon the murderer was another important change. This change was expressed in the following words:

> If the answer of the law officer declares the prisoner to be convicted of wilful murder (*kutl-i-umd*), 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 Mohammedan Law, supposing all the heirs of the slain entitled to prosecute the prisoner for kisas have attended and prosecuted him ... and have demanded kisas.[41] (underline added)

Imprisonment was earlier substituted for *diyut* or blood money for non-

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36 Ibid, at p.31.

37 Ibid, at p.33.

38 Ibid, at p.35.

39 Ibid, at p.39.

40 Ibid, at pp. 39-40.

41 This change was brought about by Regulation IV of 1797. For the text of the Regulation see supra note 33, vol 1, and supra note 14, vol 1, at p.366. See also Regulation VIII of 1799 and Regulation VIII of 1801 for subsequent modifications.

wilful homicide.[42]

In principle, the Mohammedan law of homicide continued to operate, subject to these amendments. Changes were sometimes introduced indirectly, as by section 4 of Regulation IV of 1797. This section provided that if in the opinion of the Mohammedan Law Officers, the prisoner is not guilty of wilful murder but is convicted of homicide under any of the four denomination distinguished by the Mohammedan Law, the final sentence is to be consonant to justice and to Mohammedan Law.[43] The new Regulation provided:

> If in any case not provided for by the regulations, the Mohammedan law appear to the Court repugnant to natural justice, they are notwithstanding to adhere thereto, if in favour of the prisoner; or if against the prisoner to grant such remission or mitigation of punishment, as just.[44]

And section 6 of Regulation VIII of 1801 provided that:

> The magistrate is authorised to release the accused if the homicide ... is clearly shown ... to have been committed by misadventure in the prosecution of a lawful act, and without any malignant intention.[45]

Seen from the standpoint of the end result of these changes upon the accused, the amendments described in the preceding two paragraphs clearly favoured the accused. However, other Regulations prescribed death sentences for a number of homicides which were punishable by *diyut* only. These include the imposition of death sentence for the accused who had intended to murder someone but had actually killed a different person by accident (section 2, Regulation VIII of 1801), and death sentence in cases of *kutl-i-khuta* and *kutl-i-kaem* with intent (section 3, Regulation VIII of 1801).

Killing of a wife and/or her paramour, found in the act of committing adultery, was a justifiable homicide in Mohammedan Law.[46] Section 5 of Regulation IV of 1822 changed this to provide:

> It having been found that in certain cases of murder, the justifying plea, that the person murdered was the mistress or relation of the prisoner, and detected in criminal intercourse with another man, or that the murdered man was found in criminal intercourse with the prisoner's mistress or relation, or generally speaking, detected in fornication, has been upheld by the law officers in bar of capital or discretionary punishment, and has been declared to subject prisoner to diyut only, it is hereby enacted that the law officers of the Nizamut Adawlut shall be called on to declare in such cases what futwa would have been if such plea had not existed, and judges sitting on the trial shall pass sentence under the general regulations, and on consideration of the circumstances of the case, the same as if

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42 Supra note 12, at p.52.

43 Sec 4 of Regulation IV of 1797.

44 Id.

45 Supra note 33, at p.54.

46 Supra note 14, vol 1, at pp. 254-57, and sources cited therein.

no such pleas existed.[47] (underline added)

Abolition of these exemptions of the Mohammedan law made these rules similar to the ones in English law at the time.

For the Mohammedan law of homicide, Coulson has emphasised its origin in the specific societal conditions of Arabia:

> Under the pre-Islamic customary law a rough system of private justice, dominated by the notion of vengeance, had prevailed in these matters. The loss of a tribal member was to be avenged by the infliction of a corresponding loss upon the culprit's tribe who were collectively responsible for the action of one of their members. Until satisfactory vengeance had been wreaked, the soul of the victim could not rest in peace; and, since the natural tendency was for a tribe to set an exaggerated value on the member it had lost, two or more lives might be claimed in revenge for a single victim. The Quranic maxim thus radically altered the legal incidents of homicide. Henceforth only one life — the life of the killer himself — was due for the life of the victim, and the distinction is marked by a change of terminology, the term '*thaar*' (blood revenge) being replaced by that of 'kisas' (just retaliation). ... Homicide remains an offence which falls into the category of civil injuries rather than that of public offences or crimes, for it is the relatives of the victim who have the right to demand retaliation, accept compensation or pardon the offence altogether.[48]

The details of the transition of the notion of crime from a civil wrong to that of a public offence to be dealt with not by individuals but exclusively by the state need not concern us here. This transition in India was achieved by the Company legislators, as their accustomed notions of homicide could not possibly be reconciled with the private nature of this act under the Mohammedan law. Homicide, to the English eyes, was a public offence and as such the scope of private discretion of the victims or their relatives in enforcing the law was unacceptable.

In actual practice, however, pleas stemming from the private nature of the crime continued to be made in the courts and despite the Regulations to the contrary, these pleas were accepted for a number of years. In some other instances, it is difficult to see the conviction and sentence as being in conformity with the norms contained in the Regulations. In the following section we discuss some manifestations of the pre-Regulation norms in post-Regulation trials, as well as a-Regulation sentences.

PRE-REGULATION AND A-REGULATION NORMS IN POST-REGULATION TRIALS

(A) One of the last modifications of the Mohammedan law was undertaken by section 5 of Regulation IV of 1822. Until this Regulation, prisoners were

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47 Supra note 33, at p.54.

48 Coulson N J, A History of Islamic Law, London, 1964, at p.18.

routinely acquitted on proof of the plea, as already mentioned, that under the circumstances of adultery encountered by the prisoner, he was justified in the killing. In the case of *Vakeel of Government vs Dhunujee*, the Court states,

> By Mohammedan law a husband, seeing a man in the act of adultery with his wife, is justified in killing them both, to prevent a completion of the crime, which is legally punishable with death sentence. But it is a general principle, that after completion of the offence, the magistrate only is authorised to punish the offender.[49]

There are a number of instances of acquittal on the plea of justifiability in trials reported in NAR, prior to Regulation IV of 1822.[50] But a similar verdict of acquittal in the post-Regulation period is recorded in the case of *Jey Ram Mahato vs Chonne Ram Koeri*.[51] In this case, the accused and the deceased were Hindus and residents of tribal territory which was not formally part of the Mughul Kingdom. The Company had only recently acquired domination over the tribal territory. The judgement explained:

> Is this case to be treated according to the precedents in similar cases, which by Mohammedan law justifies a man killing his wife and paramour? If so, the prisoner is entitled to the benefit of it, and must be discharged ... My opinion is that the prisoner is entitled to his discharge, on the plea of justifiable homicide, in having found his wife and Goolab sleeping together at night in the same bed.[52]

The precedents referred to pre-Regulation cases of *Chanda Singh v. Bhuja,*[53]

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49 Reports of the Cases Determined in the Court of Nizamut Adawlut, Calcutta, 1804, vol 1 at p.39. Hereinafter referred to as NAR. The first series of these Reports, in 5 volumes, covered cases decided between 1799 to 1849. The second series, numbered volumes from 1 to 10, covered cases from 1850 to 1862.

50 See, for example, cases reported in NAR, vol 1, at p.74 (1805), at p.130 (1806), at p.156 (1807); and vol 2 at p.48 (1820). Figures within brackets indicate the year of the judgement.

51 NAR, vol 5 at pp. 258-59.

52 Id. The plea of adultery had to be proved. In an earlier trial in Baneras, detailed in BCJC, P/128/19, p.387, Sotoo, the accused, claimed that he had killed his wife because he found her committing adultery.
It seems, from the *futwa* that, according to the strict interpretation of this rule, the killing is justified only if the act of killing was committed when the wife was discovered during the act of adultery or immediately thereafter. The husband has to prove this fact to justify his killing. In this case, however, the heir of the deceased did not demand kisas and as such the issue of time and place of killing was not mentioned in the futwa. The futwa only explained the rule.
Further investigation, however, revealed, at pp. 389-96, that Sotoo did not kill his wife at the field where he claimed to have discovered her in the act of adultery. He had killed her later at night in their house, in a state of intoxication. Consequently, at p.396, "The Governor General in Council resolves that Sotoo be sentenced to imprisonment for life."

53 NAR, vol 2, at p.171.

Government vs Chait Ram,[54] and *Chunna vs Purshadoons*.[55]

A number of other cases had a similar outcome in the post-Regulation period. As late as 1850, in the case of *Dhunooram Chung Pramanick*,[56] the accused, having found the deceased in the act of adultery with his wife, instantly killed him with a large knife. He was acquitted on the ground of the homicide being justifiable. In many cases this plea of justifiable homicide continued to be made, and sometimes the judges took the plea into account, notwithstanding the contrary Regulation. This was probably due to the continued dominance of the old customs. Particularly, in self-sustaining Indian village communities the degree of social mores and customs formed as a result of common experience and practices were hard to displace with a brush. The names of the accused in some of these cases indicate that they were Hindus; in the case mentioned earlier the victim and the accused were from tribal communities. The plea of justifiable homicide on the ground of adultery was, it seems, accepted in non-Muslim communities as well. The universal acceptance of the practice may explain the stubborn continuance of this justifying plea, and the courts also seemed to have accepted it long after the Regulation had provided for the contrary.

The discrepancy in punishment for homicide in similar circumstances was also noticed in a critical essay published in 1857.[57] The essay cites several example of contradictory sentences in trials of cases involving wounding/killing in adultery-related situations. In the trial court a person was convicted for wounding with a *dao* or hatchet and sentenced to five years imprisonment. The circumstances of the crime appear from the records of Nizamut Adawlut:

> We believe the story told by the prosecutor on the spur of the moment, is true; that he had an intrigue with the prisoner's wife, and went for that purpose into the house, when he was detected and wounded. We are of opinion, that the assault, which was, we have every reason to suppose, committed under these circumstances, was justifiable. We therefore acquit and release the prisoner.[58]

In another trial, as pointed out in the same essay, the prisoner was similarly acquitted although;

> it was proved that the weapon was brought beforehand for the express purpose of attacking the prosecutor, that 'the wound was severe and dangerous, the weapon a deadly one, and the attack premeditated'.[59]

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54 NAR, vol 2, at p.408.

55 NAR, vol 2, at p.456.

56 NAR, (second series) vol 1, at p.329. See also Fisch, supra note 12, at p.101.

57 Author is not mentioned, "Reports of Case Determined in the Court of Nizamut Adawlut at Calcutta for 1855," 23 (1857) Calcutta Review, p.462.

58 Ibid, at p.471, quoting from the NAR.

59 Id, referring to another case reported in NAR.

The essay, moreover, mentions that defence of this nature were generally successful. In another case, reported in the same volume of NAR, a person was sentenced to transportation for life, although the Nizamut Adawlut acknowledged, almost in language identical with the previous cases, that the provocation (owing to discovery by the prisoner of his sister in the act of adultery) "was intense, and the act of murder unpremeditated, and on sudden impulse."[60] These instances clearly indicate the diverse nature of sentences for this crime.[61]

(B) Next we turn to cases in which the person convicted of murder was a minor. 'Non-age' of the accused in Mohammedan law excluded the full punishment of *hudd* or *kisas*. In such cases the punishment was by way of *tazeer*, ie, "chastisement less than the penalties of *hudd* ... On conviction of offences subject to Tazeer .. reformation of the offender himself is the principle object, the quazee is authorised to exercise a just discretion."[62]

The Regulations first mentioned the exemption for minors in clause 2, section 3 of Regulation LIII of 1803, though indirectly. Section 3 had prescribed punishment for robbery with open violence, with clause 2 stating:

> as in all other cases of criminal conviction and punishment, the party convicted be adult and of sound understanding, so as to render him a proper object of punishment.[63] (underline added)

It is clear that one who is not an adult or of sound understanding may not be "a proper object of punishment". Now, the first reported case of homicide involving minors is that of *Seedhoo vs Roopa*:

> The futwa of the law officers of the Nizamut Adawlut recited that though there was no full legal evidence, there was sufficient presumptive proof to convict the prisoner of the charge; but that as he was only 12 years of age, and his maturity doubtful, he could be punished discretionally with imprisonment and stripes. The court considered the prisoner convicted, but in consideration of his not having attained the age of maturity when the act was committed, sentence him, in pursuance of the futwa, to receive thirty lashes, and be confined five years.[64]

The minor, thus, did not become, according to the sentence 'a proper object of punishment', i.e., his punishment was not mitigated on account of his

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60 Id, citing NAR, at p. 552.

61 It has, however, been asserted sweepingly, in Beighton, T. D., "Obsolete Crimes in Bengal and Its Modern Aspects," 84 (1887) 84 Calcutta Review, p.154, at p.160 that the effect of this Regulation was "almost immediately operative. The reports of succeeding years show a distinct change in the class and degree of crime attributable to jealousy."

62 Supra note 13, vol 1, at pp. 322-24.

63 Supra note 32, vol 1, at p. 721. Underlined.

64 NAR, at vol 1, pp. 152-53.

age. The only reported case of those years to mitigate punishment on account of minority of the accused that we could find was that of *Laljee vs Mussumat Soobhanee & Goolab* of 1807.[65] Mother Soobhanee and her 9 year old son Goolab were convicted of murdering the 7 year playmate of Goolab for the victim's ornaments:

> The law officer of the Nizamut Adawlut gave a futwa, declaring that Soobhanee was convicted of murder .... liable to suffer death by seasut; that there was strong presumption that Goolab was abetting in the act; but that by reason of his not having reached maturity he should be only slightly punished at the discretion by tazeer. The Nizamut Adawlut sentenced Soobhanee to suffer death. In consideration of the extreme youth of Goolab, it was not thought proper to sentence him to any punishment; and was discharged.[66]

In this case the minor was convicted only of abetting and this may explain the acquittal, a result opposite to a large number of later cases involving minors. In *Jaekishen vs. Mussammat Odeneah*,[67] the accused was convicted of murder and robbery. It was accepted by the court that "at the time she committed the crime she was nine years and a few months old..."[68] The *futwa* stated that *kisas* were barred for non-age and the prisoner was liable to *tazeer* by discretionary punishment. "The court, in consideration of the prisoner's youth, with all circumstances of the case, sentenced her to imprisonment for life."[69] Similarly in *Poorun vs Budloah*[70] a case also decided in 1810, the *fatwa* stated that *kisas* was barred since the prisoner was about 14 years old and had not yet attained puberty. The *futwa* suggested *tazeer* at discretion:

> The court, on consideration of the terms of it (*futwa*) and of the prisoner's not having attained the age of maturity, did not think proper to adjudge him to suffer death, but sentenced him to confinement with hard labour and transportation for life.[71]

Tazeer, i.e., discretionary punishment for crimes not deserving of *hudd* or *kisas*, was usually inflicted in the form of upto 39 stripes under the pre-Company rules. The Futawa-i-Alamgiri had specified 17 crimes, e.g., abusive language, forgery, selling wine, taking interest, causing minors to drink alcohol, breaking fast in *Ramadan* etc., for which *tazeer* was the prescribed punishment.[72] Discretion in *tazeer* included the scope for inflicting other punishments. Evidently this was done to include long term imprisonment

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65 NAR, at vol 1, p. 155.
66 Id.
67 NAR, vol 1, at pp.213-14.
68 Id.
69 Id.
70 NAR, vol 1, at pp..215-16.
71 NAR, vol 1, at p. 216.
72 Supra note 14, at pp.324-27

for minors who were otherwise exempt from *hudd* and *kisas*. By sentencing to long term sentences, the courts were clearly turning the minors into 'proper objects of punishment', notwithstanding the contrary provisions of the Regulations.

(C) In conformity with the private nature of homicide and the vengeance motive of punishment under the Mohammedan law, the killer of a close relative was not subjected to death sentence. This exemption was abolished by section 2 of Regulation VIII, 1799. Also, a distinction was supplied between involuntary homicide in prosecution of a lawful intention and involuntary homicide in prosecution of an unlawful or murderous intention by Regulation VIII of 1801. Earlier, mutilation as a form of punishment was abolished. Section 51 of Regulation IX of 1793 provided that a sentence of 14 years of imprisonment would be substituted if the punishment by futwa was for loss two limbs, and 7 years for loss of one.[73]

CONCLUSION

We have indicated that the structure and logic of the Mohammedan law of homicide was based on the principle of private wrong, and vengeance was the motive of punishment. From such a framework it followed that (i) the victim's relatives had a central role in both prosecution of the wrong and execution of the punishment; (ii) they also had the right to accept blood-money as compensation for the killing, or pardon the accused; and (iii) the relationship between the victim and the accused determined the legal incidence of the killing, e.g., killing of a son by father or of a slave by the master did not entail punishment of *kisas*. This law of homicide is clearly rooted in the tribal structure of the Arabian society, i.e., the place of origin of Mohammedan law. This law also presupposed a limited intervention of the state in societal relationships, which could not continue as an operative principle for state in the early nineteenth century Bengal.

Step by step, the law of homicide was stripped of those rules which were based on the logic of private wrong and vengeance. Punishments gradually became the legal incidence of the criminal act alone and not the relationship between the victim and the convict. The victim's relatives also lost their prerogative of blood-money and pardon.

On the technical side, intent was made the determining criterion and several exempting clauses were removed.

Mutilation as punishment was abolished. Another measure, introduced by Regulation XIV of 1797, limited the consequence of fines. Prior to this Regulation, inability to pay fines resulted in indefinite imprisonment. This

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73 See also supra note 12, at pp. 63-5.

practice of confining the convict to prison until he could pay the fine often meant long imprisonment, a consequence disproportionate to the original crime. The Regulation provided that if the prisoner was unable to pay, the fine would be commuted to a definite term of imprisonment.[74]

All these changes, despite the far-reaching effects, purported to preserve the framework of the Mohammedan law of homicide. For this end, the amendments were formulated in terms of legal fictions:

> If, for instance, the relations granted pardon, or if the witness was a Hindu, or the victim was a child of the murderer, the law officer had to prepare their futwas under the assumption that pardon had not been granted, or that the witness was a Muslim, or the victim was not the murderer's child. Thus from a formal point of view, not a new system of law was built up, but a system of fictions which transformed real cases into fictitious ones.[75]

It was in laws relating to homicide that we notice a consistency in law making by the Company's judicial officials. In murder/homicide, rules were changed to make the act a crime. However, the process of change continued over a number of years, starting, as we have mentioned, in 1790 and continuing for the next three decades, as the Regulation IV of 1822 indicates. During this period, at least at the level of conjecture, we can easily suggest that often it would have been extremely difficult to be aware of which acts, how and in what circumstances, would result in the severest punishment or which nuances or dispositions of the judges would lead to acquittal. Thus, even a consistency of principle does not entail uniformity and predictability concerning rules or their application. The decisions cited above indicate the mercurial nature of judgements in criminal trials and thereby reinforces our contention that application of law was often indeterminate and fraught with uncertainties, even in acts central to any system of criminal justice system, i.e., homicide.

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74 Ibid., at p. 50.

75 Ibid., at pp.46-7.