CHAPTER II

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Vedic Period:

Before we deal in detail with the position of capital punishment at every stage of the Hindu period, it would be convenient to emphasise, by way of a rapid survey, that the fact that capital punishment was in vogue. The emphasis on "Danda" (coercive authority of the King) is note worthy here. During the Vedic period (1500 B.C. to 600 B.C.) originated the doctrine of the Divine affinity of the temporal ruler. The authority of king was coupled with his obligation toward his subjects, and the coercive authority (danda) of the ruler was recognised as the cause of Dharma. The earliest Aittareya Brahman of the Vedas is more explicit on personified warfare between the gods or devas and the demons.

In the pre-Maurya Period (600 B.C. to 325 B.C.) the concept of obligation of the king to protect his subject was developed. In one of the earliest Smritis, the list of offenders punishable with death includes those who caused injury to the seven constituents of the state, and those who forged royal edicts, etc. A king who fails to inflict punishment (danda) on a guilty man, or who punished an innocent man, was required to undergo a fasting. Some of the Pali Texts of that period, while emphasising the importance of righteousness, also emphasised the duty of the King to protect his people.
From the study of Vedic literature it is concluded that the infliction of penalties, including the penalty of death, is a process operating against certain classes in general; and even if a single individual is subjected to any penalty, including the penalty of death, it is because of that individual's belonging to the enumerated class of social degenerates. The hundred-fourth hymn of the Seventh Part of the Rig Veda and the fourth hymn of the Eighth Part of the Atharva Veda have been addressed in common to the deities of Indra and Soma. Infliction of punishment on culprits appears to be the common jurisdiction of these two deities. The following hymns appearing both in the Rig and the Atharva Vedas reflect the instrumentality of the Indra in inflicting penalties in consultation with Soma, making thereby the infliction of punishments as a matter of common deliberation of the deities of Indra and the Soma, as if the two are respectively the executives and the judicial organs, acting in unison, in the cosmic government.¹

The later Upanishads, particularly, the Chhandogya and the Brihadaranyaka Upanishads, do bear references to particular kings, like Janak, which indicate, by that time, the establishment of royal governments, yet the kings as well as the common folk, are described as concerned more with the knowledge of metaphysical truths. Killing was justified either in war or in combat. There is no reference to the king administering criminal justice by inflicting penalty of death.

¹. ग्रंथं दिवो अहमानमित्र तोमंतलं मध्यत्सं शिष्याधि ।
ग्रंथं दिवो अहमानमित्र तोमंतलं मध्यत्सं शिष्याधि ।
Rig Veda, 7/104/19 and Atharva Veda 8/4/19.
In Vedas, classes of offenders have been referred. It was the belief of the time that crime was an act of demon or evil spirit, and as such a person perpetrating a crime must either be killed or, at least, vanished. This kind of act was believed to be religious act for safeguarding the welfare of the Aryans. So religion was the law of that time. John Gillin J.L., in this regard records that infliction of punishment (on demons) was a sort of religious ceremony.

Dr. Chaturvedi has quoted2 Ved Martand, Acharya, Priyavrat, Ved Vachaspati for various punishment in the Seventh and Tenth Parts of the Rig Veda, and Eighth Part of the Atharva Veda through slokas has referred to the penalty of death by hanging,3 shooting4 and thunderbolt5 or electrocution.6

Ramayana Period:

Till the Ramayana period indiscriminate of the demonic race was, thus, a mode of punishment inflicted by the Aryan warriors on the demonic aborigines of India. The existence of demons was a constant panic to the Aryans, and death, without any staged trial, was the only punishment deserved by the demons. Staged trial had been unknown till the Ramayana period for the simple reason that the Aryans were a peaceful people. The asuras or the demons were the only culprits who were punished with death without need of any formal trial.

2. Chaturvedi & Chaturvedi, op.cit., p.29
3. Rig Veda 7/104/9; Atharva Veda 8/4/9
4. Atharva Veda 1/16/4
5. Atharva Veda 1/7/7
6. Rig Veda 7/104/20; Atharva Veda 8/4/20
For the protection of suras (Devas) against the asuras (demons) India killed Vritasur, Vishnu killed Bhasmasur, Madhu and Kaitabha and Narsimha killed Hiranyakasip. These illustrations of Vedic period show how the Devas maintained an orderful society.

In the Ramayana period Lord Rama's victory over Ravana again illustrates maintaining of peace in the society.

In this period stray instances of offences are found in which death penalty was given but on individual level without intervention of the Crown Parashuram cut throat of his mother by the order of his father. Lord Rama had shot balee dead on the smug extermination that the latter has established an adulterous relation with the wife of his own younger brother, Sugreeva.

**Mahabharata Period**:

Danda has always been conceived of security of person and property as well as the stability of the social order. It compels individuals for obedience to authority. The King (state) uses danda without any discrimination and partiality. Pitahmah Bhishma once asked King Yudhishthra to slay without hesitation a person acting against the interest of his kingdom whoever he may be. This reference indicates that, it was done for the protection of the society and maintaining peace in the kingdom. Bhishma states that danda is the means placed in the hands of the king.

7. Mahabharat XII, 57/5-7
for the smooth running of all human affairs on the path of Dharma.8

In Mahabharata period political powers were at the top, but even in this epic, no reference is found to any king holding a session of his court to pass capital sentence to an offender, illustrations of killings are either in war or combat. Killing of Shishupal, Putana, Kansa, Jarasandha are the examples of slay-killings either in war or combat.

Buddhist Period:

During Buddhist monarchy when Ahimsa was the rule of conduct, there was an all round protest against the taking of life of human beings, yet it cannot be said that doctrine of Ahimsa was extended to penology for making capital sentence itself a royal crime. In Buddhist sanskriti and late Pali text references relating to death sentence can be found. There is a reference that the King is one who rules and guides the world. He censures fines and executes a man who transgresses his command. Ashvaghosh at one place states that Sudhodhana while not executing criminals kept them under mild restraint, as their release would not have been a good policy.9 On the one hand the pillar edicts of King Ashoka point to the fact that capital sentence was taken for granted. Pillar edict IV, for instance reads:

8. Mahabharat XXII, 121
9. 35th Law Commission report p.196
"For as much as it is desirable that there should be uniformity in judicial procedure and uniformity in penalties, from this time onward my rule in this- To condemned over lying in preson under sentence of death a respite of three days is granted by me".

During this interval his friends and relations or any one may take any necessary steps for taking the sentence of death annulled, on the other hand, the King Gautamiputra Satkarni of Satvahana dynasty refrained from hurting the life even of an enemy. Some other translations have laid down some different versions.

Dharmashastra Period:

Dharmashastra has sanctified the power vested in the King to punish a person found guilty of an offence. Punishment is said to be a great boon to human beings. The fear of punishment prevents the offender from repeating his offence together with a general feeling of fear on other members of society by deterring them and checking their subversive movements thus society becomes fearless and feels security and safety to life and property.

Arthashastra Period:

Kautilya in his Arthashastra emphasises that Danda is the surest and the most universal means of ensuring public security. However, he advocated death penalty only in specified cases.

10. Ashoka Pillar edict IV
11. Supra, chap.II note 9, pp.202-03
Moreover, he explains that a King who gives out just punishment does not destroy righteousness. During this period law of treason was developed and various acts of treason had attracted the death penalty.

Kautilya categorised offences into four classes which would entail death penalty, namely, spying against the state, misappropriation from the state exchequer, personal property of the king or resources of the state; conspiracy by officers of the State including ministers and other heinous offences committed by citizens.

**Smiriti Period**:

On a perusal of the literature it becomes clear that he upheld theory of staged trials conducted on the basis of evidence and by adherence to the principles of hearing the parties without any departure from what is enunciated in the Manusmriti.

When the world was in distress and people ran helter skelter out of fear, for protection, the Lord created kingship with the object to protect them.15 Punishment is in reality the king and the manager of affairs and the ruler, and that is the guarantor for the four orders to act in accordance with Law.16 'Punishment alone governs all created beings. It protects them. It watches over them while they are a sleep'.
According to M.B. Shanti and Manu it is difficult to find a man in this world who is always pure in all respects. It is only on account of the fear of punishment that an individual behaves properly and is kept within bounds.  

These above versions declare an all time truth about the real human nature, that an individual behaves properly only on account of fear of punishment. The above versions of Manu and M.B. Shanti therefore eulogise the power to punish the offender through the instrumentality of Kingship (State) and also explain the necessity of the eternal vigilance on the part of the King to protect his subjects day and night by inflicting appropriate punishment on the wrongdoer. It is however impressed that the power to impose penalty must be exercised judiciously, by stating that punishment properly inflicted keeps the people happy and if inflicted arbitrarily it destroys an orderly society. According to law, it was the prerogative of the King to impose penalty on individuals for committing offence, or to give relief in respect of a civil injury, and no person could take law into his own hands. Manu has emphatically brought about the principle that no one is above law, not even the king. This is in conformity with the definition in Br. Upanishad according to which law is the king of kings, which means that law is supreme and not the king.

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18. सवाँ त्रेष्विते लोको दृष्टे हि भविष्यन।
दर्शिते हि भयावहीतो भेजायेत शरीरस्त। ॥ M.B. Shanti 15.34.


20. नादृष्टे हि भयावहीतो भेजायेत।
नादृष्टे हि भयावहीतो भेजायेत।
कार्यार्थं ज्ञाते जाते ज्ञाते हि भयावहीतो भेजायेत। ॥ Manu VIII 335-336.

'Punishment' (danda) in the Code of Manu is personified as a god with a black hue and red eyes, created by the Lord of the World as his son, and as an incarnation of Law, formed of Brahman's glory.  

Main source of Hindu law is smriti literature. The five sources of Hindu law (Dharma) have been laid down in Manu smriti and Yajnavalkya smriti which are ascribed to Vedas. But in fact in Vedas there are no fixed data which can constitute the substance of a politically administered law in the modern significance of the term. The Smritis had undertaken to fill up this lacuna and make up the concretised Codes of social conduct. The law primarily has been derived from the Smiriti and latter from those commentaries, expositions or revisions effected upon the original Smritis by the renowned scholars, in addition to Manu, Yajnavalkya, Katyayana, Vashishtha and Vrashapati are the other Smritis in which Vyavahar and danda have been discussed.

In Manu Smriti punishment has been conceived as a means "to keep the whole world in order, since without it the stronger would oppress the weaker and roast them, like fish on a spit... and all barriers would be broken through."

From the Manu Smriti several references can be drawn for various kinds of punishment including death penalty. In 8/34 it has been laid down that if stolen property is recovered with

22. Manu VII/1445
24. Hastings James; Encyclopaedia of Religion of Ethics, p.284 Vol.4
thieves, the property may be saved by keeping them in exchaquer and the offender (thief) be roasted by elephant. In 8/93 where any person receives other's property by deciet the king should kill that offender before the public after giving many torture. In 8/321 and 8/323 provisions are laid down for death punishment to the offenders for stealing gold, silver and costly ornaments of ladies. Pt. Janardan Jha, in his commentaries on Manu Smiriti has tried to mention several reference in which the king could administer, death penalty, on the accused for various offences, namely, (i) acts of subverting the state, (2) Mahapatakas (killing a Brahman, drinking the liquor called 'sura' by a twice born (Dwija), adultery with guru's wife, and abetment of these offences. Incendiarism, murder, robbery, poisoning, adultery, abetment of theft by giving subsistence, instruments for house breaking or asylum, causing breach of embankment, attempt to murder, causing abortion vide kaut, prescribed death penalty for a Brahman if he has committed theft of gold, caused abortion or killed a woman (Strihatyata). There were several modes of inflictning death sentence referred to in ancient law texts, such as by administering poison, by getting the person trampled under the feet of an elephant, by an implement, by burning or by getting him killed through wild animals.

Thus from the Manu Smiriti it appears that capital punishment was awarded even for theft of more than ten "Kumbhans". However

Brahmans were not subject to the death penalty.  

In Yajukvalyka Smriti there were various forms of punishments such as saying 'fie' using harsh words, giving corporal punishment or (even) death sentence.  

In Narad Smriti it is provided that taking of human life through poison, weapon or other means was sahasa of the highest degree and should be punished accordingly. Brahspati Smriti refers death sentence for murders. Both notorious murderers and secret assassins should be put to death by various modes of execution after confiscating their property.  

After the death of Kautilya the Magadh regime tended to disintegrate, giving rise to small principalities. The rulers or their deputies carried the principles of criminal justice on the basis of customary and scriptural rules without any codified enactments. A codified system of penal law never appeared even in the Mughal period and death penalty for hienous offences continued to be a part of criminal justice, though the history from times of Mamu to Mughal has failed to provide any known instance of a regular stage criminal trial. During seventh century A.D. King Harshavardhana used to inflict capital punishments on all the offenders who ventured to slay any living creatures. After

27. योज्यः यज्ञः समं तसं श्रवणं दयां दयां दयां दयां ।
    योज्यः यज्ञः समं तसं श्रवणं दयां दयां दयां दयां ।

Harsha, foreign invasions took place and local rulers maintained administration of criminal justice on the basis of old pattern.

**Medieval Period:**

Though Muslim period starts from 12th century A.D. yet its administration of justice, in real sense, in the country starts from 16th century when Babar tried to establish his empire in India. During Mughal times the main system of criminal law administered in the country was a Islamic one. The system had organised and grown outside India. Its main sources were the Quran, Hadith, Ijma and Qiyas. All these four sources were trans-Indian.

The king Akbar's idea of justice may be gathered from his instruction to the Governor of Gujrat that he should not take away life till after the most mature delibrations.\(^{30}\) The emperor himself was the final Court of Appeal. Akbar was keen to lay down that capital punishment was not to be accompanied with mutilation or other cruelty, and that except in cases of dangerous citizens. The Governor should not inflict capital punishment until the proceedings were sent to the emperor and confirmed by him. During Jahangir's time no sentence of death could be carried out without the confirmation of the emperor.\(^{31}\) Capital punishment was almost totally unknown under the regime of King Aurangzeb.

\(^{30}\) Hussein, Wahid.: Administration of Justice During the Mughal Rule in India, p.33
\(^{31}\) Ibid, p.41
Aurangzeb executed death penalty on Teg Bahadur Singh, the 9th preceptor of the Sikhs. Guru Govind Singh's two sons were put to death by plastering them inside a wall but all these three illustrations of death penalty were based on religious and political vendatages. But there was no settled law and procedure providing for trial of offences calling for the penalty of death. Aurangzeb, under the dictate of anger and passion, never issued any order of death.

Before the Indian Penal Code, a uniform criminal law for the whole of India was enacted, Muslim law was undoubtedly the basis of the criminal law. As late as in 1852, Sir George Campbell wrote:

"The foundation of our criminal law is still the Mohammedan Code; but so altered and edited by our regulations, that it is hardly to be recognised... still the hidden substructure on which the whole building rests is this Mohammedan law." 32

Sources of Muslim Homicide Law:

From the time of the conquest of India by Muslim the victors imposed their own criminal law on the conquered. The primary basis of Mohammedan criminal law was the Quran, the divine origin but the laws of Quran were found inadequate as it was only 80 or 90 verses of the Quran which lay down something like a general rule on matters which might come before a civil or criminal court of justice. Even these are very largely open

32. George, Campbell. Modern India, p.464
to the observation that the sanction put in the foreground is the religious one.  

Indeed there were very few passages which distinctly prescribe a duty to punish offenders against the rule in question. Sir William Muir has referred that in a case Prophet summarily sentenced the murderer to the punishment of death.  

To supply the want of a large and a civilised country rules of conduct (i.e. Sunna) was deduced from the oral precepts, actions and decision of the Prophet. These authentia traditions were taken to be the second authority of Muslim law and were regarded conclusive in cases which have not been expressly determined by the Quran. The third source of legal authority received by the Sunnis was the concurrence of the companions of the Prophet i.e. Ijma and failing this they took the aid of analogy as the fourth source i.e. Qiyas.  

Before we proceed with the Mohammadan Penal Law it would be convenient to have a clear idea about the conception and the classification of crime of homicide under this law, which is very complicated and confusing. The justified homicide was if it was in prosecution of war against hostile non-Muslims for the advancement of Islam or in support of the Muslim community was considered as justified. So also the homicide of an apostate from Islam, who  

33. Wilson, R.K.: An Introduction to the study of Anglo-Mohammadan Law, p.60  
34. Muir, Sir William.: Life of Prophet, p.281
after being duly called upon, to return to the faith, persisted in his apostacy, of an insurgent against the rightful Imam, when slain in the act of insurrection, or of open resistance to the established government of a condemned criminal by the order of the Quadi or Magistrate authorised to pass sentence of death of a murderer.\(^{35}\) It was also justifiable to kill a person in self-defence, in defence of another or in defence of property from theft or robbery.\(^{36}\) In prevention of adultery, rape and other heinous offences were punishable with death.

The Muslim law recognised the general legality of putting another person to death, if necessary, for the prevention of evil, and safety of the community, violent destructes of the peace, highway robbers, persons committing extortions under the pretext of collecting of public taxes, false informers and accusers before tyrants for purposes of oppression and generally all habitual ill-doers who made a practice of committing offences injurious to society. However, illegal homicide to which Muslims, as administered in Bengal, referred to, while defining offence was of the following five kinds:

- Qatlı-i-Amd or wilful homicide
- Shabah Amd or quasi deliberate homicide
- Qatlı-i-Khata or erroneous homicide
- Qatlı-i-Qaim or involuntary homicide and
- Qatlı-ba-Sahub or accidental murder

\(^{35}\) Hedaya, Vol.II, pp.140-41, 227,254
Qatl-i-Amd implies intention to kill followed by a voluntary act. It is also defined as homicide committed by a responsible person. It may be done by sharp piece of wood, sharp stone, fire or sharp weapon. The Shabah Amd resembles wilful homicide but differs from it by the use of an instrument not considered to endanger life, so that the intention to kill cannot be presumed. Roughly it might be called manslaughter. Qatl-i-Khata means an erroneous homicide. It was an error in the act when an arrow was shot at a mark and it hits a man. A person was considered to have erred in his intention when a man was mistaken for a game animal and shot as such, or when a Musalman was shot, under a supposition of his being a hostile non-Muslim whom it was lawful to kill. Qatl-i-Qa'im meant involuntary homicide. The example given in Hidaya is a sleeping persons falling on another and killing him thereby. Other instances are when death was occasioned by the accidental fall of a brick or a piece of wood on the head of a person. Lastly Qatl-ba-Sahub or accidental homicide by an intervening cause, for instance, when a person dug a well, or set up a stone in ground not belonging to him and another was killed by falling into it or over the stone.

Principles of Punishment in Muslim Jurisprudence:

During the Moghul reign in India, the Muslim law of crimes had become the law of the land for the administration of criminal

37. Banerjee, T.K.: Background to Indian Criminal Law, pp.38-40
40. Ibid, p.264
justice. When company assumed responsibility for administering Bengal, Bihar and Orissa, the Muslim law of crimes was very well entrenched in that territory. The British administrators did not immediately disturb the status quo, and allowed the Muslim law of crimes to continue to operate.

For executing the punishment for homicide and other offences stated earlier in the Muhammadan Law. Jurisprudence had four broad principles of punishment:

(1) the so-called jinayat that is misdemeanours consisting of killing or wounding, which must be punished either with retaliation (quisas) or with payment of the diya ('price of blood') or other damages; (2) adultery, robbery, and other crimes, which must be punished with a fixed penalty (hadd); and (3) all other kinds of transgressions, which must be punished with tazir ('correction').

Quisas:

Quisas or retaliation meant, in principle, life for life and limb for limb. Quisa applied to cases of wilful killing and certain types of grave wounding or maiming, and gave to the injured party or his heirs a right to inflict a like injury on the wrongdoer.

41. Hastings James, op.cit., p.291
Diya:

Diya meant "blood money". The Diya was claimed for killing of a human being in two ways: In certain cases, like unintentional inquiries, diya was awarded to the victim on a fixed scale.

According to the Muslim law-books, retaliation is still permitted in only two cases: (1) when any one has deliberately and unjustly killed another, the heirs of the latter have the right to kill the murderer; (2) if any one is deliberately and unjustly wounded or mutilated, he has the right to revenge himself on his injurer, if it is possible to make him suffer precisely the same wounding or mutilation. According to Muslim lawyers, this is in general possible only when a hand, foot, arm, leg, ear, finger, nose, toe, tongue, eye, or tooth, or other part of the body, has been cut off or destroyed. Moreover, retaliation is in both these cases permissible only (1) if the guilty person was of full age when his crime was committed, and in the full possession of his intellectual powers; (2) if the injured party is at the same time an equal of the guilty person.

Those who have the right to demand revenge for blood are the heirs belonging to the first and second classes, the asabat

42. According to Muslim canon law, the question whether the culprit acted deliberately or not depends on the sort of weapon with which his act was accomplished. The opinions of the various high-schools differ as to the details.

43. Diya is not applicable to one who has killed or wounded another if he had a right to do so. He, for instance, who finds a thief in his house, or any one outraging his wife, may immediately kill him without incurring penalty— not only in self-defence, but also in vengeance on the offender.
and the dhauril fara'id (see art. Law Muhammadan). According
to the Malikites, however, wives cannot exercise any qisas. If
the heirs give up their right to qisas, the guilty person is
obliged to pay the price of blood (diya); according to the
Hanafites, however, the diya cannot be demanded in this case, if
the guilty person does not himself agree to it. If the deceased
has left various heirs, and some of them are willing to spare the
guilty, no vengeance for blood may be exacted, but only the diya.

Vengeance for blood is carried out personally, under the
supervision of the judge, by those who have instituted the pro-
ceedings against the guilty person. If there are several who
demand it, one of them is appointed to carry out the punishment.

When any one has been killed deliberately and unjustly, and
his heirs give up their right to exact the qisas; (2) when any one
has been killed unintentionally. 44 In both the cases the diya
consists of 100 camels, or 1000 dinar of gold, or 12,000 dirhams
of silver (according to the Hanafites, however, 10,000 dirhams of
silver). But in the first case the so-called 'heavy', and in the
second case the 'light' price of blood is incurred. In the fiqh
it is accurately decided what sorts of camels must be given in
each of these cases. If gold or silver is paid in place of
camels, according to some Muslim lawyers a greater sum may be

44. It must be noticed that, according to Muslim lawyers, any
one who has accidentally killed another is punishable even
if no fault attached to him in so doing. The price of
blood may even be demanded if, for instance, any one has
fallen from the roof and in his fall has killed another.
demanded for the 'heavy' diya than for the 'light'; but according to others it is not so; and, according to the later opinion of Shafi' no fixed payment of gold or silver is due, but the worth of the 100 camels. The 'light' price of blood must be paid within a period of three years by the so called aqila, i.e. by those who pay the aql (price of bold). To these aqila belong, according to the Hanafites and Malikites, all asabat (i.e. the male relations on the paternal side) of the culprit, and according to them he must also himself pay part of the sum incurred; according to the Shafi'is on the other hand, neither the culprit himself nor his blood relations in the direct line belong to the aqila.

Besides the cases in which any one is killed either intentionally or accidentally, Muslim lawyers distinguish yet a third case in which the culprit did, indeed, attack the deceased intentionally, but without meaning to kill him. In that case the aqila must pay the so-called 'heavy' diya. They are also obliged to do this, according to some Muslim lawyers, if he has killed another accidentally, either in the sacred months (Muharram, Rajab, Dhu'l qa'da, Dhu'l hijja); further, if the deceased was a mahram (i.e. a relation whom it is forbidden to marry) of the culprit; according to others, however, they are in this case liable only to the 'light' diya.

Hadd:

Hadd etymologically means boundary of limit. In criminal law, it meant specific penalties for specific offences. The
idea was to prescribe, define and fix the nature, quantity and quality of the punishments for certain particular offences which the society regarded as anti-social or anti-religion. These offences were characterised as being 'against God', or in other words, against 'public justice'. The punishments prescribed under hadd could not be varied, increased or decreased; if the offence was established, the prescribed punishments had to follow as a matter of course. The judge had no discretion in the matter. Some of the hadd punishments were; death by stoning or scourging, amputation of a limb or limbs, and flogging. The prescribed punishments for certain offences were: for zina or illicit intercourse, death by stoning or scourging; for theft, amputation of limbs like the right hand or the left foot; for falsely accusing a married woman of adultery, eighty stripes.

The hadd punishment were severe; they may appear to us today even as barbarous. The main aim underlying these punishments was to deter criminals from committing those crimes which were injurious to the community of God's creatures. Hadd was distinguished from Qisa which was considered the right of man; as well as from tazeer which was indefinite and was left to the discretion of the magistrate. Being a public right, the ruler or his deputy was exclusively entitled to enforce it, the claim and prosecution by the injured party not being a consideration precedent to enforce the punishment. The injured party could not remit of compound the prescribed penalty as he could do in case of Qisa.
In practice, however, there were many restrictions on the infliction of the hadd punishments. The proof of the offence must be very strict and full legal evidence of either two or four competent eye witnesses of proved credit was insisted upon for convicting the offender. As for example, Zina could be punished only if there were four male eye witnesses of the actual act and, thus, in practice, a person could not be convicted of the offence of Zina unless he defied public decency and committed the offence in the open. An accused person could be committed for a hadd offence on his confession, but it had to be made four times before the Qazi and it could be retracted any time.

Apart from technical rules of evidence, any doubt would be sufficient to prevent the imposition of hadd. Such doubt might arise from the nature of authority applicable to the facts of a particular case, or from the character of the evidence, or from the state of mind of the accused person, that is, his knowledge of the law or facts, or the state of his will at the time of

45. Rahim, Abdur: Mohammadan jurisprudence (1911) p.361
"Hadd used to be prevalent in Arabia at the time of the promulgation of Islam, and the Muhammadan law, while confirming it as the extreme punishment for certain crimes, has laid down conditions of a stringent nature under which such punishments may be inflicted. These rules are so strict and inflexible that it must be only in rare cases that the infliction of hadd as of retaliation would be possible, and in fact, there are only a few instances known in which hadd has been inflicted".

46. Ibid, p.326, "...the policy of law in connection with this offence is to punish only those offenders who defy public decency and openly flaunt their vices. Hence it is, that four male eye witness are required for its proof. Even if they are forth coming which is hardly to be expected, the magistrate is asked to scrutinise their testimony closely in order to see if they are not mistaken, and to allow them to retract what they have deposed to".
commission of the offence changed against him. If there be a show of authority, even though not of a sound character, against the accepted law which declared a particular act to be punishable with hadd, this was treated as a doubt sufficient to prevent the imposition of such a sentence, although the accused himself did not entertain any doubt on the point. This was called error or doubt with respect to the subject of the application of law. Even when the offender misconceived the law in a case where there was no basis for misconception, and he actually believed that what he was doing was not an offence, the sentence of hadd was not enforced against him. Thus, the savagery of hadd punishments was compensated by the rarity in awarding them because of the difficulties of getting a conviction for the offence concerned.\(^{47}\)

**Tazir:**

Tazir (correction) means discretionary punishments when no special punishment is prescribed, the judge, as has already been noted, must condemn the culprit to the punishment which seems to him to be the most suitable in view of the circumstances. He may for instance, send him to prison, exile him, or sentence him to be publicly put to shame or scarged, etc. According to the Malikite doctrine, he is even entitled in this case to condemn him to as many stripes as are prescribed in the case of hadd, or even more: according to the other figh schools, however, this is not

\(^{47}\) Jain, M.P.: Outlines of Indian Legal History (1976) p.407
permissible. According to them, the tazir must always be less severe than a hadd. The tazir is among other things, applicable to a thief when the stolen property is not of so much value that the culprit must be condemned to the hadd; further more, in general, to all kinds of transgressions for which no other kind of punishment or any special atoning sacrifice is prescribed. The judge could even invent new punishments according to his whims and notions.48

However, Tazeer could be inflicted in the following situations:

First, it could be inflicted for offences for which penalty by way of hadd or Qisa was not prescribed. These offences were not serious or of a heinous nature and so were left to be punished according to the discretion of the judge. The number of such offences was very large that is use of abusive language, forgery of deeds or letters with a fraudulent design, bestiality, sodomy, offences against the human life, property, public peace and tranquility, decency, morals, religion and so on. In fact, the entire Muslim criminal law was based on the principal of tazeer because the hadd or Qisa had been prescribed for a very few offences only. The process of trial in cases falling under the category of tazeer was simple as compared to the trial procedure in cases coming under hadd. The condition for conviction for tazeer offences were not very difficult. Tazeer could be inflicted

48. Idem
on a confession, evidence of two persons, or even on strong presumption. The whole of this part of criminal law being discretionary could be regulated by the sovereign.

Secondly, tazeer could be inflicted even in cases falling under hadd or Qisa. If the proof available for an offence was not such as was required by the law for the award of the prescribed penalty, but nevertheless, was sufficient to establish a strong presumption of guilt then, instead of hadd or Qisa, some other punishment was awarded in the discretion of the judge. If because of some technical difficulty, insufficiency of evidence, or some other special circumstances, hadd or Qisa could not be awarded, then tazeer was awarded.

Thirdly, the doctrine of tazeer covered heinous and flagrant crimes, crimes having a dangerous tendency or capable of causing extensive injury to society. Such crimes called for exemplary punishment, known as Siyasat, because they were detrimental and injurious to the society in a high degree and thus deserved severe punishments, even more than hadd, so that others were deterred from committing these offences. For example, for protection of the community against dangerous character especially against those who habitually committed atrocious crimes and of whom there could be no hope of reformation, exemplary punishment could be awarded by the ruler or his delegate such as he might deem expedient. Tazeer punishments were thus inflicted for meeting the ends of public as well as private justice. Even for cases falling
under hadd or Qisa, siyasat punishment could be inflicted in certain situations.\textsuperscript{49}

Muslim Criminal Law, thus, was founded on the most lenient principles and an abhorrence of blood shed.\textsuperscript{50} Now before considering the codifications of criminal law, this has been my endeavour now the statutory modifications were made in criminal of the country and provisions regarding imposition of death penalty on the accused were enacted.

\textbf{Modern Period}:

Modifications in criminal provisions were primarily made of regulations. Warren Hastings, who was transferred from Madras to Bengal as a governor to improve the deteriorated political as well as socio-economic conditions of the three provinces Bengal, Bihar and Crissa. Warren Hastings was of the opinion that Indians are very much accustomed to their traditions and customs, even the most injudicious or most fanciful customs which were either ignorance or superstition could be substituted, and he was convinced that any attempt to free them from such laws would be a 'severe hardship'.\textsuperscript{51}

The policy of Britishers therefore was to interfere with the Mohammedan Criminal Law. Nevertheless this principal of non-interference with the Mohammedan Penal Law was conditioned

\textsuperscript{49} Ibid, p.408  
\textsuperscript{50} Mouckton, Jones : Hastings In Bengal, p.331  
\textsuperscript{51} A letter of Warren Hastings to Lord Mansfield, dated March 21, 1774.
by one big 'If'— if it shall be found to contain nothing hurtful to the authority of Government or to the interests of society.\(^{52}\)

Some Muslim Penal provisions were of such a nature that the Company could not allow their continuance on grounds of humanity and justice.\(^{53}\) Even then only the most glaring defects were gradually removed by Regulations and a 'patchedup' and modified' law was put in its place.\(^{54}\)

In 1772, the existing provisions for dacoity was changed, and to suppress the ruthless and wanton deprivation of the robbers it was provided that dacoits were to be executed in their villages.\(^{55}\)

The Supreme Court established in Calcutta under the 1774 letters patent enforced the British law, that is Forgery Act 1729, by imposing death penalty on Nandkumar in 1775.

From 1772-1790 there were no other changes in the penal law of country. In 1790 the then Governor General in Council, Lord Cornwallis in Bengal with his strong mind and superior authority made some remarkable changes in government attitudes. In his minute of December 3, 1790 he pointed out the gross defects in the Mohammadan law and he suggested reforms on several

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54. Banerjee, T.K. : op.cit., p.68
55. Article 35 of the plan for the administration of justice in Bengal, framed by the committee of circuit, Aug.15, 1772.
points. The court of Directors were of the opinion that no other reform should be attempted in Penal law excepting the abolition of the barbarous punishments which Mohammedan law prescribed. In December 3, 1790, Regulation suit from Bengal government contained that the discretion left to the next of kin of a murdered person to remit the penalty of death on the murderer would be taken away, and the law was to take its course upon all persons convicted thereof without any reference to the will of the relatives of the deceased.

In 1791, the punishment of mutilation was abolished. On May 1, 1793 the Cornwallis Code was enacted. In cases of murder it was declared that the following circumstances were not to bar the trial or condemnation of the prisoner: (i) refusal of the heir to prosecute; (ii) non appearance of the heir within a reasonable time and; (iii) legal incompetency e.g. minority of the heir to prosecute.

A Bengal Regulation of 1797 provided that in cases of wilful murder, judgment was to be given on the assumption that "retaliation" had been claimed. The sentence could extend to death if that was the prescribed sentence under Mohammedan Law. As regard to the "fine of blood", the judges were directed to commute the punishment to imprisonment which could extend to life imprisonment. By the same Regulation of 1797, offenders guilty

56. General Letter from Court of Directors April 12, 1786
of putting to death "any person" on the ground of his or her being versed in and practising sorcery or any other ground such person or persons were declared to be guilty of murder on being convicted of the crimes, and were punished accordingly.

By sections 1 to 5, Bengal Regulation 4 of 1799, elaborate provisions were made for the trial of persons charged with treason and other crimes against the state.

Certain homicide which were regarded as justifiable homicide under the Muslim Law, were considered as opposed to public justice, and by Bengal Regulation 8 of 1799, such cases were declared liable to capital punishment. These included such cases as the prisoners being one of the ancestors of the slain or being the master of the deceased, or the consent of the deceased. Death sentence could be passed provided if the court saw no circumstances which may render the prisoner a proper object to mercy.

By the same Regulation (Section 5), it was made clear, that wilful homicide by poisoning or by drowning when the intention of drowning, etc., was evident, was included in the rule that it is the intention which is material and not the manner and instrument of perpetration.

Death sentence was prescribed by Bengal Regulation VIII of 1801 for accidental homicide (as known to Muslim law) occurring in the prosecution of unlawful murderous intention, that is shooting at A with intention to kill A and by accident killing B.

58. Ibid, p.225
By Bengal Regulation VI of 1802, the whole practice of infanticide by drowning was declared to be wilful murder punishable with death. It was stated that the practice of killing female children had been widely prevalent in India, and the object was to stop that practice. The Regulation, however punished the throwing into sea, river, etc., of "any infant or person not arrived at the age of maturity".

Regarding robbery, by Bengal Regulation 53 of 1803, death sentence was provided for all cases of murder committed in the process of robbery, or aiding, or abetting the same, etc. The Nizamat Adalat was empowered to inflict the capital sentence on habitual and notorious robbers.

Regarding escape by convicts, by Bengal Regulation 53 of 1803, convicts escaping from their places of transportation, if apprehended, were directed to be tried, and on conviction, were to be sentenced to death, "if no circumstances appear to the Court to render such convict an object of mercy". Regarding hostility to Government, open hostility to the British Government, or actual commission of any overt act of rebellion against the authority of the same, or the act of openly aiding and abetting the enemies of the British Government were, in 1804, declared to be liable to the immediate punishment of death and to the forfeiture of the property, etc., of the convict. The Regulation provided for trial by courts martial and was applicable during times of war or open rebellion, but did not preclude the Government from causing the persons to be charged under Regulations 4 of 1799
and 20 of 1803.

Regarding robbery, Bengal Regulation 3 of 1805 made special provisions. It had been brought to light that many village watchmen and some police officers were concerned in the preparation of robbery, or connived at the commission of robbery.

Hence the Regulation laid down that any police officer convicted of robbery by open violence or of murder, wounding, maiming or any other aggravating act in the prosecution of robbery or an attempt to rob was to be sentenced to death. Any direct or indirect connivance at any of these crimes on the part of any police officer was to be considered as its actual commission and punishable accordingly.

By Bengal Regulation XVII of 1817, persons convicted of murder in prosecution of robbery, burglary or theft were made liable to the sentence of death. By section 15 of the same Regulation, exemption of Brahmins of Banaras from capital punishment was abolished.

Regarding waging war, in the year of the Indian Mutiny, waging war and other offences against the State of instigation of the same was made punishable with death or transportation for life or rigorous imprisonment up to 14 years in addition to forfeiture of property, etc.

In 1857, the offence of intentionally seducing or endeavouring to seduce any officer or soldier from his allegiance to
British Government on duty to East India Company, exciting or causing others to excite mutiny or sedition in the army was made liable to the punishment of death or transportation for life or imprisonment with hard labour up to 14 years, besides forfeiture, etc.\textsuperscript{59}

Later, in the 1858 an Act was passed to deal with persons who had escaped from jails during the mutiny. The punishment was transportation for life\textsuperscript{60} for such offence.

**Capital Punishment in Indian Penal Code, 1860:**

The Common Law of England was never made applicable to India by any Act of the British Parliament or by any enactment of the Indian Legislature. The history of the codified penal law, as traced in Nelson's Commentaries on the Indian Penal Code\textsuperscript{61}, reveals that it were only the charters, granted to the East India Company, that enjoined, upon the Company and its servants, due obedience to the Common and Statute Law of England. The Mohammedan Law, with regard to offences were administered by the Company's Courts. From 1802 onwards, the various Regulations (Regulation II of 1802; Regulation III of 1808, Regulation XVII of 1825; Bengal Regulation XVII of 1817; Regulation XII of 1818; Bengal Regulation XIV of 1827; Regulation XVIII of 1827; Regulation XVI of 1832) were passed with regard to the trial of offences

\textsuperscript{59} Ibid; p.227  
\textsuperscript{60} Ibid; p.228  
and trial of civil suits.\textsuperscript{62} It was the law, declared in these Regulations, that governed the trial and punishment for offences before the commencement of the Indian Penal Code of 1860.\textsuperscript{63}

Section 53 of the Indian Penal Code, 1860 recognises death as the highest form of punishment. The Code, however, prescribes only 8 offences for which offender may be punished with death penalty. The offence of murder by a life convict is punished by the least punishment of death under section 303 of the Indian Penal Code which has recently been declared unconstitutional.\textsuperscript{64} However, the section still is adhered with the Indian Penal Code, 1860. In under the Indian Penal Code are following:

\begin{itemize}
  \item \underline{Weaging war against the government of India (section 121)}\textsuperscript{65}
  \item Abetting mutiny by the member of armed forces (section 132)\textsuperscript{66}
  \item Fabricating false evidence with intend procure conviction of capital offence, with the death penalty applicable only if an innocent person is executed as a result (section 194)\textsuperscript{67}
  \item Committing
\end{itemize}

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\textsuperscript{62} Gopal Naidu Vs. Emperor, AIR 1923 Mad 533(2): 24 Cri.L.J.599.
\textsuperscript{63} Emperor of India Vs. Mulua, ILR 1 All 599.
\textsuperscript{64} Mathew Vs. State of Punjab AIR 1983 SC
\textsuperscript{65} Indian Penal Code, 1860 section 121- Whoever wages war against the government of India, or attempts to wage such war, or abets the waging of such war, shall be punished with death or imprisonment for life and shall also be liable to fine.
\textsuperscript{66} Ibid, section 132- Whoever abets the committing of mutiny by an officer, soldier, sailor or airman, in the Army, Navy or Air force of the Government of India, shall, if mutiny be committed in consequence of that abetment, be punished with death or imprisonment for life or imprisonment upto ten years and fine.
\textsuperscript{67} Ibid, section 194- Whoever gives or fabricates false evidence; intending thereby to cause or knowing it to be likely that he will thereby cause, any person to be convicted of an offence which is capital by the law for the time being in force in

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of murder (section 302), committing of murder by life convict (section 303), abetting suicide of a child or insane person (section 305), attempted murder actually causing hurt when committed by a person already under the sentence of life imprisonment (section 307), and finally decoicy with murder (section 396).

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India shall be punished with imprisonment for life or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine, and if an innocent person be convicted and executed in consequence of such false evidence, the person who gives such false evidence shall be punished either with death or with the punishment herein before described.

68. Ibid, section 302- Whoever commits murder shall be punished with death or imprisonment for life and shall also be liable to fine.

69. Ibid, section 303- Whoever, being under sentence of imprisonment for life, commits murder, shall be punished with death.

70. Ibid, section 305- If any person under eighteen years of age, any insane person, any delirious person, any idiot, or any person in a state of intoxication commits suicide, whoever abets the commission of such suicide shall be punished with death or imprisonment for life, or imprisonment for a term not exceeding ten years, and shall also be liable to fine.

71. Ibid, section 307- Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned. When any person offending under this section is under sentence of imprisonment for life, he may, if hurt is caused, be punished with death.

72. Ibid, section 396- If any one of five or more persons, who are conjointly committing decoicy, commits murder in so committing decoicy, every one of those persons shall be punished with death or imprisonment for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.
Capital Punishment In Post Constitutional Legislations:

With the rapid change in the socio-economic, socio-political and socio-legal environment of the country and with the increase of socio-economic offences and offences against social welfare and law and order, the government to cope with them all has either introduced and enacted many a new criminal legislations or modified old legislations with appropriate amendments. The Commission of Sati (Prevention) Act, 1987 has recently been enacted. In the Act Death penalty has been imposed on the persons who commits abetment of Sati.\footnote{73} For preventing and controlling the atrocities of the terrorists in Punjab and other places an Act, the Terrorist and Disruptive Activities (Prevention) Act, 1987, came into existence by its section 3(2). Terrorist has been liable to be punished with death.\footnote{74} With the increase of frauds in medicines and narcotic drugs the Narcotic Drug and Psychotropic Substances (Amendment) Act, 1988 was passed. The Act received the assent of the President on Jan 6, 1989 and published in Gazette of India on Jan 9, 1989. Section 31 A of the Act provides that if a person is convicted for the commission or attempt to commit or abetment of Sati.

\footnote{73} The Commission of Sati (Prevention) Act, 1987, section 3- "Abetment of Sati- (i) Not withstanding anything contained in the Indian Penal Code, if any person commits Sati, whoever abets the commission of such Sati, either directly or indirectly, shall be punishable with death or imprisonment for life and also be liable to fine.

\footnote{74} The Terrorist and Disruptive Activities (Prevention) Act, 1987 section 3(2) provides- "(2) whoever commits a terrorist Act shall; (1) if such act has resulted in the death of any person, be punishable with death, or imprisonment for life and shall also be liable to fine".
of or conspiracy for the offence under this Act shall be punishable with death.75

To control the unlicensed weapons the Parliament has enacted an Amendment to the Arms Act, 1959 as The Arms (Amendment) Act, 1988. By this Amendment Act, under its section 2776 mandatory sentence of death for the accused using prohibited arms or using prohibited ammunition has been laid down.

Recently with an object to prevent and control atrocities on scheduled castes and scheduled tribes in 1989 the scheduled caste and scheduled tribes (Prevention of Atrocities) Act, 1989 was enacted. Under section 3(2)(1) of the Act77 false or fabricated evidence if results in execution of death of an innocent

75. The Narcotic Drugs and Psychototropic Substances (Amendment) Act, 1988, section 31A, Sub-section(1) provides that if any person who has been convicted of the commission of or attempts to commit, or abetment of or criminal conspiracy to commit any of the offence punishable under section 15 to section 25 or section 27A of the principal Act is subsequently convicted of commission or an attempt to commit, or abetment of, or criminal conspiracy to commit, an offence relating to (a) engaging in production, manufacture, possession, transportation, import into India, export from India or transhipment of narcotic drugs and psychototropic substances of the various kinds as enumerated and involving a certain quantity specified in each case. (b) financing directly or indirectly, any of the activities specified in clause (a) shall be punishable with death.

76. The Arms (Amendment) Act, 1988, section 27 punishment for using arms etc. (1)... (2)... (3) whoever uses any prohibited arms, or prohibited ammunition or does any act in contravention of section 7 and such use or act results in the death of any person, shall be punishable with death.

77. The Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989, section 3(2)(1) : Any person not being a member of scheduled caste or scheduled tribe if falsely make

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member of scheduled caste or scheduled tribes such person making false or fabricating evidence will be punished with death sentence.

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or give evidence by which any member of scheduled caste or scheduled tribe is punished with life imprisonment or he knows that by such evidence guilt is likely to be proved, such aducing person shall be punished with life imprisonment. And if any member of scheduled caste or scheduled tribe is proved guilty on this evidence and hanged the false evidence making or, giving person shall be punished with death.