

Extract from

Wright, “Macaulay’s Indian Penal Code: Historical Context and Originating Principles”

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Criminal law codification was never realised in England, despite its central place in 19th century law reform debates there. Codes were developed in other British jurisdictions and the first of these, and the one most directly influenced by the ideas of Jeremy Bentham, was Thomas Babington Macaulay’s Indian Penal Code (IPC). Bentham coined the term codification, a sweeping legislative reform based on his critique of the common law and his ambitious ‘science of legislation.’ All existing laws were to be replaced by comprehensive provisions set out in a rational, consistent, and accessible form amenable to efficient administration and minimal judicial discretion. Such a code, anchored in the principles of utility, would not only enhance the rule of law, but held out promise of a ‘universal jurisprudence,’ applicable to places as diverse as England and Bengal as Bentham put it, later predicting that he would be the “dead legislative of British India.”¹ In the year following his death in 1832, imperial authority in India was reconstituted under fellow utilitarian James Mill’s direction and Macaulay was appointed legal representative to the Governor General of India’s new Legislative Council. Macaulay’s productive sojourn in India was highlighted by the drafting of the IPC, a concise, lucid and comprehensive code that aimed to minimise discretion, differences in legal status, and concession to local circumstances. K.J.M. Smith observes that the IPC and its antecedents are an important episode in the development of English criminal jurisprudence and 19th century intellectual history.² It is also an important episode for jurisdictions that codified such as Canada.

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The Charter Act, 1833 reorganized British government in India by creating a unified legislative body in the form of an appointed Legislative Council headed by the Governor General, which centralised and co-ordinated civil and military authority and East Indian Company commercial interests.³ A law commission under Macaulay’s direction was struck shortly after his arrival as the Council’s legal representative. Undeterred by the complexities of India, Macaulay pursued an

¹ See Bentham, “On the influence of time and place in matters of legislation” (1782) in J. Bowring ed., The Works Of Jeremy Bentham (11 vols.) (Edinburgh, 1843), (hereafter *Bentham’s Works*) vol.I, 169-94. Bentham’s prescient comment about India appears in vol. X and at the end of his life he consulted closely with James Mill and drafted long letters to Governor General Bentinck.

² K.J.M Smith, “Macaulay’s Indian Penal Code: An Illustration of the Accidental Function of Time, Place and Personalities in Law Making” in W.M. Gordon and T.D. Fergus eds., Legal History in the Making (Proceedings of the Ninth British Legal History Conference, Glasgow, 1989) (London: Hambledon, 1991), 145

³ James Mill, author of the influential *History of British India* (1817) was an active influence on East India House, promoting the replacement of orientalist deference to local customs approaches by utilitarian policies –see Stokes, The English Utilitarians and India (Oxford: Oxford University Press, 1959), xii

ambitious agenda to modernise laws and the colonial governance of civil society. As Eric Stokes puts it:

The physical and mental distance separating East and West was to be annihilated by the discoveries of science, by commercial intercourse, and by transplanting the genius of English laws and English education. It was the attitude of English liberalism in its clear, untroubled dawn, and its most representative figure in both England and in India was Macaulay.⁴

By 1836 law reforms ended prior restraint of the press and the special privileges accorded to European residents in civil cases. Education reforms widened accessibility and modernised curriculum. The IPC, completed in 1837, was Macaulay's biggest project. This first code of criminal law in the British Empire is arguably his most influential and lasting achievement.⁵

Macaulay faced less formidable legal professional and judicial resistance in India than reformers in England and was in a strong position to act as a utilitarian 'enlightened despotic' legislator. Yet he was no mere *factotum* or translator of Bentham's theories, nor could it be predicted that he was to become perhaps the most successful utilitarian legislator of his generation. Macaulay came from a Clapham sect background, was never part of the British circle of Bentham and Mill disciples, and identified with an older Whig tradition.⁶ Before becoming an MP he practiced briefly as a barrister but was best known for contributions to the *Edinburgh* and *Westminster* Reviews that emphasized the importance of liberties, the dangers of arbitrary power, and the virtues of gradualism as they were manifested in British experience. Radical legislative reform did not sit well with these ideas and, indeed, Macaulay's publications expressed suspicion of Bentham and Mill's ideas of enlightened legislative despotism and their reductionist view of the human behaviour and public policy.⁷ Their theories neglected historical experience and failed to

⁴ Stokes, xiii-xiv

⁵ Stokes describes the IPC as Macaulay's most enduring legacy (p.226) and the project figures prominently in John Clive's *Macaulay: The Shaping of the Historian* (Cambridge Mass: Harvard University Press, 1987). The original IPC draft appears, along with the *Report* of the Indian Law Commissioners of 14 October 1837, in the Parliamentary Papers ("Copy of the Penal Code Prepared by the Indian Law Commissioners and published by Command of the Governor-General of India in Council" BPP vol XLI, 1837-80, p. 463-587 --paper no. 673 Return of the House of Commons, 30 July 1838. See also *The Complete Works of Lord Macaulay* (Albany edition) Vol. II (London: Longham, Green & co., 1898), 3-198 (hereafter Macaulay's Works). For Macaulay's correspondence, see Thomas Pinney ed., *The Selected Letters of Thomas Babington Macaulay* Volume 3 January 1834-August 1841 (London: Cambridge University Press, 1982). Although the Law Commissioners as a group were responsible for drafting the code, as fellow commissioner John Macleod testified in 1848, "I may state a fact already generally known when I say that Mr. Macaulay is justly entitled to be called the author of the Indian Penal Code" (*Notes on the Report of the Indian Law Commissioners on the Indian Penal Code* (London, 1848), vi) --see also Clive, 443..

⁶ See Smith, 147; Stokes, 191-5. Smith notes that James Stephen of the Colonial Office, father of James Fitzjames and Leslie Stephen, and of a similar background to Macaulay, was offered the post but was even more ambivalent about utilitarianism. Mill's influence was probably decisive.

⁷ As Stokes puts it (176-7), "Legislation is a science, a task for the ablest philosophic mind, a subject for dispassionate study and expert knowledge, not the sport of political passion or of popular and ignorant prejudice. Bentham found himself more at home with enlightened despots than turbulent political assemblies" Yet Bentham also stated, "Reform the world by example, you act generously and wisely; reform the world by force, you might as well reform the moon, and the design is fit only for lunatics" *Bentham's Works* vol.IV, 416. Jennifer Pitts challenges the assumption that Bentham shared James Mill's view of empire. Despite his "dead legislative of India" reference, other writings called for self-rule and expressed scepticism of European imperial ventures. She attributes the view

sufficiently value the late 17th century constitutional compromises and more recent Parliamentary reforms that secured British liberties, Parliament's supremacy (forever banishing the prospect of a return to Tudor and Stuart excesses that the Restoration reactionaries had threatened), and trading prosperity. These themes were later elaborated in his *History of England From the Accession of James II* which celebrated the British Constitution, the benefits of which were to be eventually transmitted throughout the Empire on the foundation of trade and enlightened government, the 'whig theory of history' famously critiqued by Herbert Butterfield in 1931.⁸

Macaulay distinguished himself as erudite contributor to the debates leading to passage of the Great Reform Act, 1832 and the final legislative steps to prohibit slavery throughout the empire (1834). More surprisingly, he became a prime mover of the 1833 Charter Act bill drafted by James Mill, with whom he became acquainted in 1832 as Secretary of the government's Board of Control, charged with supervising the East India Company and Indian public affairs. Macaulay's embrace of utilitarianism appears to date from this time. Stokes suggests that Macaulay's ambivalence about utilitarian political and moral theories did not extend to Bentham's legal theory.⁹ John Clive suggests that Macaulay participated in the politics of utilitarian absolutism as a means to an end, to put into effect developments that would result in freedom and independence at an uncertain future point.¹⁰ Macaulay declared in Parliamentary debate on the Charter Act:

I believe that no country ever stood so much in need of a code of laws as India, and I believe also that there never was a country in which the want might be so easily supplied...A code is almost the only blessing—perhaps the only blessing which absolute governments are better fitted to confer on a nation than popular governments.¹¹

Such were the contradictions of 19th century British liberalism. They were more easily overlooked in an overseas setting, where the executive powers of colonial government gave Macaulay wide latitude to experiment with a dramatic reconstituting of legal authority in what was deemed, under utilitarian premises and imperial policy, to be the general public good. As we shall see, the metropole's political classes were also increasingly concerned about the legitimacy of British colonial rule, its conformity to constitutional claims, and the legal bases for the exercise of British power. In this respect it is telling that the delayed enactment of the IPC in 1860 was sparked by the crisis of the 1857-8 Mutiny. The IPC became a legislative priority

of utilitarianism as imperialist to Stokes and Elie Helevy's influential portrayal of Bentham as a deeply authoritarian thinker—see Jennifer Pitts, "Legislator of the World?: A Rereading of Bentham on Colonies" (2003) 31 *Political Theory*, 200-234

⁸ See eg., T.B. Macaulay, "Utilitarian Logic and Politics," "Bentham's Defence of Mill," and "Utilitarian Theory of Government" written in late 1820's. Herbert Butterfield, *The Whig Interpretation of History* (1931 repr London: Bell, 1950)

⁹ "He rejected the Utilitarian idea of the general renovation of society by means of an abstract universal theory...Macaulay accepted Bentham's jurisprudence but not the general political theory..." Stokes, 191-2.

¹⁰ Clive, 467-73. See also Pinney, "Introduction" vii-xi; 112-15.

¹¹ Debates on the Charter Act, 10 July 1833 *Parliamentary Debates* 3rd series Vol.19

because restoring the semblance of legality, in a manner that would enhance the effectiveness of the rule of law and minimise future resort to arbitrary emergency measures or military intervention, became a political priority. The IPC was also an attempt to make imperial authority more effective and legitimate. And there were retrograde changes to the draft during enactment and retreats on Macaulay's aim of equal legal status. Little was done to confront the substantive barriers and gulfs between the colonizers and the colonized. But in the 1830's Macaulay and his utilitarian colleagues were remarkably optimistic, boldly intervening into the intractable complexities of India, expressing the hope that the IPC would be emulated elsewhere and inspire reform in the metropole.¹²

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This historical study examines the originating premises and principles underlying the IPC, the drafting process 1835-7, and surveys the events that eventually resulted in its enactment in 1860 (the criticisms and endorsements of the Indian Law Commissioners, 1846-8, the 1853 selection of Macaulay's effort over the rival Bethune code, and the recommendations and revisions of the Commission in the 1850's led by Sir Barnes Peacock). It also examines selected provisions in the light of contemporary law reform debates,¹³ and attempts to place the IPC in broader political, policy contexts.¹⁴ These illuminate the IPC's significance as the groundbreaking and most Benthamite criminal code enacted in the common law world but also as an important new initiative in colonial governance.

The basic objectives and principles of the IPC can be briefly summarised. The code was to replace a patchwork of Muslim and Hindu laws overlaid with a mixture of transplanted English laws and East Indian Company regulations to ensure, as much as possible, a singular standard of justice. Macaulay rejected the idea of mere consolidation and sought a code that would apply to the entire Indian empire (although local conditions, such as the autonomy of the Princely States, would entail compromise universality). He noted how the criminal law had been the focus of reformers since Beccaria and the policy preoccupation of politicians ranging from Peel to Brougham, and, given the continuing chaotic state of English criminal law notwithstanding the

¹² See Macaulay to James Mill, 24 August 1835 reproduced in Pinney, 146-51.

¹³ Smith's succinct overview is difficult to emulate let alone improve upon. Older positive assessments begin with John Stuart Mill (1838) XXXI Westminster Review, 395 and James Fitzjames Stephen's close study-see A History of the Criminal Law of England, Volume III (London: Macmillan, 1883), 283 (hereafter Stephen, *History*). See also, S.G. Vesey-Fitzgerald, "Bentham and the Indian Codes" in G.W. Keeton and G. Schwarzenberger eds., Jeremy Bentham and the Law: A Symposium (London: Stevens, 1948), 222 and M.C. Setalvad., The Common Law in India (London: Stevens, 1960).

¹⁴ Modern assessments that examine the IPC from the perspective of rights, cultural heterogeneity and colonial rule debates, include Vasudha Dhagamwar, Law, Power and Justice: The Protection of Personal Rights in the Indian Penal Code (New Delhi: Sage, 1992); Radhika Singha, "No Needless Pains or Unintended Pleasures: Penal Reform in the Colony, 1825-45 (1995) 11 Studies in History, 29 and A Despotism of Law: Crime and Justice in Early Colonial India (Delhi: OUP, 1998); Elizabeth Kolsky, "Codification and the Rule of Colonial Difference: Criminal Procedure in India" (2005) 23 Law and History Review, 631. See also recent work on imperial networks and the resurgence of comparative work by Chris Bayly and others (eg., C.A. Bayly, *The Birth of the Modern World, 1780-1914: Global Connections and Comparisons* London: Blackwell, 2004; 'Colonial Rule and the 'Informational Order' in South Asia' in N Crook ed., *The Transmission of Knowledge in South Asia: Essays on Education, Religion, History and Politics* Oxford: Oxford University Press, 1996, 280)

ongoing work of Brougham's Criminal Law Commissioners, he expressed hope that the IPC would inspire the stalled codification project in England itself.¹⁵ He succinctly described the core objectives of his project in his 4 June 1835 Minute to Council, paraphrased as follows:

-It should be more than a mere digest of existing laws, cover all contingencies, and "nothing that is not in the Code ought to be law."

-Crime should be suppressed with least infliction of suffering, and allow for the ascertaining of the truth at the smallest possible cost of time and money.

-Its language should be clear, unequivocal, and concise. Every criminal act should be separately defined, the language followed in indictment, and conduct found to fall clearly within the definition.

-Uniformity is the chief end, and special definitions, procedures, or other exceptions to account for different races or sects should not be included without clear and strong reasons.¹⁶

Macaulay had these principles in mind as early as his Parliamentary speech on the Charter Act when he declared, "[u]niformity where you can have it; diversity where you must have it; but in all cases certainty."¹⁷ They represented a concrete and practical version of Bentham's legislative aspirations. Early legal commentators tended to dismiss Macaulay's achievement and those that did not tend to downplay Bentham's influence. As Fitzjames Stephen put it:

The Indian Penal Code may be described as the criminal law of England freed from all technicalities and superfluities, systematically arranged and modified in some few particulars (they are surprisingly few) to suit the circumstances of British India.¹⁸

This bias was corrected by Stokes, and even Stephen acknowledged elsewhere, "[t]o compare the Indian penal code with English criminal law was like comparing *Cosmos* with *Chaos*."¹⁹ Yet, as we shall see, Bentham's precise impact remains difficult to determine.

There is little doubt that the IPC derived from the leading ideas expressed in the early 19th century English law reform debates. Although utilitarian hopes that the IPC would inspire stalled efforts in England itself were to be disappointed, it was followed by Robert Wright's Jamaica code, and codes enacted in Canada (1892), New Zealand (1893) and Queensland (1899). Retrograde changes to the IPC continued apace after enactment and in most cases after independence as well. Stephen, as a later Indian law commissioner, helped to modify the IPC. Stephen's his cautious 1880 Draft England Code bill came closest to domestic success (notwithstanding the recent attempt to codify by the English Law Commission, 1968-2008), and became the main influence on the Canadian and New Zealand codes.

Macaulay's aim of according formal equal legal status to all subjects under modernised laws was an ambitious project and his originating principles of comprehensiveness, consistency, and

¹⁵ Macaulay to Mill, 24 Aug 1835 in Clive, 436-8

¹⁶ See Macaulay's Minute 4 June 1835

¹⁷ 10 July 1833, Macaulay's Works

¹⁸ Stephen, 300.

¹⁹ Social Science Association, "Mr. Fitzjames Stephen on Codification" (1872-3) 54 Law Times, 44 at 45.

accessibility have, in many respects, stood the test of time and remain progressive law reform aims in the 21st century. If there were systematic amendment and elaboration according to these principles of existing IPC provisions, or of other codes for that matter, we would certainly see considerable improvement in our criminal laws. However, in reflecting on the 150th anniversary of the IPC and the prospects for similar criminal law reform in the twenty-first century, it must be acknowledged that the task of updating the IPC is a difficult one and the aim of perfecting it in accordance with original principles, while admirable, is perhaps impossible. Not only must hard questions be asked about claims of orthodoxy in connection with the IPC, its adoptions and prospects, Bentham's scientific, universal and comprehensive legislative ideals that inspired Macaulay proved elusive despite Macaulay's ideal opportunity to pursue them.

As he elaborated his science of legislation, Bentham struggled with the tension between inductive and deductive logics and the challenges of crafting specific provisions that accounted for particular circumstances. It is a reflection of Macaulay's remarkable energies that while taking on the bulk of the work on the IPC he wrote a biography of Bacon, representative of the British pragmatist tradition that has more affinity with case by case incremental development of general principles, characteristic of the common law, than the principled abstraction of Plato or Cartesian identification of first principles and derived implications, characteristic of the Roman-civilian legal tradition. Macaulay may have been inspired in this regard by Robert Peel, who quoted Bacon widely to undercut opposition to his criminal law consolidation bills at Westminster. Like Bentham, Macaulay did not resolve the tensions between the universal and the situational. Aspiring to craft universal laws, Macaulay was obliged to take time and place into account, as even Bentham acknowledged was necessary. Macaulay sought to shift law-making from the courts to the legislature and limit judges to simple application of the law, but even Bentham realised that the discretionary powers of judges could not be eliminated. That the IPC fell short of Bentham's ideals is little surprise to legal realists who recognise that legislation is coloured by local and particular influences when adopted and applied in varying settings. Novel situations, developments and new issues cannot be fully anticipated. Experience shows that the systematic updating required for comprehensive codes is seldom a legislative priority, and amendment is achieved through *ad hoc* reactive legislation or by judicial invention, judges unable to resist overlaying legislation with constructions and inconsistent statutory interpretation.²⁰

Nor, of course, did Macaulay's reform occur in a vacuum. Careful historical enquiry obliges us to consider the context in which the IPC was produced and implemented. The IPC was the product of a particular time and place, cultural and intellectual context, and an expression of British imperial policies. Macaulay's premises were informed by the limits of his experiences, outlook, and intellectual milieu of British liberalism and European Enlightenment rationalism embraced by Bentham and Mill. Despite liberal and utilitarian conceits, the IPC was not a disinterested initiative. It was crafted and implemented within a political and policy context of a modernising British state concerned about effective colonial governance, crises and challenges to its sovereignty. It did more than enact more rational legal responses to crime. It was also a quasi-constitutional initiative, a projection of British rule that aimed to better regulate relations

²⁰ See eg., M. Sornorajah, "The Interpretation of the Penal Codes" [1991] 3 The Malayan Law Journal, cxxix on judicial constructions and deference to English law in modern IPC jurisdictions.

between the colonizers and the colonized. While promotion of the rule of law and the reduction of archaic forms of discretionary authority and status differences represent an advance, the aim of making the law more effective and legitimate in culturally diverse frontier settings was also about sovereignty. Despite Macaulay's vague aim of a free India at a distant point in the future, the adoption of the IPC by authoritarian legislative decree, denial of indigenous factors, and demands for common obligations of citizenship as defined by an external power while colonial difference persisted, reflect the limits of assimilative liberal ideals and contradictions between sovereignty and liberal rationalities.²¹

That the IPC fell short of scientific legislation and a universal jurisprudence is not surprising. But it is also reductionist to dismiss the IPC as essentially an exercise in power. Interesting historical research remains to be done on global connections beyond the horizons of local and nationalist post colonial narratives. And the IPC is of continuing interest to legal scholars, not only as an important manifestation of 19th century debates about criminal law reform, but also as an enduring example of comprehensive and progressive legislation.

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²¹ Kolsky, 636-8